

# FERPA

## Review of New Regulations

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# FERPA – Review of Final Regs

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## Definitions

### Attendance

- Formerly defined to include attendance in person or by correspondence.
- Regulations will add other situations in which students are not physically present on a campus, but attend class in another manner, such as:
  - Video conference
  - Satellite
  - Internet
  - Other electronic information and telecommunications technologies

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- Ensures that the records of individuals receiving instruction through distance learning and other contemporary modalities are understood to be students whose records are protected under FERPA.

## **Directory Information**

- Formerly defined as information that would not generally be considered harmful or an invasion of privacy if disclosed.
- Some items are listed specifically, but no items are listed as prohibited from being designated as Directory Information.
- Regulations will specifically prohibit the designation of a student's SSN or student ID number as Directory Information, except the SIN can be so considered if an “electronic personal identifier.”

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- Regulations will permit the designation as directory information of a student's "user ID" or other unique personal identifier used to access or communicate in electronic systems when the identifier functions as a name, and cannot be used without some other authentication factor (such as a secret password or PIN) to gain access to education records.
- Ensures that schools are able to use electronic information systems to deliver certain student services.

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## **Disclosure**

- Formerly defined as permitting access to or the release, transfer, or other communication of information from education records to any party by any means; prohibited disclosing education records back to the original provider of the records.
- Regulations will change the definition of “disclosure” to permit the return of an education record to the provider or creator of the record.
- Change will allow an institution to access information it originally provided to a State consolidated record system without violating prohibition on redisclosure.

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- Change will allow an institution to return a questionable document (such as possibly falsified transcripts or letters of recommendation) to the purported sender for verification of the information in the document.

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## Education Records

### Post-enrollment records:

- Former regulations excluded records that contain information about an individual after he or she is no longer a student. Intended to apply to fundraising and other records related to alumni.
- This provision has been misinterpreted to apply to **any** records created or received after a student is no longer enrolled, such as a settlement agreement that concerns matters that arose while the individual was a student in attendance.
- Regulations clarify that the exclusion covers only those records that concern an individual after that person is no longer a student, such as alumni activities.

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## **Personally Identifiable Information**

- Formerly defined to include student’s name and other personal identifiers, as well as indirect identifiers, such as the address of the student or personal characteristics or other information that would make the student’s identity easily traceable.
- Former regulations did not define “easily traceable.”
- Regulations add “biometric record” to the list of personal identifiers.
- Regulations list additional indirect identifiers, such as date and place of birth and mother’s maiden name.

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- Regulations delete the non-defined term “easily traceable” and modify the definition to include other information that “would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.”

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## State Auditor

- Former regulations permitted a school to disclose education records to State and local educational authorities and officials for audit or evaluation of education programs, or to enforce or comply with Federal legal requirements of education programs.
- Former regulations did not address the disclosure of education records to State auditors not employed by an educational authority.
- Proposed regulations defined “state auditor” as a party under any branch of government with authority and responsibility under State law to conduct audits.
- This intended to clarify that audits conducted by legislative branch officials and other parties that are not educational authorities may be given access to education records for purposes of auditing Federal or State supported *education* programs.

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- Could not reach consensus on new wording, so provision was dropped from the new Regulations.

## **Disclosure to parents and rights of students**

- Former regulations stated that all rights of parents under FERPA transfer to the student when the student reaches 18 years old or attends a postsecondary institution.
- Former regulations (§ 99.31) permitted disclosures to parents after FERPA rights have transferred to students.
- Some schools misinterpreted the transfer of rights to prohibit any disclosure of education records without consent to parents.

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- Regulations clarify that schools are permitted to disclose education records without consent to parents in some circumstances:
  - When a student is a dependent student under the IRS tax code;
  - When the student has violated a law or the school's rules or policies governing alcohol or substance abuse, if the student is under 21 years old;
  - When the information is needed to protect the health or safety of the student or other individuals in an emergency.
  - Ensure that schools understand that FERPA does not block information sharing with parents if any of the above exceptions apply.

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## **§ 99.31: Authorized disclosures without prior written consent**

### **“Other school officials”**

- Former regulations permitted disclosure of education records to school officials within the agency or institution if the official has been determined to have a *legitimate educational interest* in the records.
- Former regulations did not directly address disclosure of education records to contractors, consultants, volunteers, and other outside parties providing services and functions or otherwise acting for an agency or institution.

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- Regulations expand the school official exception to include contractors, consultants, volunteers, and other parties to whom a school has outsourced services or functions under certain circumstances:
  - The party is under the direct control of the school;
  - The party is subject to the same conditions governing the use and re-disclosure of education records applicable to other school officials;
  - The school has specified these parties as school officials in their annual FERPA notice as required in § 99.7.

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- Clarifies the specific conditions under which schools may disclose education records to outside parties performing services or functions for the school.

## **Controlling access to education records by school officials**

- Former regulations did not specify the steps a school must take to ensure that a school official only gains access to education records for which the official has a legitimate educational interest.
- Some institutions permit school officials unrestricted access to education records, particularly those contained in electronic records systems.

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- Regulations require schools to use “reasonable methods” to ensure an official is given access to only those education records in which the official has a legitimate educational interest.
- Schools may choose to use methods such as:
  - Physical controls (locked filing cabinets)
  - Technological controls (role-based access controls for electronic records)
  - Administrative policies (must be effective in ensuring compliance)
- Clarifies that a school is responsible for ensuring that it is taking measures to permit only those officials with a legitimate educational interest to access education records.

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## **Disclosure to a school where student seeks or intends to enroll**

- Under certain circumstances, former regulations permitted a school to disclose education records to another school where the student seeks or intends to enroll.
- Former regulations did not address whether a school is permitted to disclose education records after a student has actually enrolled in another school.
- Regulations clarify that the authority to disclose or transfer education records to a student's new school continues after actual enrollment so long as the disclosure is in connection with the student's enrollment.

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- Ensures that a school may supplement, update, or correct records sent during the student’s application or transfer period.

## **Organizations conducting studies**

- Former regulations stated that a school may disclose education records to organizations conducting studies “for, or on behalf of” the disclosing school but does not explain what that means.
- Regulations clarify that a school does not have to initiate the research request or agree with or endorse the conclusions or results of the study. The school must agree with the purposes of the study and retain control over the information from the education records it discloses.

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- The school must have a written agreement with the receiving organization that specifies:
  - the purposes of the study;
  - the information may only be used to meet the purposes of the study stated in the agreement;
  - the restriction on re-disclosure of the information;
  - the requirement for destruction of the information when no longer needed.
  - Clarify requirements that information disclosed under this exception is used only to meet the purposes of the study, and that all redisclosure and destruction requirements are met.

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## **Ex parte court orders under USA Patriot Act**

- Former regulations did not address amendments to FERPA under the USA Patriot Act.
- Regulations implement the authority for the U.S. Attorney General to apply for an ex parte court order that permits the Attorney General to collect education records from a school that are relevant to an investigation or prosecution of an act of domestic or international terrorism.
- Regulations permit the disclosures without consent or notice to the student.
  - Implements a new exception to FERPA's consent requirement contained in the USA Patriot Act.

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## **Registered sex offenders.**

- Former regulations did not address changes made to FERPA by the Campus Sex Crimes Prevention Act .
- Regulations implement a new exception to FERPA that permits schools to disclose information received under a community notification program concerning a student who is required to register as a sex offender in the State.
  - Implements a new exception to FERPA’s consent requirement contained in the Campus Sex Crimes Prevention Act.

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## **De-identification of information**

- Former regulations permit release of information without consent from education records if all personally identifiable information has been removed.
- Regulations provide objective standards to inform schools when information releases may be considered to be de-identified.
- Regulations apply to individual, redacted records and statistical information from education records in both student level and aggregate form.
- Regulations clarify the permitted use of de-identified data releases for research purposes.

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- Implement objective standards schools can use to determine when information from education records can be released as de-identified data.

## **Identification and authentication of identity**

- Former regulations did not address how a school must ensure that it has identified a party to whom it discloses education records.
- Regulations require a school to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and other parties before disclosing education records.

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- Identification means determining who is the intended or authorized recipient of the information.
- Authentication means ensuring that the recipient is who he or she claims to be.
- Regulations permit use of PINs, passwords, personal security questions; smart cards and tokens; biometric indicators; or other factors known or possessed only by the authorized recipient.
  - Clarifies identification and authentication requirements, particularly in complex electronic record storage and transmission environments.

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## **§ 99.33 Redisdisclosure of education records under Clery Act**

- Current regulations under the Clery Act require a school to inform the accuser and the accused of the outcome of a school's disciplinary proceeding of an alleged sex offense.
- Former FERPA regulations permit this disclosure, but may have prohibited the recipient from redisclosing the information to another party without prior consent of the student.
- Some schools required an accuser to execute a non-disclosure agreement before making the disclosure required under the Clery Act.

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- Regulations clarify that schools may not require the accuser to execute a non-disclosure agreement or otherwise interfere with the redisclosure or other use of information required to be disclosed under the Clery Act.
  - Clarifies the responsibility of the school to disclose information as required under the Clery Act.

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## **§ 99.35 Redisdisclosure of education records by Federal and State officials**

- Former regulations did not permit Federal and State officials to redisclose education records.
- Regulations permit these officials to redisclose education records under the same conditions as other recipients of education records.
- A State educational agency that received records for audit, evaluation, or compliance and enforcement purposes would be permitted to redisclose records for other qualifying purposes, such as:
  - forwarding records to a student’s new school district
  - to another listed official, including the Secretary, or a postsecondary authority

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- to an accrediting agency
- in connection with a health or safety emergency.
- Enable SEAs and other Federal and State officials to utilize the redisclosure provisions available to other parties receiving education records.

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## **§ 99.36 Health and safety emergency**

- Former regulations permitted disclosures if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- Former regulations required this provision to be “strictly construed.”
- Regulations remove the strict construction.
- Regulations permit a disclosure when a school, taking into account the totality of circumstances, determines there is an articulate and significant threat to the health or safety of the student or other individuals.
- Provides better balance of safety and privacy interests.

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## **§ 99.37 Former students**

- Former regulations permitted disclosure of directory information on former students without providing notice or additional opt-out opportunities.
- Regulations clarify that a former student's opt-out provided while a student must continue to be honored unless specifically rescinded by the former student.
- Provides better understanding of ability to disclose directory information of former students.

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## **§ 99.37 Student identification and communication in class**

- Former regulations did not address whether an opt-out from directory information also applied within the classroom in the identification of the student by name or disclosure of an electronic identifier.
- Regulations provide specific notice that an opt-out from directory information does not prevent a school from identifying a student by name or from disclosing an electronic identifier or institutional email address in the classroom.
- Clarifies that a student's opt-out from directory information does not include a right to be anonymous in the classroom, or to impede routine classroom communication and interactions.

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## **§ 99.37 Prohibition on use of SSN's to identify students when disclosing or confirming directory information**

- Regulations clarify that SSN's may not be used to identify a student when disclosing or confirming directory information.
- Clarify that use of SSN to identify a student to disclose or confirm directory information creates an improper disclosure of the student's SSN.

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## **Safeguarding**

- Provides recommendations to assist in safeguarding education records.
- Suggested responses are included for data breaches and other unauthorized disclosures:
  - Report the incident to law enforcement authorities
  - Take steps to retrieve data and prevent further disclosures
  - Identify all affected records and students
  - Determine how the incident occurred
  - Determine whether institutional policies and procedures were breached
  - Conduct a risk assessment

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**For technical assistance and advice to school officials:**

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