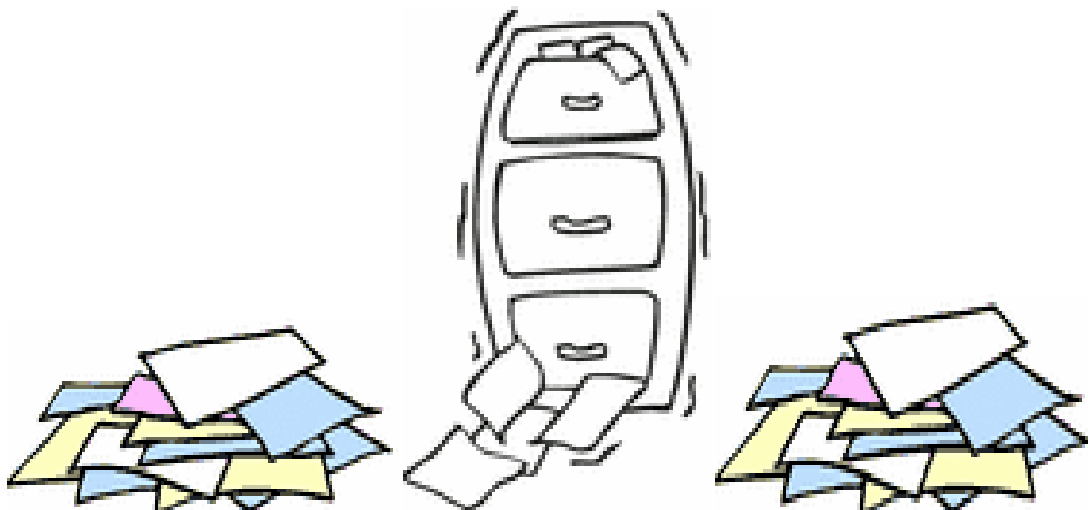


Student Records and the Family Educational Rights and Privacy Act (FERPA) of 1974



**Training Materials
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FAMILY EDUCATION RIGHTS AND PRIVACY ACT (FERPA)
AN OVERVIEW

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.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
- Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):
 - School officials with legitimate educational interest;
 - Other schools to which a student is transferring;
 - Specified officials for audit or evaluation purposes;
 - Appropriate parties in connection with financial aid to a student;
 - Organizations conducting certain studies for or on behalf of the school;
 - Accrediting organizations;
 - To comply with a judicial order or lawfully issued subpoena;
 - Appropriate officials in cases of health and safety emergencies; and
 - State and local authorities, within a juvenile justice system, pursuant to specific State law.

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.

For additional information or technical assistance, you may call (202) 260-3887 (voice) or you may contact us at the following address: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202-5901.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

FEDERAL REGULATIONS

1. Subpart A - General

2. Subpart B - What Are the Rights of Inspection and Review of Education Records?

3. Subpart C - What Are the Procedures for Amending Education Records?

4. Subpart D - May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

5. Subpart E - What Are the Enforcement Procedures?

SUBPART A - GENERAL

AUTHORITY: 20 U.S.C. 1232g unless otherwise noted.

PART 99 -- FAMILY EDUCATIONAL RIGHTS AND PRIVACY

The authority citation for part continues to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

Subpart A - General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if -

- (1) The educational institution provides educational services or instruction, or both, to students; or
- (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section -

- 1) Are provided to the agency or institution by grant, cooperative agreement, contract, sub grant, or subcontract; or
- 2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

NOTE: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to:

- (a) Attendance in person or by correspondence; and
- (b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Dates of attendance"

- (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.
- (b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g (a)(5)(A))

"Directory information" means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

(Authority: 20 U.S.C. 1232g)(a)(5)(A))

"Disciplinary action or proceeding" means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

"Disclosure" means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

"Educational agency or institution" means any public or private agency or institution to which this part applies under

§ 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education records"

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

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

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable information" includes, but is not limited to:

(Authority: 20 U.S.C 1232g)

- (a) The student's name;
- (b) The name of the student's parent or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.

"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.

(Authority: 20 U.S.C 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C 1232g)

"Student," except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C 1232g)

§ 99.5 What are the rights of students?

- (a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C 1232g(d))

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)

(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to -

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C 1232g (e) and (f))

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)

(1) "Law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to -

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a "law enforcement unit" if it also performs other, non-law enforcement functions for the agency or institution, including investigation of Incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)

1) Records of law enforcement unit means those records, files, documents, and other materials that are -

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of law enforcement unit does not mean -

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)

(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by any educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C 1232g(a)(4)(B)(ii))

SUBPART B - WHAT ARE THE RIGHTS OF INSPECTION AND REVIEW OF EDUCATION RECORDS?

Subpart B - What Are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review

the student's education records. This provision applies to -

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, 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.

(c) The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall -

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and re-view the requested records.

(e) The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C 1232g(a)(1) (A) and (B))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C 1232g(a)(1)?)

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student. (b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were

specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition

(c)

(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)

(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C 1232g(a)(1) (A), (B), (C), and (D))

SUBPART C - WHAT ARE THE PROCEDURES FOR AMENDING EDUCATION RECORDS?

Subpart C - What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) 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.

(b) 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.

(c) 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.

(Authority: 20 U.S.C 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)

(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of

the evidence and the reasons for the decision.

(Authority: 20 U.S.C 1232g(a)(2))

SUBPART D - MAY AN EDUCATIONAL AGENCY OR INSTITUTION DISCLOSE PERSONALLY IDENTIFIABLE INFORMATION FROM EDUCATION RECORDS?

Subpart D - May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

- (1) Specify the records that may be disclosed;
- (2) State the purpose of the disclosure; and
- (3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

- (1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and
- (2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(Authority: 20 U.S.C 1232g (b)(1) and (b)(2)(A))

§99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

- (1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- (2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.
- (3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of -
 - (i) The Comptroller General of the United States;
 - (ii) The Attorney General of the United States;
 - (iii) The Secretary; or
 - (iv) State and local educational authorities.

(4)

(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

- (A) Determine eligibility for the aid;
- (B) Determine the amount of the aid;
- (C) Determine the conditions for the aid; or
- (D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C 1232g(b)(1)(D))

(5)

(i) The disclosure is to State and local officials or authorities to whom this information is specifically -

- (A) Allowed to be reported or disclosed pursuant to a State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or
- (B) Allowed to be reported or disclosed pursuant to a State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(1) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)

(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

- (A) Develop, validate, or administer predictive tests;
- (B) Administer student aid programs; or
- (C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

- (A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and
- (B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable

information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)

(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with -

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)

(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information," under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)

(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the

disciplinary proceeding unless it determines that -

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)

(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if -

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

(Authority: 20 U.S.C 1232g(a)(5)(A), (b)(1), (b)(2)(B), (b)(6), (h) and (i))

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a) (1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the

information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a)(1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31 (a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C 1232g(b)(1) and (b)(4)(A))

§ 99.33 What limitations apply to the redisclosure of information?

(a) (1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

(d) Except for disclosures under § 99.31(a)(9), (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from

education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31 (a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll:

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the

health or safety of the student or other individuals.

(b) Nothing in the Act or this part shall prevent an educational agency or institution from -

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

(Authority: 20 U.S.C 1232g (b)(1)(I) and (h))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C 1232g (a)(5) (A) and (B))

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974 concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C 1232g((b)(1)(J))

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

"Alleged perpetrator of a crime of violence" is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide - manslaughter by negligence

Criminal homicide - murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

"Alleged perpetrator of a nonforcible sex offense" means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

"Final results" means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

"Sanction imposed" means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

"Violation committed" means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

Authority: 20 U.S.C 1232g (b)(6))

SUBPART E - WHAT ARE THE ENFORCEMENT PROCEDURES?

Subpart E - What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "Office" means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

- (1) Investigate, process, and review complaints and violations under the Act and this part; and
- (2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "applicable program" is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws? If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C 1232g (f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

Authority: 20 U.S.C 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202-4605.

(Authority: 20 U.S.C 1232g (g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution -

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

- (a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.
- (b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.
- (c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:
 - (1) Includes a statement of the specific steps that the agency or institution must take to comply; and
 - (2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

- (a) If the educational agency or institution does not comply during the period of time set under §99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act -
 - (1) Withhold further payments under any applicable program;
 - (2) Issue a complaint to compel compliance through a cease-and-desist order; or
 - (3) Terminate eligibility to receive funding under any applicable program.
- (b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

NOTE: 34 CFR part 78 contains the regulations of the Education Appeal Board.

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

Appendix A to Part 99 — Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

(NOTE: By definition there can be no "attempted" assaults, only "completed" assaults.)

- (a) Aggravated Assault. An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) Simple Assault. An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) Intimidation. To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

(NOTE: This offense includes stalking.)

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide - Manslaughter by Negligence.

The killing of another person through gross negligence.

Criminal Homicide - Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

(NOTE: Kidnapping/Abduction includes hostage taking.)

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

(NOTE: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.)

Sex Offenses, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) Forcible Rape (Except "Statutory Rape"). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) Forcible Sodomy. Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) Sexual Assault With An Object. To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc..)

(d) Forcible Fondling. The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the

victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: Forcible Fondling includes "Indecent Liberties" and "Child Molesting.")

Nonforcible Sex Offenses

(Except "Prostitution Offenses") .Unlawful, nonforcible sexual intercourse.

(a) Incest. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) Statutory Rape. Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C 1232g(b)(6)and 18 U.S.C 16)

Family Educational Rights and

Privacy Act Regulations

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)
AMENDED REGULATIONS - JANUARY 2009

1. DEFINITIONS – SECTION 99.3

- **Attendance**
 - **Current Regulation** – The term includes, but is not limited to: (a) Attendance in person or by correspondence; and (b) The period during which a person is working under a work-study program.
 - **New Regulation** – The term includes, but is not limited to: (a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and (b) The period during which a person is working under a work-study program.
- **Directory Information and Student ID Numbers**
 - **Current Regulation** - "Directory information" is information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.
 - **New Regulation** – Directory information may now include a student ID number if the number cannot be used to gain access to education records except when used with one or more other factors to authenticate the user's identity. Said other factors must only be known to the user.
 - A SSN can never be designated as directory information.
- **Educational Records and Peer Grading**
 - **Current Regulations** - Defines "education records" as records "directly related to a student" and "maintained by an educational agency or institution."
 - **New Regulation** - Incorporates U.S. Supreme Court decision in *Owasso v. Falvo*, which held that the term "education record" does not include peer-graded papers before they are collected and recorded by a teacher. Such documents are not FERPA protected because they are not yet "maintained" by the institution.
- **Personally Identifiable Information**
 - **Current Regulation** – The term includes, but is not limited to:
 - (a) The student's name;
 - (b) The name of the student's parent or other family member;
 - (c) The address of the student or student's family;
 - (d) A personal identifier, such as the student's social security number or student number;
 - (e) A list of personal characteristics that would make the student's identity easily traceable; or
 - (f) Other information that would make the student's identity easily traceable.

- **New Regulation** - The term includes, but is not limited to:
 - (a) The student's name;
 - (b) The name of the student's parent or other family members;
 - (c) The address of the student or student's family;
 - (d) *A personal identifier, such as the student's social security number, student number, or biometric record;*
 - (e) *Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;*
 - (f) *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*
 - (g) *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."*
- A "biometric record" is a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual, including fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

2. **STUDENT RIGHTS – SECTION 99.5**

- New regulations clarify that educational records may be released to a parent of an eligible student under the following situations:
 - Written consent is provided by the student;
 - Lawfully issued subpoena is received;
 - Health or Safety emergency exists;
 - Student is a tax dependant of the parent; or
 - Student is under 21 years old and has committed a disciplinary violation regarding the use or possession of alcohol or controlled substances in violation of any Federal, State, or local law, or any rule or policy of the institutions.

3. **DISCLOSURE WITHOUT STUDENT CONSENT – SECTION 99.31**

- **Expanding "School Official" to Include Outsourcing Organizations (99.31(a)(1))**
 - **Current Regulation** – Education records may be released to a "school official" who has a "legitimate education interest" in the education records.
 - **New Regulation** - Expands the "school officials" exception to include contractors, consultants, volunteers, and other outside service providers used by a college to perform institutional services and functions. A contractor (or other outside service provider) that is given access to education records must be under the "direct control" of the disclosing institution and subject to the same conditions on use and redisclosure of education records that govern other school officials. "Direct control" refers to a college's control over the contractor's use and maintenance of information from educational records.
- **Organizations Conducting Studies (99.31(a)(6))**
 - **Current Regulation** – Permits disclosure of educational records to organizations conducting studies for or on behalf of educational institutions to (A) develop, validate or administer predictive tests; (B) administer student aid programs; or (C) improve instruction.

- **New Regulation** - Requires colleges that uses this exception to enter into a written agreement with the recipient organization that specifies the purpose, scope, and duration of the study and the information to be disclosed; require the organization to destroy or return all personally identifiable information when no longer needed for the purposes of the study; and specify the time period during which the organization must either destroy or return the information. The written agreement must also specify that information from education records may only be used to meet the purposes of the study stated in the written agreement and that the study will be conducted in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests.
- **Dependent Student (99.31(a)(8))**
 - **Current Regulation** – Permits disclosure of educational records to parent of a tax dependent student.
 - **New Regulation** – Encourages colleges to advise parents to redact all information on tax form other than that information necessary for establishing dependency. Department has also developed 2 forms it encourages colleges to use in place of reliance on tax forms. Those forms are available at the DOE website at:
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html>
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>
- **Registered Sex Offenders (99.31(a)(16))**
 - Permits colleges to disclose information it receives from a State concerning a student who is required to register as a sex offender in the State.

4. **REDISCLASURE OF EDUCATIONAL RECORDS**

- **Redisclasure of educational records received by a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense – Sections 99.31(a)(13) & 99.33**
 - **Current Regulation** – The “final results” of a disciplinary proceeding may be released to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. Such information, however, could be released to said victim only on the condition that the victim would not disclose the information to any other party without the prior consent of the alleged perpetrating student. In many cases, colleges had victims sign non-disclosure agreements as a condition of receiving the final results.
 - **New Regulation** – Permits the disclosure of the final results of a disciplinary proceeding to an alleged victim of a crime of violence or a non-forcible sex offense and a college may not require a victim to sign a non-disclosure or confidentiality agreement as a condition of receiving such information.
 - Under the federal Jeanne Clery Act (a/k/a “Criminal Statistics Act” or “Right To Know” Law) colleges are required to inform both the accuser and accused of the outcome of an institution’s disciplinary proceeding regarding an alleged sex offense.
- **Redisclasure of educational information by federal and state officials – Sections 99.31(a)(3), 99.33 & 99.35**
 - **Current Regulations** – According to 99.31(a)(3), federal and state officials and educational authorities may receive educational records without consent if the

information is provided “in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.” When the information is not longer needed for these purposes, it must be destroyed by the federal or state officials or authorities. Said parties have no right to redisclose the educational records.

- **New Regulations** - The final regulations permit federal and state officials to redisclose education records under the same conditions that apply currently to other recipients of education records under Section 99.33. Under Section 99.33, a party receiving educational records may redisclose that information in accordance with Section 99.31.

6. **HEALTH OR SAFETY EMERGENCIES – SECTIONS 99.31(a)(10) & 99.36**

- **Current Regulation** – It is permissible under Section 99.31(a)(10) to release personally identifiable information without consent in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. This section “will be strictly construed.”
- **New Regulation** – Removes the “strict construction” requirement. If the school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to appropriate parties, including the student’s parents, whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. Colleges are required to record the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. If there is a rational basis for the determination, the Department will not substitute its judgment for that of the college in deciding to release the information.

7. **DISCLOSING DIRECTORY INFORMATION – SECTION 99.37**

- Under the current and new regulations, a student may opt-out of the college’s policy of releasing directory information without the student’s consent. Under such circumstances, a college is not permitted to release any of the student’s educational records absent an exception under Section 99.31. The new regulations require colleges to honor a former student’s opt-out request made while in attendance unless it has been specifically rescinded by the former student. This will make clear that schools may not disclose the directory information of a former student if the student opted out of the disclosure while the student was in attendance.

PART 99-FAMILY EDUCATIONAL RIGHTS AND PRIVACY

- 1. The authority citation for part 99 continues to read as follows:
Authority: 20 U.S.C. 1232g, unless otherwise noted.
- 2. Section 99.2 is amended by revising the note following the authority citation to read as follows:

§99.2 What is the purpose of these regulations?

* * * * *

Note to § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

- 3. Section 99.3 is amended by:
 - A. Adding, in alphabetical order, a definition of Biometric record.
 - B. Revising the definitions of *Attendance*, *Directory information*, *Disclosure*, and *Personally identifiable information*.
 - C. In the definition of *Education records*, revising paragraph (b)(5) and adding a new paragraph (b)(6). These additions and revisions read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Attendance includes, but is not limited to -

- (a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and
- (b) The period during which a person is working under a work-study program. (Authority: 20 U.S.C. 1232g)

Biometric record, as used in the definition of *personally identifiable*

information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include

fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting. (Authority: 20 U.S.C. 1232g)

* * * * *

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's-

- (1) Social security number; or
- (2) Student identification (ID)

number, except as provided in paragraph (c) of this section.

(c) Directory information includes a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

* * * * *

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

* * * * *

Education Records

* * * * *

(b) * * *

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not

directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

* * * * *

Personally Identifiable Information

The term includes, but is not limited to-

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) 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

(g) 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. (Authority: 20 U.S.C. 1232g)

* * * * *

- 4. Section 99.5 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

§ 99.5 What are the rights of students?

(a)(1) * * *
(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.3 1 (a)(8), §99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.3 1(a).
* * * * *

- 5. Section 99.31 is amended by:
 - A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i)(A) and adding new paragraphs (a)(1)(i)(B) and (a)(1)(ii).

- B. Revising paragraph (a)(2).
- C. Redesignating paragraphs (a)(6)(iii) and (a) (6)(iv) as paragraphs (a)(6)(iv) and (a)(6)(v) , respectively.
- D. Revising paragraph (a)(6)(ii).
- E. Adding a new paragraph (a)(6)(iii).
- F. In paragraph (a) (9) (ii) (A), removing the word "or" after the punctuation " ; " .
- G. In paragraph (a)(9)(ii)(B), removing the punctuation " . " and adding in its place the word " ; or " .
- H. Adding paragraph (a)(9)(ii)(C).
- I. Adding paragraph (a)(16).
- J. Revising paragraph (b).
- K. Adding paragraphs (c) and (d).
- L. Revising the authority citation at the end of the section.

The additions and revisions read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

- (a) * * *
- (1)(i)(A) * * *
- (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party-
- (1) Performs institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - (3) Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records.
- (ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.
- (2) "The disclosure is, subject to the requirements of §99.34, to

officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) or the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

- (6)(i) * * *
- (ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if-
- (A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;
 - (B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and
 - (C) The educational agency or institution enters into a written agreement with the organization that-
 - (1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;
 - (2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;
 - (3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and
 - (4) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the

information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

* * * * *

(9) * * *

(ii) * * *

(C) An exparte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

* * * * *

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information,

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education

research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that-

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party.

(Authority: 20 U.S.C.

1232g(a)(5)(A), (b), (h), (i), and (j)).

- 6. Section 99.32 is amended by:
- A. Revising paragraph (a)(1).
- B. Adding new paragraphs (a)(4) and

(a) (5).

- C. Redesignating paragraphs (b)(1) and

(b)(2) as paragraphs (b)(1)(i) and (b)(1)(ii) and redesignating paragraph

(b), introductory text, as paragraph (b)(1).

- D. Revising newly redesignated paragraph (b) (1).
- E. Adding a new paragraph (b)(2).

- F. Revising paragraph (d)(5).

The additions and revisions read as follows:

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31 (a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

* * * * *

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

* * * * *

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests

in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section: or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31 (a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

* * * * *

(d) * * *

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

* * * * *

• 7. Section 99.33 is amended by revising paragraphs (b), (c), (d), and (e) to read as follows:

* * * * *

§ 99.33 What limitations apply to the redisclosure of information?

* * * * *

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if-

(i) The disclosures meet the requirements of § 99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31 (a) (3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena

and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31 (a)(9) must provide the notification required under § 99.31(a)(9)(ii),

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or Institution must inform a party, to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(e) If this Office determines that a third party outside the educational agency or institution improperly rediscloses personally identifiable information from education records in violation of this section, or fails to provide the notification required under paragraph (b)(2) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

* * * * *

• 8. Section 99.34 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 99.34 What conditions apply to disclosure of information to other educational agencies and institutions?

(a) * * *
(1) * * *

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that

have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

* * * * *

• 9. Section 99.35 is amended by revising paragraphs (a) and (b)(1) to read as follows:

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to educational records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) Authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by the Act or this part and must be established under other Federal, State, or local authority.

* * * * *

(b) * * *

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the officials or agencies headed by officials referred to in paragraph (a) of this section, except that those officials and agencies may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b): and

* * * * *

• 10. Section 99.36 is amended by revising paragraphs (a) and (c) to read as follows:

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an

emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

* * * * *

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

* * * * *

• 11. Section 99.37 is amended by:
• Revising paragraph (b).
• B. Addg new paragraphs (c) and (d).

The revision and additions read as follows:

§ 99.37 What conditions apply to disclosing directory information?

* * * * *

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or

requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled.

(d) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

* * * * *

- 12. Section 99.62 is revised to read as follows:

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out its enforcement responsibilities under the Act or this part. (Authority: 20 U.S.C. 1232g(f) and (g))

§ 99.63 [Amended]

- 13. Section 99.63 is amended by removing the mail code designation "4605" before the punctuation ".".
- 14. Section 99.64 is amended by:
 - A. Revising the section heading.
 - B. Revising paragraphs (a) and (b).

The revisions read as follows:

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may determine whether the failure to comply is based on a policy or practice of the agency or institution.

* * * * *

- 15. Section 99.65 is revised to read as follows:

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under § 99.64(b). The notice to the educational agency or institution-

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notified the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

- 16. Section 99.66 is amended by revising paragraphs (a), (b), and the introductory text of paragraph (c) to read as follows:

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution. A notice of findings issued under paragraph (b) of this section to an educational agency or institution that has not complied with a provision of the Act or this part-

* * * * *

- 17. Section 99.67 is amended by revising paragraph (a) to read as follows:

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part E of the General Education Provisions Act-

* * * * *

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BILLING CODE 4000-01-P

MODEL NOTIFICATION OF RIGHTS

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT STUDENT NOTIFICATION OF RIGHTS _____ COMMUNITY COLLEGE

The Family Educational Rights and Privacy Act (FERPA) affords students certain rights with respect to their education records. They are:

(1) The right to inspect and review the student's education records within 45 days of the day the College receives a request for access.

Students should submit to the registrar, dean, head of the academic department, or other appropriate official, written requests that identify the record(s) they wish to inspect. The College official will make arrangements for access and notify the student of the time and place where the records may be inspected. If the College official to whom the request was submitted does not maintain the records, that official shall advise the student of the correct official to whom the request should be addressed.

(2) The right to request the amendment of student's education records that the student believes are inaccurate or misleading.

Students may ask the College to amend a record that they believe is inaccurate or misleading. They should write the College official responsible for the record, clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading.

If the College decides not to amend the record as requested by the student, the College will notify the student of the decision and advise the student of his or her right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the student when notified of the right to a hearing.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception that permits disclosure without consent is disclosure to school officials with legitimate educational interests. A school official is a person employed by the College in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company within whom the College has contracted (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

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.

Upon request, the College discloses education records without consent to officials of another school in which a student seeks or intends to enroll.

(4) The right to be notified annually by the College of what student record information the College designates as “directory information,” and the right to request that no student information be designated as directory information.

The College identifies the following student information as directory information:

_____. Directory information may be released by the College to a requesting third-party without a student’s prior written consent. A student has the right to request that none of his/her student record information be designated as directory information. A student must notify the College's Registrar, in writing, within two (2) weeks of the beginning of each academic semester if he/she does not wish to have any or some of his/her student information designated as directory information.

Notwithstanding the College's definition of directory information, the Department of Defense (the “DOD”), pursuant to the Omnibus Consolidated Appropriations Act of 1997 (the “Solomon Amendment”), identifies the following information as “student recruiting information”: NAME, ADDRESS, TELEPHONE LISTING, AGE (or year of birth), PLACE OF BIRTH, LEVEL OF EDUCATION (e.g., freshman, sophomore), DEGREE AWARDED, MOST RECENT EDUCATIONAL INSTITUTION ATTENDED, and CURRENT MAJOR(S).

If the College receives a request for student recruiting information from the DOD, or one of its affiliated agencies, the College will release the student recruiting information requested. Because the information sought by the DOD may include information not designated as directory information under the College’s policy, compliance with the DOD’s request may result in the release of personally identifiable information. When student recruiting information is released pursuant to a DOD request, notice of the request and the release of the information will be posted in a conspicuous location in the College's Registrar's Office for a period equaling one academic year.

If a student has exercised his/her right to request that no information be designated as directory information, then no information shall be released to any third party, including the DOD.

(5) The right to file a complaint with the U.S. Department of Education concerning alleged failures by the College to comply with the requirements of FERPA. The name and address of the Office that administers FERPA is:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-5901.

RELEASING STUDENT RECORDS WITHOUT PRIOR CONSENT

A. **Releasing Education Records Without a Student's Prior Written Consent**

Student records are protected from unauthorized disclosure pursuant to the Family Educational Rights and Privacy Act (FERPA). Under most circumstances, non-directory student information may not be released to any requesting third-party without first obtaining the student's prior written consent. Notwithstanding, FERPA provides a number of exceptions to the prior consent rule, including the following:

- **Release of Directory Information** – Student information designated as “directory information” may be released without obtaining a student’s prior written consent. Directory information is defined under federal regulations as including: the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended. Each College must notify its students through its Annual FERPA Notification as to what information it designates as directory information. A student may request that his/her College not release directory information. Such a request shall be in writing and retained in the student’s file.
- **Subpoena or Court Order** – Prior to responding to a subpoena or court order, a College must first inform the subject student of the subpoena for his/her records and afford the student a reasonable period of time to seek to quash the subpoena before complying with it. Generally, after 7 days following notice to the student, unless a court has ordered the College not to release the records, the College shall release the records in compliance with the subpoena or court order.
- **Search Warrant** - No prior consent is required when a College is served with a search warrant. Furthermore, because a search warrant is effective when served, a College must immediately grant access to the requested student records. Access may not be delayed pending notification to the subject student.
- **Health or Safety Emergency** – Records may be released without prior consent when an imminent health or safety emergency exists.
- **Ex Parte Order** – No consent is required when a college is served with an ex parte order by the U.S. Attorney General or a related governmental official in connection with an investigation or prosecution of terrorism crimes.
- **I-20 Consent** – (Applicable only to international students) The INS I-20 form contains the following statement: “I also authorize the named school to release any information from my records which is needed by the INS pursuant to 8 CFR 214.3(g) to determine my nonimmigrant status.” Information identified under 8 CFR 214.3(g) include the following: name, date and place of birth, country of citizenship, address, status (full-time or part-time), date of commencement of studies, degree program and field of study, beginning and ending dates of any authorized practical training, termination date and reason (if known), the documents the school needed to review in order to issue an I-20, the number of credits completed each semester, and a photocopy of the student’s I-20. By signing an I-20, international students consent to the release of the above-noted information to INS without the student’s prior written consent.

B. Protocol for Releasing Educational Records Information

1. Phone Call Request

Unless a verifiable emergency exists, non-directory student information shall not be released in response to a phone request from a third-party. Such information may be released to a student seeking his/her own educational record information after proper verification of the student's identification is obtained.

2. In Person Request

When circumstances exist permitting the disclosure of non-directory student information to a third party, the following steps shall be considered before releasing any information:

- Request identification from the requesting party
- Make copy of identification
- Request phone number and the name of requester's supervisor
- Contact requester's supervisor if further identification verification is necessary
- College personnel shall contact his/her departmental supervisor
- If a subpoena is presented no information shall be released until the student notice procedure has been complied with. Also, personnel shall verify that the document is a lawfully issued subpoena (proper signatures, case caption and reference number, notarized, specific court of jurisdiction identified)
- If a search warrant is presented it must be immediately complied with
- Personnel shall simultaneously contact their departmental supervisor
- Legal Counsel may be contacted for guidance

PARENTAL ACCESS TO STUDENT EDUCATION RECORDS

At the post secondary level, parents have no inherent rights to inspect a student's educational records. The right to inspect is limited solely to the student.

Records **may/must** be released to a parent **only** if one of the following conditions has been met:

1. Written consent is provided by the student;
2. Lawfully issued records subpoena is received;
3. Health or Safety emergency;
4. The student is a tax dependant of the parent on the most recent federal tax form; or
5. The student is under 21 years old and has violated an institutional policy governing the use or possession of alcohol or controlled substances.

Regarding the disclosure of student records to a parent based on the student's tax dependent status, it is important to note the following:

1. the Department of Education has expressed the view that a student enrolled in an institution of higher education is presumed to be financially independent;
2. Tax dependency must be establish based on the parent's most recent federal income tax return;
3. If one parent claims the student as a tax dependent, either parent may seek access to the student record information; and
4. Even if tax dependency is established the release of records is at the discretion of the College.

Under the new 2009 Regulations, colleges are encouraged to advise parents to redact all information on tax form other than information necessary for establishing dependency. The DOE has also developed 2 forms it encourages colleges to use in place of reliance on tax forms. Those forms are available at the DOE website at:

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html>

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>



The Commonwealth of Massachusetts
MASSACHUSETTS COMMUNITY COLLEGES

OFFICE OF THE GENERAL COUNSEL

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MEMORANDUM

TO: Deans/Vice Presidents of Student Services

FROM: Kenneth A. Tashjy, Staff Attorney

DATE: May 15, 1997

RE: **Production of Educational Records in Response to a Subpoena**

Most recently this office has experienced a dramatic increase in the number of inquiries from Colleges regarding the release of student educational records pursuant to a subpoena or other judicial order. Specifically, what type of notice must be given to a student whose records are the subject of a subpoena and what compliance time frame is appropriate?

As you are aware, when a College is served with a subpoena commanding the production of certain educational records, the Family Educational Rights and Privacy Act (FERPA) requires that the College make a reasonable effort to notify the student whose educational records are the subject of the subpoena or judicial order. Thereafter, it is the student's responsibility to seek a protective order or other legal relief if the student opposes the release of his/her records. Further, while FERPA provides no specific time frame for responding to a subpoena after notice is given to a student, it is reasonable to inform a student that if the College does not receive a court order directing it to do otherwise, it will comply with the subpoena after seven business days.

It is also important to note that FERPA only requires compliance with a "lawfully issued" subpoena or court order. While lawfully issued subpoenas may vary in form, all must be issued and signed by a court clerk, a notary public, or a justice of the peace. Further, the contents should include: a civil action or criminal docket number, the specific date and time of the court appearance, the identity of the issuing party or attorney, and an acknowledgement that notice has been conveyed to counsel for the opposing party. If you have any questions as to the sufficiency of a subpoena, you should consult with our office.

Attached please find a standard student notification letter we have prepared for your use. It is our hope that this letter will provide a consistent approach among the Colleges regarding student notification and the production of educational records pursuant to a subpoena or court order. If you have any questions regarding this matter, please do not hesitate to contact the Community College Counsel's Office.

RECORDS SUBPOENA

FERPA NOTIFICATION LETTER

To be sent by certified mail

Dear [student]:

On [date] the College was served with a subpoena commanding it to produce certain educational records of yours in its possession. A copy of the subpoena is enclosed describing the records sought and the legal action or proceeding to which it relates. Pursuant with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232(g), with regulations at 34 C.F.R. 99, and the Fair Information Practices Act (FIPA), Mass. General Laws, Chapter 66A, Section 2(k), the College is notifying you in advance of its intent to comply with this subpoena so that you may have the opportunity to seek a protective order or other legal relief concerning the disclosure of these records.

According to both FERPA and FIPA, before an educational institution releases student educational records or personal data in its possession, pursuant to a lawfully issued subpoena, the educational institution must first put the subject of the subpoena on notice of its receipt of the subpoena and afford the subject a reasonable period of time in which to seek a court's intervention to block the release of the records sought.

In order to comply with the attached subpoena, while maintaining compliance with both state and federal law, please be on notice that the College intends to forward to the requesting party the educational records and/or personal data specified in the subpoena, unless within seven (7) business days from the date of this letter the College receives a court order directing it not to release the records. If the College receives no such court order, or notice of a pending hearing, it will release the information on _____, 200__. It is your responsibility to seek appropriate judicial relief in order to prevent the disclosure of the requested records.

If you have any questions regarding this matter, please do not hesitate to contact me at _____.

Sincerely yours,

[College Official]

Enclosure

cc: [Attorney requesting the records]
[Attorney representing the student if any]

RESPONSE LETTER TO ATTORNEY WHO ISSUED THE SUBPOENA

Attorney _____
Address _____
City, MA 00000

RE: _____ v. _____
_____ Court
Keeper of Records Subpoena for _____

Dear Attorney _____:

My office serves as legal counsel for Massachusetts' fifteen Community Colleges, including, _____ Community College. On (day), (date), 200____, at approximately (time), the College was served with a Keeper of Records subpoena requesting the production of educational records pertaining to (student's name). Your subpoena requests that the records be produced in Probate Court on (date), 200____.

Please be advised that the College cannot comply with your subpoena's production deadline due to limitations placed on it pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232(g), with regulations at 34 C.F.R. 99, and the Fair Information Practices Act (FIPA), M.G.L., c.66A, Section 2(k). Specifically, FERPA requires that before an educational institution releases student educational records pursuant to a lawfully issued subpoena or court order, the educational institution must first make a "reasonable effort to notify" the student of its receipt of the subpoena or court order "so [the student] may seek protective action" Section 99.31(9)(i)(ii). Failure by the College to comply with FERPA may result in a violation of federal law and jeopardize the College's federal funding.

Further, pursuant to FIPA, M.G.L., c.66A, Section 2(k), an educational institution in the Commonwealth must "maintain procedures to ensure that no personal data (including student record information) are made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed." A violation of FIPA may result in civil liability.

Accordingly, in order to comply with a subpoena for student records, while maintaining compliance with both state and federal law, it is the prudent practice of the Commonwealth's Community Colleges to provide the subject of a subpoena with a copy of the subpoena and notice that the records requested will be released unless within seven (7) business days from the date of the notice the College receives a court order directing it to do otherwise. If neither a court order, nor a notice of hearing, is received within the specified time frame, the College will release the requested records forthwith in compliance with the subpoena.

Thank you for your attention and consideration regarding this issue. If you have any questions, please do not hesitate to contact my office.

RECORDS NOT GOVERNED BY FERPA

Records not covered by FERPA include:

- **Sole Possession Notes** - Records created and maintained by teachers, supervisors, administrators, and other college personnel that remain in the sole possession of the creator and are not shared with others (except a substitute or someone temporarily filling the role of the creator).
- **Law enforcement unit records** - A “law enforcement unit” is typically either a campus security force or that department at a college that enforces local, state, and federal law or refers such matters to the authorities. Only those records created and maintained by a law enforcement unit for a law enforcement purpose are excluded from FERPA. Records that are created by the unit but maintained elsewhere or records that are created by the unit for non-law enforcement purposes (e.g. disciplinary records) are subject to FERPA.
- **Employment Records** – Personnel records, so long as the employee does not attend the college. “Personnel records” are those made and maintained in the normal course of business, relating exclusively to the individual in his or her capacity as an employee, and not available for any other purpose.
- **Medical Treatment Records** – Medical Treatment Records are made or maintained by a campus health center or clinic, physician, psychiatrist, psychologist, or other recognized professional acting in his/her professional capacity in connection with the provision of treatment to a student. Such records are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.

Although “treatment records” are excluded from the definition of “education records” under *FERPA*, it is important to note, that a college may disclose an eligible student’s treatment records for purposes other than the student’s treatment provided that the records are disclosed under one of the exceptions to written consent under the regulations or with the student’s written consent. If a school discloses an eligible student’s treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of “education records” and are subject to all other *FERPA* requirements, including the right of the eligible student to inspect and review the records. For example, a college physician treating an eligible student might determine that treatment records should be disclosed to the student’s parents. This disclosure may be made if the eligible student is claimed as a dependent for federal income tax purposes. If the eligible student is not claimed as a dependent, the disclosure may be made to parents, as well as other appropriate parties, if the disclosure is in connection with a health or safety emergency. Once the records are disclosed under one of the exceptions to *FERPA*’s general consent requirement, the treatment records are no longer excluded from the definition of “education records” and are subject to all other *FERPA* requirements as “education records” under *FERPA*.

- **Alumni Records** - Records concerning the student’s life after he or she is no longer a student at the college.



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MEMORANDUM

TO: All Community College Presidents
Janice C. Motta, Executive Officer

FROM: Kenneth A. Tashjy, Staff Attorney

DATE: December 4, 1998

RE: **Department of Defense's FINAL RULE for Accessing Student Record Information by Military Recruiters**

On April 16, 1998, I issued a memorandum discussing our Office's recommendations regarding compliance with the Solomon Amendment. The Solomon Amendment, which was contained in the Omnibus Consolidation Appropriations Act of 1997, states that "no funds available [through] the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and Related Agencies may be provided ... to a covered school that has a policy or practice that either prohibits, or in effect prevents, the Secretary of Defense from obtaining, for military recruiting purposes, entry to campus, access to students on campus, access to directory information on students or that has an anti-ROTC policy."

With the passage of the Solomon Amendment, a compliance conflict arose between it and the Family Educational Rights and Privacy Act (FERPA). . Specifically, the production of student directory information in response to a Solomon request might cause an institution to unintentionally run afoul of its own FERPA Policy. Further, Solomon was silent on a school's responsibility to comply with a recruiter's request for student directory information when a student has requested that none of his/her student directory information be released to any requesting third party, as is a student's right under FERPA. In order to provide some guidance to schools on these issues, the Department of Defense has recently issued its Final Rule for compliance with the Solomon Amendment. The highlights of the DOD's Final Rule are as follows:

- The term "directory information" as used in the DOD's Interim Rule will be replaced with "student recruiting information." **For purposes of the Solomon Amendment, "student recruiting information" includes: NAME, ADDRESS, TELEPHONE LISTING, AGE (or year of birth), PLACE OF BIRTH, LEVEL OF EDUCATION (e.g., freshman, sophomore), DEGREE AWARDED, MOST RECENT EDUCATIONAL INSTITUTION ATTENDED, and CURRENT MAJOR(S). (Reflects changes**

implemented through 2008 Final Rules) Unless specifically requested by a student in the manner prescribed under FERPA (see 2nd bullet below) to do otherwise, this information must be disclosed in response to a Solomon request regardless of whether a school designates only some (or none) of this information as student directory information under its FERPA policy. The Rule provides that the Department of Education "will not consider provision of responsive student information as required under the [Omnibus] Act and this rule to violate FERPA."

- Under FERPA, a student may request that some or none of his/her student record information be designated as directory information, thereby preventing its disclosure to all requesting third parties. The Department of Defense will honor such a student request so long as it is "even-handedly applied to all prospective employers seeking information for recruiting purposes." Further, even in those cases where a student requests that only some of his/her student information not be designated as directory information, the Department of Defense will honor the request by not seeking student recruiting information for that student.
- When repeated requests to obtain student recruiting information are unsuccessful, the DOD agency concerned must seek written confirmation of the school's present policy from the head of the covered school through a letter of inquiry, allowing 30 days for response.
- The Secretary of Education has determined that schools which fail to comply with a Solomon request may be ineligible to receive funds from the following programs: the Federal Supplemental Educational Opportunity Grant Program (Title IV, Part A, Subpart 3), the Federal Work-Study Program (Title IV, Part " C), and the Federal Perkins Loan Program (Title IV, Part E).

Lastly, as I also mentioned in my memo of April 16, pursuant to FERPA, whenever personally identifiable student information, as opposed to directory information, is released, a record must be kept in the student's file that identifies the party who requested the information, and the "legitimate interest" the party had in requesting or obtaining the information. Recognizing that in some cases a school will release personally identifiable information in response to a Solomon request (See 1st bullet above), and that compliance with FERPA's record keeping requirements could pose an onerous burden for schools, the FERPA Compliance Office had suggested that providing students with a "general" notice of such a disclosure would suffice. Accordingly, I previously prepared a NOTICE TO ALL STUDENTS of the release of student information in response to a Solomon request, as well as inserted additional language regarding the same in the *Model Notification of Rights Under FERPA for Postsecondary Institutions* policy. Based on the Final Rule, I have further revised these materials and again strongly recommend their use. If you have any questions regarding these issues, please contact my office.

NOTICE TO ALL STUDENTS

**THE COLLEGE HAS RELEASED STUDENT RECRUITING
INFORMATION TO THE DEPARTMENT OF DEFENSE**

Date of Student Recruiting Information Request: _____

Requesting Department of Defense Agency: _____

Date Student Recruiting Information Released: _____

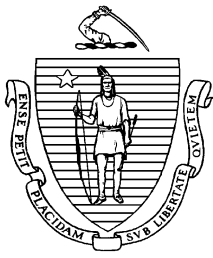
On the above-referenced date, the College received a request for student recruiting information from the above-referenced agency of the Department of Defense, pursuant to the Omnibus Consolidated Appropriations Act of 1997 (Solomon Amendment). The requested student recruiting information included: NAME, ADDRESS, TELEPHONE LISTING, AGE (or year of birth), PLACE OF BIRTH, LEVEL OF EDUCATION (e.g., freshman, sophomore), DEGREE AWARDED, MOST RECENT EDUCATIONAL INSTITUTION ATTENDED, and CURRENT MAJOR(S).

Unless a parent or eligible student exercised his/her right, in accordance with the Family Educational Rights and Privacy Act, to refuse to permit the College to designate some or all of the student's record information as directory information, the College disclosed to the Department of Defense the aforementioned student recruiting information on the release date cited above.

This Notice of the College's compliance with the Omnibus Consolidated Appropriations Act of 1997 and its amendments shall be posted in a conspicuous location in the College's Registrar's Office for one academic year. Thereafter, said Notice will remain on file in the Registrar's Office. Further, this Notice is intended to satisfy the record keeping requirements established under Section 99.32 of the Family Educational Rights and Privacy Act.

COLLEGE OFFICIAL: _____

DATE POSTED: _____



MASSACHUSETTS COMMUNITY COLLEGES

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MEMORANDUM

TO: All Community College Presidents

FROM: Kenneth A. Tashjy, General Counsel

DATE: August 18, 2008

RE: FINAL RULES - MILITARY RECRUITING AT INSTITUTIONS OF HIGHER EDUCATION

In Spring 2008, the U.S. Department of Defense issued Final Rules addressing military recruiting and access to student information at institutions of higher education. The Final Rules affect the administration of 10 U.S.C. 983, a federal law generally referred to as the "Solomon Amendment." In a recent case, *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S.Ct. 1297 (2006), the United State Supreme Court ruled that it was permissible for the federal government to withhold certain federal funds from institutions of higher education that chose to restrict or prohibit the military from conducting recruiting activities on campus or accessing student recruiting information. These Final Rules establish further guidance for the administration of the law at institutions of higher education.

The Final Rules, as stated at 32 Code of Federal Regulations Part 216, provide as follows:

- **Purpose**

The purpose of these Final Rules is to ensure that military recruiters are afforded access to students for recruiting purposes and access to student recruiting information in a manner "at least equal in quality and scope to the access provided to any other employer." The term "equal in quality and scope" means the same access to campus and students provided by the school to the any other nonmilitary recruiters or employers receiving the most favorable access.

- **Applicability**

Failure to comply with the law will affect funding from the following federal departments and agencies: Departments of Defense, Labor, Homeland Security, Transportation, Health and Human Services, the Central Intelligence Agency, and the National Nuclear Security Administration of the Department of Energy. Some Department of Education funds may be affected, excluding student financial aid (Title IV funds).

- **Important Definitions**

- **“Anti-ROTC Policy”** – A policy or practice at an institution of higher education that prohibits or prevents the Secretary of Defense from maintaining, establishing, or efficiently operating a unit of the Senior ROTC, or prohibits or prevents a student from enrolling in a Senior ROTC unit.
- **“Student”** – An institution of higher education shall provide recruiting access to and make information available on any individual who is 17 years of age or older AND is enrolled at the institution.
- **“Enrolled”** – A student is enrolled at an institution of higher education, and therefore subject to these rules, when registered for at least one credit hour of academic credit at the institution.
- **“Student Recruiting Information”** – Recruiters shall have access to student recruiting information, which shall include the student’s NAME, ADDRESS, TELEPHONE LISTING, AGE (or year of birth), PLACE OF BIRTH, LEVEL OF EDUCATION (e.g., freshman, sophomore), DEGREE AWARDED, MOST RECENT EDUCATIONAL INSTITUTION ATTENDED, and CURRENT MAJOR(S). Previously, only name, address, phone listing, and if known, age, level of education and major was required.

- **Violations of Law**

It shall be a violation of the federal law if an institution of higher education:

- Has a policy or practice that prohibits or prevents the Secretary of Defense from access to campuses or access to students on campuses for recruiting purposes that is at least equal in quality and scope to the access to campuses and to students provided to any other employer, or access to directory information on students;
- Fails to disseminate military visit information or alerts to students at least on par with nonmilitary recruiters;
- Fails to schedule visits at times requested by military recruiters that coincide with nonmilitary recruiters' visits to campus if this results in a greater level of access for other recruiters than for the military;
- Fails to provide military recruiters with a “mainstream” recruiting location amidst nonmilitary employers, thereby permitting unfettered access to interviewees;
- Fails to enforce time, place, and manner policies such that the military recruiters experience an inferior or unsafe recruiting climate;
- Has through policy or practice in effect denied students permission to participate, or has prevented students from participating, in recruiting activities; or
- Has an anti-ROTC policy or practice regardless of when implemented.

- **Conflict With FERPA**

The Family Compliance Office of the Department of Education, which enforces the Family Educational Rights and Privacy Act (“FERPA”), has indicated that if compliance with the Solomon Amendment results in a conflict with an institution’s FERPA policy, the Solomon Amendment shall supersede FERPA. However, a student who has required non-disclosure of directory information to any party under FERPA shall be afforded that protection under FERPA, even when the requesting party is the military.

- **Charging Military Recruiters a Fee**

An institution of higher education may charge military recruiters a fee for the costs incurred in providing access to student-recruiting information when that institution can certify that such charges are the actual costs, provided that such charges are reasonable, customary and identical to fees charged to other employers.

If you have any questions pertaining to these new Final Rules or your College’s Solomon Amendment or FERPA policies, please do not hesitate to contact my office.

Presidents/memo/2008-09/Solomon Amendment 8-18-08-#t



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

RECENT AMENDMENTS TO FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

RELATING TO ANTI-TERRORISM ACTIVITIES

April 12, 2002

Dear Colleague:

The purpose of this guidance is to provide you with an overview of recent changes made by Congress to the Family Educational Rights and Privacy Act (FERPA) in response to the September 11th terrorist attacks on the United States. In so doing, we also will provide an overview of the relevant provisions of current law. The changes to FERPA became effective on October 26, 2001, when the President signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.” (Public Law 107-56; 115 Stat. 272.) Section 507 of the USA PATRIOT ACT amends FERPA, and is attached for your convenience at the end of this letter.

Overview of FERPA

FERPA is a federal law that applies to educational agencies and institutions that receive federal funds under any program administered by the Secretary of Education. 20 U.S.C. § 1232g; 34 C.F.R. Part 99. Generally, FERPA prohibits the funding of an educational agency or institution that has a policy or practice of disclosing a student’s “education record” (or personally identifiable information contained therein) without the consent of the parent. When a student turns 18 years old or attends a postsecondary institution at any age, the rights under FERPA transfer from the parent to the student (“eligible student”).

FERPA defines “education records” as “those records, files, documents and other materials which –

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”

20 U.S.C. § 1232g(a)(4)(A)(i) and (ii).

FERPA generally requires prior written consent from the parent or eligible student before an educational agency or institution may disclose personally identifiable information from education records to a third party. However, the law contains 16 exceptions to this general rule. Pertinent exceptions that allow release of personally identifiable information without prior written consent are discussed below.

Ex Parte Orders

Significantly, the recent amendment to FERPA permits educational agencies and institutions to disclose – without the consent or knowledge of the student or parent – personally identifiable information from the student’s education records to the Attorney General of the United States or to his designee in response to an *ex parte* order in connection with the investigation or prosecution of terrorism crimes specified in sections 2332b(g)(5)(B) and 2331 of title 18, U.S. Code.¹ An *ex parte* order is an order issued by a court of competent jurisdiction without notice to an adverse party.

In addition to allowing disclosure without prior written consent or prior notification, this provision amends FERPA’s record keeping requirements (20 U.S.C. § 1232g(b)(4); 34 C.F.R. § 99.32). As a result, FERPA, as amended, does not require a school official to record a disclosure of information from a student’s education record when the school makes that disclosure pursuant to an *ex parte* order. Further, an educational agency or institution that, in good faith, produces information from education records in compliance with an *ex parte* order issued under the amendment “shall not be liable to any person for that production.”

A copy of the new statutory language follows this guidance. The Department will be working with the Department of Justice in the implementation of this new provision. In addition to this guidance, we will be amending and updating the FERPA regulations to include this new exception to the written consent requirement. You should address any questions you have on the new amendment to FERPA@ED.Gov.

Lawfully Issued Subpoenas and Court Orders

FERPA permits educational agencies and institutions to disclose, without consent, information from a student’s education records in order to comply with a “lawfully issued subpoena or court order” in three contexts. 20 U.S.C. § 1232g(b)(1)(J)(i) and (ii), (b)(2)(B); 34 C.F.R. § 99.31(a)(9). These three contexts are:

1. **Grand Jury Subpoenas** – Educational agencies and institutions may disclose education records to the entity or persons designated in a Federal grand jury subpoena. In addition, the court may order the institution not to disclose to anyone the existence or contents of the subpoena or the institution’s response. If the court so orders, then neither the prior notification requirements of § 99.31(a)(9) nor the recordation requirements at 34 C.F.R. § 99.32 would apply.
2. **Law Enforcement Subpoenas** – Educational agencies and institutions may disclose education records to the entity or persons designated in any other subpoena issued for a law enforcement purpose. As with Federal grand jury subpoenas, the issuing court or agency may, for good cause shown, order the institution not to disclose to anyone the existence or contents of the subpoena or the institution’s response. In the case of an agency subpoena, the educational institution has the option of requesting a copy of the good cause determination. Also, if a court or an agency issues such an order, then the notification requirements of § 99.31(a)(9) do not apply, nor would the recordation

¹ These statutes define Federal crimes of terrorism as offenses calculated to influence the conduct of government such as destruction of aircraft, assassination, arson, hostage taking, destruction of communications lines or national defense premises, and use of weapons of mass destruction.

requirements at 34 C.F.R. § 99.32 apply to the disclosure of education records issued pursuant to the law enforcement subpoena.

3. All other Subpoenas – In contrast to the exception to the notification and record keeping requirements described above, educational agencies or institutions may disclose information pursuant to any other court order or lawfully issued subpoena only if the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action. Additionally, schools must comply with FERPA’s record keeping requirements under 34 C.F.R. § 99.32 when disclosing information pursuant to a standard court order or subpoena.

Health or Safety Emergency

FERPA permits non-consensual disclosure of education records, or personally identifiable, non-directory information from education records, in connection with a health or safety emergency under § 99.31(a)(10) and § 99.36 of the FERPA regulations. In particular, § 99.36(a) and (c) provide that educational agencies and institutions may disclose information from an education record “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals” and that the exception will be “strictly construed.” Congress’ intent that the applicability of this exception be limited is reflected in the *Joint Statement in Explanation of Buckley/Pell Amendment*, 120 Cong. Rec. S21489 (Dec. 13, 1974).

Accordingly, the Department consistently has limited the health and safety exception to a specific situation that presents imminent danger to a student, other students, or other members of the school community – or to a situation that requires the immediate need for information from education records in order to avert or diffuse serious threats to the safety or health of a student or other individuals. For example, the health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student’s education records.

Under the health and safety exception school officials may share relevant information with “appropriate parties,” that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36(a). Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception. FERPA’s record keeping requirements (§ 99.32) apply to disclosures made pursuant to the health or safety exception.

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. However, the Department is available to work with institutions to assist them in making such decisions in order to ensure that the disclosure comes within the exception to FERPA’s requirement of prior written consent.

In short, the health or safety exception will permit the disclosure of personally identifiable information from a student's education record without the written consent of the student in the case of an immediate threat to the health or safety of students or other individuals. Of course, a school official, based on his or her own observations, may notify law enforcement officials of suspicious activity or behavior. Nothing in FERPA prohibits a school official from disclosing to federal, State, or local law enforcement authorities information that is based on that official's personal knowledge or observation and not from an education record.

Law Enforcement Unit Records

Under FERPA, schools may disclose information from "law enforcement unit records" to anyone – including federal, State, or local law enforcement authorities – without the consent of the parent or eligible student. FERPA specifically exempts from the definition of "education records" – and thereby from the privacy restrictions of FERPA – records that a law enforcement unit of a school district or postsecondary institution creates and maintains for a law enforcement purpose. A "law enforcement unit" is an individual, office, department, division, or other component of a school district or postsecondary institution – such as a unit of commissioned officers or noncommissioned security guards – that is officially authorized or designated by the school district or institution to: (1) enforce any federal, State, or local law; or (2) maintain the physical security and safety of the school. See 34 C.F.R. § 99.8.

FERPA narrowly defines a law enforcement record as a record that is: (i) created by the law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b). While other components of an educational institution generally can disclose, without student consent, student education records to school law enforcement units (under FERPA's exception for school officials with legitimate educational interests), these records are not thereby converted into law enforcement unit records because the records were not created by the law enforcement unit. Thus, a law enforcement unit cannot disclose, without student consent, information obtained from education records maintained by other components of an educational institution.

Directory Information

FERPA's regulations define "directory information" as information contained in an education record of a student "that would not generally be considered harmful or an invasion of privacy." 34 C.F.R. § 99.3. Specifically, "directory information" includes, but is not limited to the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate, full-time or part-time), participation in officially recognized activities or sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended. *Id.* A school may disclose "directory information" from the education records without prior consent only after giving notice to the student of its directory information policy, and providing parents and eligible students with an opportunity to opt out of having their "directory information" disclosed. See 34 C.F.R. § 99.37.

Under FERPA, a school may not comply with a request for "directory information" that is linked to other non-directory information. For instance, a school cannot disclose "directory information" on students of a certain race, gender, or national origin. However, the school could disclose "directory information" on *all* students (who have not opted out) to law enforcement authorities who may be requesting "directory information."

Disclosures to the Immigration and Naturalization Service (INS)

The Immigration and Naturalization Service (INS) requires foreign students attending an educational institution under an F-1 visa to sign the Form I-20. The Form I-20 contains a consent provision allowing for the disclosure of information to INS. The consent provision states that, "I authorize the named school to release any information from my records which is needed by the INS pursuant to 8 C.F.R. 214.3(g) to determine my nonimmigrant status." This consent is sufficiently broad to permit an educational institution to release personally identifiable information of a student who has signed a Form I-20 to the INS for the purpose of allowing the INS to determine the student's nonimmigrant status. Students that have an M-1 or J-1 visa have signed similar consents and education records on these students may also be disclosed to the INS.

Finally, we anticipate there may be a need for additional guidance in the future on other INS disclosure issues.

Technical Assistance on FERPA

For additional guidance on these or other provisions of FERPA contact the Family Policy Compliance Office at the following address and telephone number:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-4605
(202) 260-3887 – Telephone
(202) 260-9001 – Fax

Additionally, schools officials may contact the Family Policy Compliance Office by e-mail for quick, informal responses to routine questions about FERPA. That address is: FERPA@ED.Gov. The Web site address is: www.ed.gov/offices/OM/fpco.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

Public Law 107-56, October 26, 2001; 115 Stat. 272
"Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"

SEC. 507. DISCLOSURE OF EDUCATIONAL RECORDS. [115 Stat. 367-68]

Section 444 of the General Education Provisions Act (20 U.S.C. 1232g), is amended by adding after subsection (i) a new subsection (j) to read as follows:

“(j) Investigation and Prosecution of Terrorism.—

“(1) In general.--Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--

“(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

“(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

“(2) Application and approval.--

“(A) In general.--An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

“(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

“(3) Protection of educational agency or institution.—An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

“(4) Record-keeping.--Subsection (b)(4) does not apply to education records subject to a court order under this subsection.”.

FAMILY POLICY COMPLIANCE OFFICE ADVISORY

USE OF STUDENT SOCIAL SECURITY NUMBER AS STUDENT IDENTIFIER

Dr. Evangelos J. Gizis, Interim President
Hunter College of the City University of New York
695 Park Avenue
New York, New York 10021

Complaint No. XXXX
Family Educational Rights and Privacy Act

Dear Dr. Gizis:

This is to advise you of the finding in the complaint filed with this Office by [Student] who alleged that Hunter College of the City University of New York (College) violated his rights under the Family Educational Rights and Privacy Act (FERPA). Specifically, the Student alleged that Mr. Cullen Schaffer, a computer science professor, posted his exam and final grade on a web page along with the last four digits of his social security number.

This Office advised you of the allegation by letter dated August 21, 2000, and you responded on behalf of the College by letter dated September 25, 2000. You state in your letter that many College professors do post grades by the last four digits of a student's social security number. You state that "no student names are listed" and that this "enables students to easily identify their own grades, yet remain unable to identify any other student's identities." You also state that the College does "not consider this practice to be in violation of FERPA or any other applicable laws."

FERPA protects privacy interests of parents in their children's "education records," and generally prohibits the disclosure of personally identifiable information from education records without the consent of the parent. The term "education records" is broadly defined as all records, files, documents and other materials which:

contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 "Education records." When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student" under FERPA and all of the rights afforded by FERPA transfer from the parents to the student.

Under FERPA an eligible student must provide his or her prior written consent before an educational agency or institution discloses personally identifiable information from his or her education records. 20 U.S.C. § 1232g(b); 34 CFR § 99.30. Section 99.3 of the regulations defines the "Personally identifiable information" as information that includes but is not limited to:

- a. the student's name;
- b. the name of the student's parent or other family member;
- c. the address of the student or the student's family;
- d. a personal identifier, such as the student's social security number or student number;

- e. a list of personal characteristics that would make the student's identity easily traceable; or
- f. other information that would make the student's identity easily traceable.

34 CFR § 99.3 "Personally identifiable information." (Emphasis added.) A student's social security number is, by definition, "personally identifiable information" under FERPA, and may not be disclosed without consent in any form.

FERPA provides that educational agencies and institutions may not disclose personally identifiable, non-directory information from education records unless a parent or eligible student has provided a signed and dated written consent in accordance with the requirements of § 99.30 of the FERPA regulations. While there are certain exceptions to this general prohibition, none permit an educational agency or institution to publicly disclose personally identifiable information, including the student's grades and portions of the student's social security number, from the education records of students.

In this case, the Student's grades were publicly disclosed along with the last four digits of his social security number absent his consent when they were posted on a web page. Because a social security number, or portions thereof, are by definition "personally identifiable information" under FERPA, this Office finds that the College violated the Student's rights under FERPA as alleged. The Student will be advised of this finding by copy of this letter.

We note that FERPA does not prevent an educational agency or institution from posting the grades of students without written consent when it is not done in a personally identifiable manner. Thus, while FERPA precludes a school from posting grades by social security numbers, student ID numbers, or by names because these types of information are personally identifiable or easily traceable to the students, nothing in FERPA would preclude a school from assigning individual numbers to students for the purpose of posting grades as long as those numbers are known only to the student and the school officials who assigned them.

We will close the investigation of the complaint upon receipt of assurance that the College has taken appropriate steps to come into compliance with FERPA. Specifically, please provide this Office with assurance that: 1) The College has taken appropriate steps to revise its policy on posting grades in accordance with the provisions of FERPA as set forth in this letter of finding and 2) appropriate College officials have been advised of FERPA's prohibition on posting grades in personally identifiable form, and that using a student's social security number, or a portion of that number, means a disclosure in personally identifiable form under FERPA. At a minimum, the College should provide a memorandum to all appropriate staff outlining the above requirements of FERPA and provide this Office of such once it has been distributed.

Thank you for your cooperation in the investigation of this complaint. Please provide the requested assurances within two weeks of your receipt of this letter.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

FERPA & ELECTRONIC RECORDS

Are electronic records “education records”?

Yes, as long as they are “directly related to a student,” are “maintained by an educational agency or institution or by a party acting for the agency or institution,” and do not fall within any of the listed exceptions to that term; the medium in which information is recorded is irrelevant to the analysis. In 1996, the Department of Education amended the regulatory definition of the threshold term “record” to include “*any* information recorded in *any* way, including, but not limited to, handwriting, print, *computer media*, video or audio tape, film, microfilm, and microfiche.” 34 C.F.R. § 99.3 (emphasis added). The Department stated that the amendment was intended “to reflect changing technology and changing modes of maintaining information.” 61 Fed. Reg. 10663, 10664 (Mar. 14, 1996).

Are student e-mail messages “education records”?

Maybe – it depends on the context in which the question is asked. Most student e-mail messages will be “personally identifiable” to (at least) the authoring student, and thus “directly related to” that student, by virtue of the student’s e-mail address and/or the content of the message. The answer thus seems to hinge on whether the message is “maintained” by the institution. A message that a student sends to a professor or staff member, and that is in the possession of that professor or staff member, seems without question to be so “maintained” and thus an “education record” in the absence of an applicable exception. See, e.g., President and Trustees of Bates College v. Congregation Beth Abraham, 2001 Me. Super. Lexis 22 (2001) (“The e-mail messages here were generated by students and directed to the[ir] faculty advisor The records directly related to the named students and sought the advice and assistance of a person acting for the college. Although the e-mail correspondence may be of a different character than most records, files and documents maintained by an educational institution, [FERPA] does not limit the definition of [education records]. As such that term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of the students.”) The same should hold true for a professor’s or staff member’s copy of a message sent *to* a student.

But what about a copy of that same message, or of a student-to-student message, that is resting in the student’s account on an institutional server? In some sense, that copy is “maintained” jointly by both the student and the institution. Nevertheless, it seems clear that FERPA would not prevent the *student* from doing with it as he or she wishes – even if it also is “directly related to” another student – because the student is not “maintaining” the copy *on behalf of* the institution. Cf. Owasso Independent School District v. Falvo, 122 S. Ct. 934 (2002) (discussed below). But if a system administrator has access to the message, or an institutional official wishes to retrieve the message as part of an investigation, or the institution has received a public records request for the message, the restrictions of FERPA should apply.

The status of e-mail messages that a student may post to a class listserv or web page is less clear. When the institution’s role is only the passive, technical one of making the medium available for student use (similar to the institution’s role in permitting students to post messages to physical bulletin boards), the messages arguably are not “maintained” in the sense required for FERPA to be applicable. Cf. *id.* (Alternatively, the student might be deemed to have waived FERPA in those circumstances.) If, however, a professor actively manages the listserv or web page, and/or if students are *required* to post messages, the answer potentially could be different.

Are e-mail addresses “directory information”?

Yes, *if* the institution has included e-mail addresses in its designation of directory information. See 34 C.F.R. §§ 99.3, 99.31(a)(11), and 99.37. See also 65 Fed. Reg. 41852, 41855 (July 6, 2000) (“[A]s methods of communication and record management continue to evolve, it is useful to list additional categories of information that we believe are directory information, such as a student’s e-mail address We do not believe that the disclosure of student e-mail addresses will generally be considered harmful or an invasion of privacy. We think that a student’s e-mail address is analogous to a student’s mailing address, an item already included as directory information.”)

May a student’s consent to disclosure of education records be given electronically?

Yes, *but*. FERPA regulations require a “signed and dated written consent” for those disclosures that require consent. 34 C.F.R. § 99.30(a). Earlier this year, however, the Family Policy Compliance Office of the Department of Education amended the regulations to provide that such consent “may include a record and signature in electronic form” if it sufficiently identifies and authenticates the person giving the consent and indicates that person’s approval of the information contained in the consent. 34 C.F.R. § 99.30(d). FPCO did not specify any particular means, noting that it wanted to “permit schools to take advantage of changing technology as it may become available”, but did state that the FSA standards for electronic signatures in student loan transactions could be considered a “safe harbor”. 69 Fed. Reg. 21670 (Apr. 21, 2004) (attached).

May an institution deliver education records by e-mail or make them available through the web?

Yes, *but*. Nothing in FERPA or the implementing regulations specifies or limits the particular means by which an institution may transmit education records; it focuses on *whether* they may be disclosed, not *how*. The fact that electronic delivery is not perfectly secure also does not prevent its use. FERPA does not mandate perfection – if it did, paper delivery would not be an option, either. And in fact, with appropriate precautions such as PINs or passwords, encryption, and the like, electronic delivery can be much more secure than paper delivery.

Exactly what type and level of precautions are necessary is unclear – and probably a moving target. For an excellent resource on the technical aspects of the issue, see Privacy and the Handling of Student Information in the Electronic Networked Environments of Colleges and Universities, <<http://www.educause.edu/ir/library/pdf/PUB3102.pdf>>, a white paper developed jointly by CAUSE (the predecessor of EDUCAUSE) and AACRAO in 1996.