

CLIENT NEWS BRIEF

New Guidance Answers Questions Regarding FERPA And School Law Enforcement Units

The United States Department of Education (Department) issued answers to 37 Frequently Asked Questions (FAQs) regarding the Family Educational Rights and Privacy Act (FERPA). The FAQs focus on how FERPA relates to school law enforcement units and school resource officers (SROs). The full document, issued by the Department on February 12, 2019, is available [here](#).

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The Department issued the FAQs in response to the [Final Report of the Federal Commission on School Safety](#) (Report), which was completed in December 2018. The Report stated that “[e]ducators, parents, law enforcement officers, and others are often unclear about FERPA’s specific requirements and exceptions,” and “substantial misunderstanding remains at the local level among officials and educators concerning the privacy law, and in particular its application to school-based threats.” One common misconception identified by the Report is the degree to which FERPA impedes the sharing of private student information with law enforcement. The FAQs, therefore, outline the several exceptions to FERPA that may apply in the context of sharing information with law enforcement. It is important to note that these FAQs do not create any new law, they simply clarify existing law. Some key takeaways from the FAQs are outlined below.

The “School Official” Exception

One exception to the general rule against disclosing personally identifiable information (PII) without parental consent is disclosing information to a school official with a “legitimate educational interest.” The FAQs clarify that law enforcement officers—even those that are not employed by the school district—may fall under the school official category if they:

1. Perform an institutional service or function for which the school or district would otherwise use employees (e.g., to ensure school safety);
2. Are under the “direct control” of the school or district with respect to the use and maintenance of the education records (e.g., through a memorandum of understanding (MOU) that establishes data use restrictions and data protection requirements);
3. Are subject to FERPA’s use and re-disclosure requirements, which provide that the PII from education records may be used only for the purposes for which the disclosure was made (e.g., to promote school safety and the physical security of students), and which limits the re-disclosure of PII from education records; and
4. Meet the criteria specified in the school or district’s annual notification of FERPA rights for being school officials with legitimate educational interests in the education records.

The FAQs advise developing MOUs between school districts and law enforcement entities to explicitly address these four elements. Such MOUs can establish law enforcement officers as school officials to whom schools can disclose PII to in certain situations, such as when disclosure is necessary to



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protect students at the school.

The FAQs also explicitly warn that SROs are not *automatically* considered school officials under FERPA. SROs, like any other law enforcement officer, must meet the four requirements outlined above to be considered a school official to whom disclosure of PII is legal. The FAQs, in particular, emphasize the third requirement regarding re-disclosure. SROs may not re-disclose information from education records to others, including other employees of the local police department who are not acting as school officials, unless: (1) the re-disclosure is on behalf of the educational agency or institution; (2) the re-disclosure fits within one of the exceptions to FERPA's consent requirement; and (3) the recordkeeping requirements in 34 CFR § 99.32 have been met.

The FAQs also state that a member of a threat assessment team (such as a mental health therapist) who is not a school district employee may also fall under the "school official" exception to FERPA if the four conditions discussed above are met. The FAQs suggest—but recognize that FERPA does not require—having members of a threat assessment team sign an acknowledgement of their responsibilities for safeguarding student information under FERPA.

The "Law Enforcement Unit Record" Exception

The FAQs also remind school administrators that, under the federal regulations implementing FERPA, records that are created and maintained by a law enforcement unit for a law enforcement purpose are not education records. Therefore, investigative reports and other law enforcement records "may be released subject to school policy, State law, and other applicable laws." However, a law enforcement record that is provided to a school may become an education record subject to FERPA.

The "Health or Safety Emergency" Exception

Another exception to FERPA's general rule against disclosure of PII without parental consent discussed by the FAQs is the "health or safety emergency" exception, under which districts may disclose education records absent parental consent to protect the health or safety of the student or others. The FAQs clarify that this exception "is limited to the period of the emergency and does not allow for a blanket release of PII from a student's education records." Disclosures under the emergency exception must be related to a significant and articulable threat. The FAQs state that "articulable and significant threat" is a "flexible standard" in which deference is given to school officials. Despite such deference, school officials must be able to articulate what the threat is and why the disclosure is necessary.

The FAQs also emphasize that the health and safety emergency exception permits disclosure of education records only to a party whose knowledge of such information is necessary to protect the health or safety of the student or other persons. The FAQs explain that such parties typically include local or State law enforcement officials, public health officials, trained medical personnel, and parents.

Takeaways

The Department issued these FAQs to clarify misconceptions about FERPA and the limitations it places on the exchange of information between law enforcement and school districts. Districts can use these FAQs as a guide in developing MOUs with law enforcement and analyzing when exchanging information with law enforcement is appropriate and legal. Districts should also note the FAQs' emphasis on the limited application of the "health and safety emergency" exception and on the fact the law enforcement officials who are considered "school officials" cannot, in general, re-disclose information from education records to their law enforcement colleagues who do not meet the "school official" criteria.

To learn more about laws applicable to law enforcement officials and agencies working in schools, tune in to the Lozano Smith Podcast [Episode 14 - Police in Schools: The Role of a School Resource Officer](#).

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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For more information about the FAQs, FERPA, or student matters generally, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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