

Transcript: FERPA 101, FERPA Basics Presentation

December 2011

(Baron)

Slide 1:

Hello and welcome to the first in a series of webinars provided jointly by the Family Policy Compliance Office at the U.S. Department of Education and the Privacy Technical Assistance Center. This webinar is entitled, FERPA 101, FERPA Basics. The intention of today's webinar is to provide participants with a basic overview of FERPA. We will cover some of the new regulation changes during this webinar, but the primary focus will be on FERPA basics today.

Participants should also be aware that the Department is currently working on guidance documents around video and email as it relates to FERPA and hopes to have information out on these topics in the near future.

Thus, we won't be responding today to questions specifically about those two subject matters.

My name is Baron Rodriguez and I lead the Privacy Technical Assistance Center. With me, is Ellen Campbell, Acting Director of the FPCO. With that, we will turn it over to Ellen to begin. Ellen?

(Ellen)

Slide 2:

Thank you, Baron. We are very pleased to present this basic FERPA training for school officials. We routinely respond to questions from school official about how FERPA applies in various situations. Often in providing advice, there are many factors that we have to consider. And then there's the challenge of applying FERPA to an ever-changing and sometimes complex technological landscape.

Today, however, we are going to touch on the *fundamentals* of FERPA, reminding you of the basic requirements. At the end of the presentation, we have responded to a few questions about FERPA we've received from you, but we hope that if you have additional questions after the webinar, you will email them to us at the address we will give you.

Congress passed the Family Educational Rights and Privacy Act (FERPA) in 1974 around the same time that other privacy statutes were passed. Congress has amended FERPA approximately 10 times since its original enactment. Typically, when Congress amends the statute, the Department issues new regulations reflecting those changes, as well as changes based on administrative experience. What we are going to talk about today are the FERPA regulations – by which the Department administers this important law.

Slide 3:

(Ellen)

FERPA is a federal law that affords parents the right to have access to their children’s education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.

When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student, and he or she is known as an “eligible student” under FERPA.

We will talk specifically about these rights as we get into this presentation.

(Baron)

So if my daughter (age 17) graduates early and moves on to a postsecondary institution, then she controls the rights to her records, correct?

(Ellen)

Yes, that is correct. However, the great majority of parents of 17 year olds want to remain a part of their academic lives – so FERPA does permit schools to disclose education records to parents of eligible students under several exceptions to the general consent rule. The main exception that typically applies permits schools to disclose a student’s education records to parents if that student is a dependent for IRS tax purposes. This is the case whether your daughter wants the school to disclose the information to you, her parent, or not.

Additionally, these days, a lot of high school students are taking courses at a local college before they graduate from high school – that is, they are “dually enrolled” in both the high school and the college. We get questions about to whom do the rights belong in that scenario. For example, a student is 17 years old and is still in high school is also but taking courses at the local

community college. Under FERPA, the rights belong to the student with regard to the records over at the college, but the rights still belong to the parents with regard to the education records at the high school. In this situation, FERPA not only permits the college to disclose information to parents of the high school student if he or she is a dependent for Federal income tax purposes, but it also permits the high school and the college to share information because the student is enrolled in both schools.

Slide 4:

(Ellen)

FERPA applies to schools that receive funds under any program administered by the Department of Education. Most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.

(Baron)

For Example: Privates and parochial schools that receive E-rate funds would not necessarily be subject to FERPA. The E-rate program is administered by the FCC, not U.S. ED.

(Ellen)

That's correct. I also want to point out that FERPA does not apply to a private school just because that school has students or teachers who receive services from a local or state education agency funded by program administered by this Department. A number of Department programs serve private school students and teachers (as distinct from the private school itself). In those cases, the recipient of the financial assistance is not the private school b/c it receives no money, but the LEA or SEA. Thus, the private school would not be subject to FERPA unless it receives funds from any program administered by the U.S. Department of Education.

Also, if a student is placed in a private school under IDEA, for instance, the placing public agency (typically the LEA) remains responsible under FERPA for that specific student's records and compliance with FERPA.

Slide 5:

(Ellen)

On December 2, 2011, the Department issued final regulations making certain changes to the FERPA regulations. Here is a link to the *Federal Register* document on our website. You can also just go to the front page of FPCO's website and see information about the amendments.

Listed here are some of the main highlights of what was amended, but today we will only be focusing on the changes to the "directory information" provisions in FERPA.

Slide 6:

(Ellen)

Understanding the definitions in FERPA will help you understand how to apply FERPA to your particular situations. The most basic definition is the term "education records." Education records are broadly defined to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for agency or institution.

Slide 7:

(Ellen)

There some exceptions to the definition of education records. They include –

Sole possessions used as a personal memory aid;

Law enforcement unit records;

Student employment records' and

"Treatment records."

These last two are typically found at the college level.

(Baron)

Ellen, can you give an example of a “sole possession record used as a personal memory aid”?

(Ellen)

Well, as you said, a “sole possession record” serves as a personal memory aid or “memory jogger,” we like to say. It certainly depends on the nature and content of the notes. I think a good example would be a note to remind yourself to “talk to Ricky’s parents about his grades.” A sole possession record would not generally be notes that a school official took recording information the student told the official about the student’s problems at home. The parents would generally have a right to inspect and review the information regarding the student’s version of troubles at home, if requested.

Slide 8 & 9:

(Ellen)

Another important definition to keep in mind is the definition of “personally identifiable information.” This works together with “education records” in determining what information must be protected from disclosure. In 2008, we amended the definition to include some more items. “Personally identifiable information” includes not only direct identifiers, obvious items such as name, address, SSN, but also indirect identifiers that would, as we see on the next page, would have the effect of identifying a student. The standard is, can a “reasonable person in the school community” – someone without personal knowledge of the circumstances – identify the student. Also, PII includes information requested by a person whom the school believes knows the identity of the student.

Slide 10:

(Ellen)

Directory Information is defined as PII that is not generally considered harmful or an invasion of privacy if disclosed. These are items that you might find in a school yearbook, a sports program, or a student directory.

(Baron)

Question: A lot of elements in your definition of PII are also part of agency designated directory information? How do we reconcile the differences/similarities between PII and Directory Information when the definitions are so similar?

(Ellen)

Directory information is simply PII that can be designated and disclosed without consent. A school has to follow the requirements we will talk about in a few minutes found in section 99.37 to designate certain information as directory information. There are some items listed under the PII definition that can NOT be considered directory information, such as a social security number.

Slide 11:

(Ellen)

As we just mentioned, directory information cannot generally include a student's social security number or student ID number.

In the regulations released on December 2nd, we amended the definition of "directory information" to include a student ID number or other unique personal identifier that is displayed on a student ID badge, 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.

(Baron)

Question: Does this mean that a parent or student who opts out of directory information cannot use FERPA's opt out provisions to prohibit students from wearing ID badges?

(Ellen)

That's correct.

Slide 12:

(Ellen)

Now we are going to talk about the rights of parents and eligible students under FERPA. One important thing to note is that FERPA affords full rights to either parent, custodial or noncustodial, unless there is a legally binding document that states otherwise.

Slide 13:

(Ellen)

As previously mentioned, when a student turns 18 or enters college at any age, the rights under FERPA transfer from the parents to the student. However, nothing in FERPA prevents a school from disclosing education records to parents under one of the exceptions that might apply. This applies at the high school level as well as at the college level.

(Baron)

Can you give an example of the second bullet, “disclosing education records without prior written consent”?

(Ellen)

Sure, the first one listed (section 99.31(a)(8)) permits disclosures to parents, without consent of the student, if the student is a dependent for IRS tax purposes. A school may – but is not required to – disclose any education records to parents under this exception to consent.

Slide 14:

(Ellen)

Schools are required to annually notify parents and students of their rights under FERPA. We have a model notification on FPCO’s website that schools can download and adapt to their situation. The model notices have recently been updated.

Slide 15:

(Ellen)

Note here that the annual notification must include the criteria for who your school considers to be a school official and what you consider to be a legitimate educational interest. We have sample language for that in the model notice as well.

(Baron)

Generally these are provided in student/parent handbooks or in yearly student registration information. A website notice alone is not generally sufficient to reach your student/parent audience for consideration since some parents and students don't have access to the Internet.

Slide 16:

(Ellen)

Now we are going to talk about parents and students' right to access education records.

Schools must comply with a request for access within 45 days of receiving the request. In some states, there may be a law that addresses access to education records. Some states may require schools to provide access in fewer than 45 days and other states may require that school provide access in more than 45 days. If your state law requires access be provided in, say, 60 days, the school must comply with FERPA and provide access in no more than 45 days after receiving a request.

Also note that FERPA doesn't require that you maintain education records and a school can destroy records – unless there is an outstanding request for access.

Slide 17:

(Ellen)

SEAs are required also to provide parents and eligible student with access to education records that they maintain on students.

(Baron)

An SEA can provide any student record information it maintains to the LEA. In my experience it is generally best to provide the most up to date information to the parents requesting access and therefore, since MOST information is kept MOST current at the LEA (including parental custodial issues), it is highly recommended that SEA's work closely with their LEAs.

Slide 18:

(Ellen)

LEAs and SEAs may charge for copies of education records within reason – unless doing so prevents a parent or student from exercising their right to inspect and review education records.

And, schools need to be careful when a record contains information on more than one student – the parent or student may see or be informed of only the specific information that relates to the student.

Slide 19:

(Ellen)

Another right under FERPA is the right to seek to amend information in education records.

(Baron)

Question: What are the general scenarios that you have seen this happen? For example is a grade amendment part of this procedure?

(Ellen)

The right to seek amendment is not unlimited; a school is not required by FERPA to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student. The legislative history of FERPA indicated that FERPA was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational [agency or] institution." Rather, FERPA was intended to require only that educational agencies and institutions conform to fair recordkeeping practices. It was not intended to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations. Thus, while FERPA affords

parents the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded.

Slide 20:

(Ellen)

Another right that parents and eligible students have under FERPA is the right to provide consent before PII from education records is disclosed. Consents must be signed and dated and must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made.

Slide 21 & 22:

(Ellen)

There are a number of exceptions to FERPA's general consent rule. Here are some that generally relate to LEAs.

Slide 23:

(Ellen)

You need to be familiar with FERPA's recordkeeping requirements, which you can read about in section 99.32 of the FERPA regulations. Generally, you must record to whom you disclose PII from education records and that party's legitimate interest in obtaining that information. There are exceptions to recordation, such as disclosures made with consent and disclosures to school officials.

(Baron)

Many agencies are either using or considering the use of electronic audit systems which can record who has accessed education records and when it was accessed. If the agencies ALSO capture a reason for the disclosures, would this be sufficient for meeting this requirement?

(Ellen)

It would – as long as parents and eligible students can access that information should they request to do so – either at the SEA or the LEA level.

Slide 24 –

(Ellen)

You should also be aware that there are limitations on the RE-disclosure of PII from education records, which are discussed in section 99.33. When you disclose PII to one of the parties listed in the exceptions to consent (section 99.31), a school should inform the receiving party that it may not make further disclosures of the PII, except when the disclosure is to the parent or the eligible student, the third party makes disclosures on behalf of the school, the disclosure was made to comply with a court order or subpoena or in connection between litigation between the school and the parent or eligible student, or it's a disclosure of directory information.

Slide 25:

(Ellen)

Now let's talk about the audit or evaluation exception to FERPA's general consent rule. This is the exception under which LEAs typically disclose PII on students to the SEA.

Note that authorized representatives of SEAs (or the other specific entities or officials listed in the regulations that can receive information under this exception) may have access to PII from education records only 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.

(Baron)

It is generally best practice for SEAs to review their agency data access policies and limit the number of employees that have access to personally identifiable data to those that only have an explicit need to that level of access. All employees should be trained in the proper use, protection, and disposal of personally identifiable data and should sign employee agreements around these criteria.

Slide 26:

(Ellen)

Yes, you can see from the next slide that information must be protected in a manner that does not permit the redisclosure of that PII to anyone else and destroyed with no longer needed for the purposes listed above.

Slide 27:

(Ellen)

In the last few years, we have gotten a lot of questions about disclosures that relate to health or safety emergencies. In 2008, we clarified that if a school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose PII to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Slide 28:

(Ellen)

Based on the information available at the time and if there is a rational basis for the disclosure, the Department will not substitute its judgment for that of the school. However, school officials need to remember that this exception relates to emergencies. This provision cannot be used for disclosures on a routine, non-emergency basis, such as the routine sharing of non-directory information on students with the local police department (which is not allowed). We've written extensively about this in the final regulations issued in 2008 and in several guidance documents, which appear on our website and which are listed at the end of this webinar.

Slide 29:

(Ellen)

Section 99.37 provides the conditions for disclosing directory information. Schools may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance concerning directory information.

Also, the FERPA regulations were amended to state that a parent or eligible student may not use the right to opt out of directory information in order to prevent a school from requiring the student to wear or otherwise display a student ID badge or card that exhibits information that has been properly designated by the school as directory information.

The regulations were also amended to clarify that schools may adopt a limited directory information policy that allows for the disclosure of directory information to specific parties, for specific purposes, or both. The school must specify its limited directory information policy in the public notice to parents and students.

(Baron)

Can a district make a policy that they will not disclose directory information to marketers, but will provide the directory for other explicit purposes such as yearbook information?

(Ellen)

Yes, but the school has to adhere to its stated policy in the directory information notice. If a school states in its directory information notice to parents and students that it will not disclose directory information to marketers, for instance, it can't turn around and disclose directory information to those entities. The school could only do this by revising and reissuing its directory information notice and providing parents and eligible students another opportunity to opt out.

Slide 30:

(Ellen)

FPCO is the office in the Department that administers FERPA. We are the office that investigates complaints filed by parents and eligible students and provide technical assistance on FERPA.

In the regulations published in December, we amended the enforcement provisions in FERPA so that if an SEA or another entity that receives funds under a program administered by the Department has access to PII from student education records and violates FERPA (regardless if they have students in attendance), FPCO may bring an enforcement action against that entity.

We also clarified in the recent regulations that enforcement options against entities that receive funds under a program administered by the Department include: withholding payment, cease

and desist orders, and compliance agreements. The regulations also clarified that the Department's option include the 5-year rule, which may be applied against any entity outside of the educational agency or institution whether or not such an entity receives funds under a program administered by the Department if the entity violates FERPA's re-disclosure provisions or the requirement under the studies exception to destroy the PII from education records when no longer needed for the purposes for which the study was conducted.

(Baron)

Can you give an example of the general enforcement progression that FPCO uses to bring agencies into FERPA compliance?

(Ellen)

Before we get to the point of recommending to the Secretary the enforcement options I just mentioned, FPCO works with educational agencies and institutions to bring them into compliance with FERPA. Should we find that a school violated FERPA through our investigation, FPCO would require that the school take certain measures to come into compliance with FERPA and provide us with assurance that it has done so.

Slide 31 - 33:

(Ellen and Baron review questions received from school officials and the answers to those questions.)

Slide 34:

(Baron)

Here are links to some of the guidance documents we mentioned today, as well as to the FERPA regulations and the new model notices.

Slide 35:

(Ellen)

And here are instructions on how to sign up for FPCO's listserv.

Slide 36:

(Baron)

Thank you for attending the webinar today. We appreciate your attention and look forward to your participation in the upcoming webinars. Please review our website for the most recently posted and upcoming webinars, guidance, and events at www.ed.gov/ptac and www.ed.gov/fpco.