

CLIENT NEWS BRIEF

No. 9

February 2009

**UNITED STATES DEPARTMENT OF EDUCATION ISSUES
FINAL FERPA REGULATIONS**

The United States Department of Education (“DOE”) issued final regulations on December 9, 2008, that implement provisions of the Family Educational Rights and Privacy Act (“FERPA”). Generally, FERPA bars the release of students’ educational records maintained by educational institutions without parental consent. FERPA applies to educational agencies and institutions (“schools”) that receive funds under any program administered by the DOE. These new regulations are effective January 8, 2009, and are summarized as follows:

Educational Records

Under FERPA, “educational records” are records that contain personally identifiable information about a student and are maintained by a school. The definition of personally identifiable information now includes: date and place of birth, mother’s maiden name, biometric records (e.g., fingerprints, etc.), and other information that would make the student’s identification easily traceable.

Directory Information

Generally, directory information (e.g., student name, address, telephone listing, e-mail address, photograph, date and place of birth, dates of attendance, grade level, participation in activities and sports, etc.) may be released without permission unless a parent requests otherwise. A social security number is not directory information. A student identification number can be released provided that it cannot be used to gain access to educational records without a password. Schools cannot display directory information of a former student if the student opted out of disclosure while he or she was a student, unless he or she rescinds the opt out. Schools can still use a social security number for educational record keeping, provided that access to the number is strictly limited.

Release/Use of Records Without Prior Consent

A school can release or use educational records without prior written consent in the following circumstances:

Health and Safety Emergency: In the wake of the Virginia Tech shootings, FERPA regulations now allow schools and colleges to disclose information to certain parties (such as current or prior schools, peers, mental health professionals, law enforcement officials, parents (if student is over 18 years old) or potential victims) where the school has a rational basis to believe that there exists a significant threat to the health and safety of a student or other individuals, and disclosure is necessary to protect against the threat. The threat must be one of physical harm, attack or injury (e.g., terrorist attack, natural disaster, campus shooting, or outbreak of an epidemic like e-coli). Schools must record information concerning the circumstance of the emergency.

De-Identified Records: Schools may release educational records without consent where all personally identifiable information (e.g., name, address, date of birth, race, gender, activities, initials, etc.) has been removed. Once all such information has been removed, release of such “de-identified” records is not considered a “disclosure” under FERPA.

Transfer Students: Schools can disclose records to another school where the student seeks to enroll or has transferred, if disclosure is for purposes related to transfer. School officials can disclose any records, including health and disciplinary records, to another school where the student seeks to enroll.

Outsourcing: FERPA allows the disclosure of records without consent to school officials where there are legitimate educational interests in the information. The new regulations expand the definition of “school officials” to include contractors, consultants and volunteers to whom the school has outsourced services that it would otherwise use employees to perform (e.g., enrollment and degree verification services, fundraising and alumni communications, development and management of information systems, etc.). The outside party must be under “direct control” of the school and subject to conditions governing use and re-disclosure. Schools must use reasonable methods to ensure that school officials have access only to those educational records in which they have legitimate educational interests.

Redisclosure: Officials such as State and local educational authorities may redisclose records received from a school pursuant to current rules on disclosure (to entities with legitimate educational purposes, for transfer purposes, etc.). Information about the redisclosure must be recorded. For example, a school can now request a transferring student’s records from prior recipient California Department of Education instead of from the former school.

Studies: Schools can disclose records to organizations conducting studies on behalf of the school for purposes of testing, student aid and instruction improvement. Schools must enter into a written agreement with the recipient organization that specifies the purpose of the study, that information from the records may only be used to meet the purposes of the study, restrictions on redisclosure and destruction of information.

Patriot Act Orders: The new regulations implement a provision of the Patriot Act that allows the United States Attorney General to apply for an ex parte court order to collect educational records without student or parental consent or knowledge.

Verification of Records: A school that receives a record (e.g., a transcript) can submit the record to the creating school in order to verify the record as accurate and not falsified.

College Parents: Colleges may disclose information to a parent without student consent if the student is a dependant; there is a health and safety emergency; or if the student is under 21 years old and violated a substance abuse policy.

Documents that are not Educational Records

Records created or received by a school about a person who is no longer a student that are not directly related to the student's attendance are not "educational records," and thus not protected by FERPA.

Likewise, student-graded assignments that have not yet been collected by the teacher are not educational records.

Disclosure

Schools must use reasonable methods to identify and confirm the identity of parents and other recipients of records. (E.g., requiring a driver's license or other identification, use of a PIN, etc.) Relying solely on recipient's presented name, date of birth, social security number or student identification number is no longer sufficient.

Notice to Parents

Schools must now annually notify parents that the school will forward a student's educational record to other schools where the student seeks to enroll.

Schools must now make a reasonable effort to notify a parent (or student, if over 18 years old), regarding a subpoena or court order, before the school may disclose personally identifiable information.

Educational agencies should review their board policies and administrative regulations and work with legal counsel to conform them to the new regulations. If you have questions about these new regulations or privacy of student records in general, please contact one of our seven offices statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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