



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

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.

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 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 a 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.”.