

# FERPA – AN OVERVIEW AND RECENT AMENDMENTS

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## **1. Introduction.**

The federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, regulates educational agencies and institutions that receive federal funds under grants administered by the U.S. Secretary of Education or the U.S. Department of Education.<sup>1</sup>

FERPA gives parents three broad categories of rights:

- a) To inspect their child's educational records.
- b) To prohibit a school from disclosing their child's educational records to third parties without parental consent, subject to many exceptions.
- c) To ask the school to amend their child's records.

FERPA also addresses when these rights transfer from parents to "eligible students."

The U.S. Department of Education regulations implementing FERPA<sup>2</sup> were last amended on December 9, 2008, effective January 8, 2009.<sup>3</sup> The Department's comments, published in the Federal Register alongside the new regulations, are helpful for understanding these amendments.<sup>4</sup>

The Family Policy Compliance Office, an organ of the U.S. Department of Education, has primary responsibility for enforcing FERPA. Many materials on the statute and regulations are posted on the Office's website, <http://www.ed.gov/policy/gen/guid/fpco/index.html>.

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<sup>1</sup> 20 U.S.C. § 1221(c)(1) and 34 C.F.R. § 99.1(a)(defining applicable programs); 20 U.S.C. § 1232g(a)(1)(A), (B), (b)(1), (2), (e) and 34 C.F.R. § 99.1 (tethering FERPA to applicable programs).

<sup>2</sup> 34 C.F.R. Part 99.

<sup>3</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74851-55.

<sup>4</sup> These include comments to the Notice of Proposed Rulemaking, Federal Register, Vol. 73, No. 57 (March 24, 2008), at 15574-15602, as well as comments to the final regulations, Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74806-51.

This essay focuses on FERPA provisions that concern public elementary and secondary schools.

## 2. Constitutional background.

Congress passed FERPA pursuant to its constitutional authority to tax and spend, which includes the power to attach reasonable strings to federal funds.

Since FERPA is a Spending Power statute, a special rule of statutory construction applies – the “rule of clear statement.” As the Supreme Court advised in Pennhurst State School v. Halderman (1981):

“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the ‘contract.’ There can, of course, be no knowing acceptance if a State is unaware of the conditions or unable to ascertain what is expected of it. *Accordingly, if Congress intends to impose a condition on the grant of federal funds, it must do so unambiguously. . . .* By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>5</sup>

Thus, ambiguities in FERPA or the implementing regulations must be resolved in a school’s favor.<sup>6</sup>

## 3. Key FERPA terms.

To understand FERPA, the reader must master six terms used in the statute – parent, student, eligible student, education record, record, and personally identifiable information.

“**Parent.**” The term includes “a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.”<sup>7</sup>

What if a student’s parents are divorced or separated, or never married? A school must give “full rights” under FERPA “to either parent,” unless the school “has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights.”<sup>8</sup>

► **PRACTICE TIP.** When parents are divorced, *either* parent may furnish consent and *both* parents are entitled to inspect the student’s records, unless the divorce decree explicitly terminates a parent’s FERPA rights.

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<sup>5</sup> Pennhurst State School v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) (emphasis added).

<sup>6</sup> Gonzaga University v. Doe, 536 U.S. 273, 286, 290, 122 S.Ct. 2268, 153 L.Ed.2d 309, 37 IDELR 32, 102 LRP 12265 (2002); Owasso Independent School District v. Falvo, 534 U.S. 426, 432, 435, 122 S.Ct. 934, 151 L.Ed.2d 896, 36 IDELR 62, 102 LRP 5515 (2002).

<sup>7</sup> 34 C.F.R. § 99.3.

<sup>8</sup> 34 C.F.R. § 99.4.

**“Student.”** The term means “any individual who is or has been *in attendance* at an educational agency or institution and regarding whom the agency or institution maintains educational records.”<sup>9</sup>

**“Eligible student.”** This term is important, because *once a student becomes an “eligible student” all FERPA rights transfer from the parents to the student.*<sup>10</sup> The FERPA regulations define “eligible student” as “a student who has reached 18 years of age or is attending an institution of postsecondary education.”<sup>11</sup>

**“Education record.”** The statute defines education records as “records, files, documents, and other materials” that “contain information directly related to a student” and are “maintained by an educational agency or institution or by a party acting for the agency or institution.”<sup>12</sup>

The FERPA excludes the following from the definition of education records.<sup>13</sup>

- Records “in the sole possession of the maker” (discussed in Section 4 of this essay, regarding “Inspection of Records”).
- Employment records.
- Records maintained by a law enforcement unit of the school (e.g., campus police) “that were created by the law enforcement unit for the purpose of law enforcement”; and
- Treatment records (maintained by “a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional”) involving a student who is 18 years of age or older or who is attending an institution of postsecondary education.<sup>14</sup>
- Records created or received by an educational agency or institution after an individual is no longer a student in attendance and *that are not directly related to an individual’s attendance as a student.*<sup>15</sup> This includes personally identifiable information “related solely to a [former]

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<sup>9</sup> 34 C.F.R. § 99.3 (emphasis added). The old regulations defined “attendance” as “attendance in person or by correspondence.” Recognizing advances in technology, such as on-line courses, the new regulations define the term as follows. “Attendance in person or by paper correspondence, videoconference, satellite, Internet, or electronic information and telecommunications technologies for students who are not physically present in the classroom.” New 34 C.F.R. § 99.3. The regulations define attendance to also include “[t]he period during which a person is working under a work-study program.” Old and new 34 C.F.R. § 99.3.

<sup>10</sup> 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5. However, if a student is not an eligible student, the school may give the student rights “in addition to those given to parents.” 34 C.F.R. § 99.5(b). For example, FERPA does give every student a right to inspect his or her own records; it confers that right only on eligible students. A school may nevertheless allow non-eligible students to inspect their own records.

<sup>11</sup> 34 C.F.R. § 99.3. See 20 U.S.C. § 1232g(d).

<sup>12</sup> 20 U.S.C. § 1232g(a)(4)(B). Accord 34 C.F.R. § 99.3.

<sup>13</sup> 20 U.S.C. § 1232g(a)(4)(B). Accord 34 C.F.R. § 99.3, “Education records.”

<sup>14</sup> *Id.* However, at the request of an eligible student, a school must allow a “physician or other appropriate professional of the student’s choice” to review treatment records. 34 C.F.R. § 99.10(f).

<sup>15</sup> New 34 C.F.R. § 99.3, “Education Records,” (b)(5) (emphasis added). This exception does not allow a school to disclose a settlement agreement, reached between the student and the school after the student left the school, involving events that occurred while the student attended the school. Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74811.

student's activities as an alumnus.”<sup>16</sup>

★ **NEW.** The new regulations add one more exception: “Grades on peer-graded papers before they are collected and recorded by a teacher.”<sup>17</sup> This codifies the U.S. Supreme Court’s decision in Owasso Independent School District v. Falvo (2002),<sup>18</sup> but interprets the decision quite narrowly.<sup>19</sup>

**“Record.”** Since FERPA regulates only “education records,” the definition of “record” is critical. The statute does not define this term. The regulations define “record” as “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”<sup>20</sup>

**“Personally identifiable information.”** FERPA prohibits a school from disclosing education records “or personally identifiable information contained therein” without written parental consent.<sup>21</sup>

★ **NEW.** The new regulations amend the definition of personally identifiable information to read as follows. (*The new language is underscored.*)

“The term includes, but is not limited to –

- (a) The student’s name;
- (b) The name of the student’s parent or other family members;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

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<sup>16</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74811.

<sup>17</sup> New 34 C.F.R. § 99.3. “Education Records,” (b)(6).

<sup>18</sup> 534 U.S. 426, 122 S.Ct. 934, 151 L.Ed.2d 896, 36 IDELR 62, 102 LRP 5515.

<sup>19</sup> The Falvo court speculated that FERPA covers only “institutional records kept by a single central custodian, such as a registrar,” rather than individual teachers’ records, such as grade books. 534 U.S. at 435-36. However, the court’s ultimate ruling was narrower. “[E]ven assuming a teacher’s grade book is an education record, . . . in all events the grades on students’ papers would not be covered under FERPA at least until the teacher collected them and recorded them in his or her grade book.” 534 U.S. at 436.

<sup>20</sup> 34 C.F.R. § 99.3, “Record.”

<sup>21</sup> 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.30(a).

- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.<sup>22</sup>

*For brevity, this essay will use the following shorthand.* “Parents” includes eligible students. “Schools” mean education agencies or institutions covered by FERPA. “Education records” include personally identifiable information contained in education records.

#### 4. Inspection of records.

FERPA gives parents a right to “inspect and review” their child’s education records.<sup>23</sup> A school must honor such a request “within a reasonable time,” not exceeding 45 days.<sup>24</sup> A school may not destroy education records when there is an outstanding request to inspect them.<sup>25</sup>

The regulations add that a school must “respond to reasonable requests for explanations and interpretations of the records.”<sup>26</sup>

► **PRACTICE TIPS.** It is best practice for a school employee to sit with parents during records reviews, not only to provide explanations, but also to ensure that parents do not alter or remove any documents.

If the school has communicated with its lawyer about a student, the school should remove attorney-client communications before allowing parents to inspect the student’s records. Such communications are privileged and confidential. Although FERPA does not explicitly address attorney-client communications, conventional wisdom is that parents have no right to inspect such records.

Teachers often overlook that e-mail communications qualify as education records that parents may inspect. When communicating with each other via e-mail, teachers should pay attention to how parents may interpret these messages. If teachers want to communicate confidentially, they should do so orally, not via e-mail.

When a parental request to inspect education records is pending, the school must be careful to avoid deleting e-mail messages directly related to the student.

FERPA does not ordinarily require that a school provide *copies* of records. However, “[i]f circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review

<sup>22</sup> New 34 C.F.R. § 99.3, “Personally identifiable information.” This new definition of “personally identifiable information” spawned another new definition, for the term biometric record. “Biometric records . . . means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.” New 34 C.F.R. § 99.3, “Biometric records.”

<sup>23</sup> 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(a).

<sup>24</sup> 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(b).

<sup>25</sup> 34 C.F.R. § 99.10(e).

<sup>26</sup> 34 C.F.R. § 99.10(c).

the student's education records," the school must either:

- "(1) Provide the parent or eligible student with a copy of the records requested; or
- (2) Make other arrangements for the parent or eligible student to inspect and review the requested records."<sup>27</sup>

Examples include parents who are nonambulatory or who reside a great distance from the school. Of course, school districts may voluntarily provide copies in other circumstances, even when FERPA does not compel copying.

A school may charge a fee for copies, unless the fee "effectively prevents" parents from exercising their right to inspect and review the student's records.<sup>28</sup> However, a school may not charge a fee to search for or retrieve education records.<sup>29</sup>

The statute and regulations impose limits on the right to inspect records. If a record contains information on more than one student, the parent "may inspect and review *or be informed of* only the specific information about [his or her child]."<sup>30</sup> At the postsecondary level, the regulations exempt two additional categories from inspection by an eligible student: a) financial records of the student's parents; and b) confidential letters of recommendation (subject to certain conditions).

At the elementary and secondary levels, the most important exception involves records "in the sole possession of the maker." As noted above, parents have a right to inspect and review their child's "education records."<sup>31</sup> The term "education record" means records "directly related to a student" maintained by a school or "by a party acting for" the school.<sup>32</sup> However, the definition of educational records excludes "records in the sole possession of the maker."<sup>33</sup>

"The term [education records] does not include . . . [r]ecords that are kept in the sole possession of the maker, are *used only as a personal memory aid*, and are not accessible or revealed to any other person except a *temporary* substitute for the maker of the record."<sup>34</sup>

In other words, the record cannot be "accessible" or "revealed" to anyone other than the author or a temporary substitute and it must be used "only as a personal memory aid."

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<sup>27</sup> 34 C.F.R. § 99.10(d).

<sup>28</sup> 34 C.F.R. § 99.11(a).

<sup>29</sup> 34 C.F.R. § 99.11(b).

<sup>30</sup> 34 C.F.R. § 99.12(a) (emphasis added). *Accord* 20 U.S.C. § 1232g(a)(1)(A). This implies that, when a document contains information on more than one student, the school may simply tell the parent what the document says about that parent's child, instead of masking or redacting what the document says about other children.

<sup>31</sup> 34 C.F.R. § 99.10(a).

<sup>32</sup> 34 C.F.R. § 99.3, "Education records," (a)(1).

<sup>33</sup> 34 C.F.R. § 99.3, "Education records," (b)(1).

<sup>34</sup> 34 C.F.R. § 99.3, "Education records," (b)(1) (emphasis added).

★ **NEW.** The statute and regulations do not define “accessible” in the context of “sole possession” records.

However, the new regulations discuss the meaning of accessibility in an analogous context – when allowing “school officials with a legitimate educational interest” to inspect student records without parental consent.

“An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective. . . .”<sup>35</sup>

This implies that locked rooms or locked file cabinets are not necessary. A policy allowing only specific individuals to inspect specific records will suffice, if the policy “is effective.”

One could argue that this relaxed standard extends to records in the sole possession of the maker.

► **PRACTICE TIP.** School employees often forget that, while records in the sole possession of the maker are exempt from inspection under FERPA, they may eventually be revealed. For example, when there is litigation, they may be compelled to produce documents through pretrial discovery, in compliance with a subpoena, or when testifying. Even in the absence of litigation, *state* law may give parents and students the right to inspect records in the sole possession of the maker.

Among people involved with special education, any discussion of records in the sole possession of the maker inevitably leads to a debate over test protocols. This is because the special education evaluations usually involve the administration of multiple tests in a one-on-one setting. A student’s IEP may also call for one-on-one testing to measure progress.

Test protocols are the documents used and generated during this individualized testing. They commonly include test questions, the student’s answers (which the student or the examiner may write), scoring calculations, and scores. The protocols sometimes include notes recording the examiner’s personal observations.

Examiners often write narrative reports summarizing their test results. These narrative reports are typically distributed to parents and other members of the special education team and are placed in the student’s file so that other school personnel may see the results of the evaluation. However, examiners often keep the underlying test protocols in private files, which they do not share with anyone.

Many examiners are reluctant to disclose their protocols, for several reasons. The test forms are ordinarily copyrighted. Examiners purchasing the forms are often required to sign contracts with the test publisher, promising not to disclose the test materials except under certain specified circumstances. A parent might reproduce and distribute the test questions or correct answers; ensuing cheating by examinees would reduce the educational and commercial value of the instrument.

FERPA does not explain whether test protocols kept in an examiner’s personal file qualify as

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<sup>35</sup> New 34 C.F.R. § 99.31(a)(1)(ii).

“education records,” which parents may inspect, or as records “in the sole possession of the maker,” which are exempt from inspection. Nor do the U.S. Department of Education’s IDEA regulations answer that question.

The Family Policy Compliance Office has issued advisory opinions regarding the status of test protocols under FERPA.<sup>36</sup> These letters conclude that any test records bearing the student’s name or some other personal identifier qualify as education records, which parents may inspect.<sup>37</sup> If the answer sheet contains such personally identifiable information, but a separate booklet of test questions does not, the Office advises that parents have no right to inspect the test questions (unless such access is necessary to answer the parents’ reasonable questions about the meaning of the answer sheet). The U.S. Department of Education’s Office of Special Education Programs agrees with that analysis.<sup>38</sup>

The Family Policy Compliance Office’s advisory opinions suggest practical techniques to avoid making copies for parents, even when they live far from the school. Possibilities include sending the test protocols to a school close to where the parents live (so that parents can inspect the documents at that school) or sending copies of the protocols to the parents’ experts.

Curiously, the Office’s opinion letters do not address whether test protocols are records in the sole possession of the maker and therefore exempt from inspection. However, some other authorities have addressed this issue. These include decisions by state hearing officers in IDEA cases and opinion letters from the U.S. Department of Education’s Office for Civil Rights (OCR) and Office of Special Education Programs (OSEP).<sup>39</sup>

It seems (from a quick survey) that the majority of authorities believe that test protocols ordinarily do not qualify as records “in the sole possession of the maker.” However, most of these opinions are flawed in one important respect – they ignore the Pennhurst rule of clear statement.<sup>40</sup> Since the statute and regulations are ambiguous on whether protocols created solely by the examiner qualify as records in the sole possession of the maker, Pennhurst arguably compels a narrow interpretation that allows schools to withhold such documents from parental inspection.

On the other hand, writing samples and answer sheets completed by students surely do not qualify as records in the sole possession of the maker, even when the test examiner keeps them in a personal file. In such instances, the student, not the examiners, is “the maker.”

► **PRACTICE TIPS.** When parents insist on copies of test protocols, offer to send the protocols to the parents’ attorney or to their experts. However, in return, demand that the parents’ experts send copies of their complete files, including test protocols, to the school’s attorney or experts. This practical solution avoids squabbles over what the law requires, levels the playing field, and fosters the truth-finding process.

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<sup>36</sup> E.g., Letter from Rooker to Carroll Independent School District (Sept. 13, 2005), [www.ed.gov/policy/gen/guid/fpco/ferpa/library/carrollisd091305.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/carrollisd091305.html); Letter from Rooker (Oct. 2, 1997), <http://www.fetaweb.com/04/ferpa.rooker.ltr.protocols.htm> (cited in the Sept. 13, 2005 letter).

<sup>37</sup> The Office’s reasoning is that FERPA allows parents to inspect only “education records,” 34 C.F.R. § 99.10(a), which FERPA defines as records “directly related to a student.” 34 C.F.R. § 99.3, “Education records,” (a)(1).

<sup>38</sup> E.g., Letter to MacDonald, 20 IDELR 1159 (OSEP, 1993).

<sup>39</sup> E.g., Montgomery County Public Schools, 104 LRP 36722 (Md. Dept. of Ed., 2003) and authorities cited therein.

<sup>40</sup> E.g., Letter to Hill, EHLR 211:259 (OSEP, 1981).

It is often to the school's advantage for evaluators to keep their protocols in school files rather than personal files, even though this forfeits any claim that the protocols are in the sole possession of the maker. The school may need access to the test protocols after the evaluator is no longer employed, particularly when looking at whether longitudinal testing (pre-testing and post-testing) demonstrates progress. For example, test protocols may show whether the student's answers on specific test questions improved over time. If different evaluators reported their scores in different formats that are not comparable, the protocols may contain information that enables the school to recalculate the scores using a common format.

## 5. Disclosing personally identifiable information with parental consent.

FERPA prohibits a school from "release[ing] . . . education records" or "personally identifiable information contained therein" without prior written parental consent.<sup>41</sup> The regulations substitute the term "disclose" for "release."<sup>42</sup>

★ **NEW.** The new regulations redefine the operative term.

*"Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record."*<sup>43</sup>

The new definition adds the underscored language. It allows a school to disclose a document to the purported author to confirm whether the document is authentic.<sup>44</sup>

There are two major exceptions to the prohibition on disclosing education records without parental consent.

- A school may disclose "directory information" (which consists of information that is not very private), unless parents opt out.<sup>45</sup>
- A school may disclose relevant education records (and any personally identifiable information from those records) to certain third parties under certain circumstances without parental consent.<sup>46</sup>

Those two exceptions are discussed in Sections 6 and 7 below.

It is important to remember that FERPA does not *compel* a school to disclose records to third parties,

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<sup>41</sup> 20 U.S.C. § 1232g(b)(1). *Accord* 34 C.F.R. § 99.30(a).

<sup>42</sup> 34 C.F.R. § 99.30(a).

<sup>43</sup> New 34 C.F.R. § 99.3. "Disclosure" (emphasis added).

<sup>44</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74810.

<sup>45</sup> 20 U.S.C. § 1232g(b)(1); 34 C.F.R. §§ 99.31(a)(11), .37.

<sup>46</sup> 20 U.S.C. § 1232g(b)(1)-(3), (h)-(j); 34 C.F.R. § 99.31(a)(1)-(10), (12)-(15).

even when parents consent to disclosure.<sup>47</sup> Hence, FERPA often uses the term “may” rather than “shall.” If state law compels disclosure, FERPA modifies state law by describing steps a school must take when complying with state law.

When a school relies on written parental consent as authority to disclose records to third parties, the consent must:

- “1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class of parties to whom disclosure may be made.”<sup>48</sup>

The permission form must be “signed and dated.”<sup>49</sup> The regulations allow consent in “electronic form,” if the consent meets certain criteria for establishing authenticity.<sup>50</sup>

Upon parental request, the school must provide copies of the disclosed records to the parent and/or student.<sup>51</sup> The school may ordinarily charge parents a fee for such copies.<sup>52</sup>

## **6. Directory information.**

FERPA allows a school to disclose “directory information” without parental consent.<sup>53</sup> The statute defines directory information as follows:

“the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight, and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.”<sup>54</sup>

The old regulations defined directory information somewhat more broadly, as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” The old regulations elaborated that directory information “includes, but is not limited to”: a) the

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<sup>47</sup> Old 34 C.F.R. § 99.31(b); new 34 C.F.R. § 99.31(d); Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74809.

<sup>48</sup> 34 C.F.R. § 99.30(b).

<sup>49</sup> 34 C.F.R. § 99.30(a).

<sup>50</sup> 34 C.F.R. § 99.30(d) (“Signed and dated written consent” may include “a record and signature in electronic form” that “identifies and authenticates a particular person as the source of the electronic consent” and “indicates such person’s approval of the information contained in the electronic consent”). For an explanation of electronic consent, see the U.S. Department of Education’s comments accompanying the 2004 amendments to this regulation. Federal Register, Vol. 69, No. 77 (April 21, 2004), at 21670-72.

<sup>51</sup> 34 C.F.R. § 99.30(c)(1), (2).

<sup>52</sup> 34 C.F.R. § 99.11(a). The Family Compliance Office has orally advised that § 99.11(a), governing fees for copies, applies in this context.

<sup>53</sup> 20 U.S.C. § 1232g(b)(1).

<sup>54</sup> 20 U.S.C. § 1232g(a)(5)(A).

categories of information recited in the statutory definition of the term; and b) the student's e-mail address, photograph, grade level, and enrollment status (e.g., undergraduate or graduate, full-time or part-time).<sup>55</sup>

★ **NEW.** The new regulations amend the definition of directory information.

The first portion of the new definition, describing what directory information *includes*, is virtually identical to the old regulation.<sup>56</sup>

The second portion of the new definition, describing what directory information *does not* include, is entirely novel. According to the new regulation, directory information cannot include a student's social security number.<sup>57</sup> Nor may it include a student identification number, if one can electronically access the student's records with that number alone. However, directory information may include a student identification number if anyone attempting to access the student's education records must also enter some additional identifier (such as a password or PIN) to authenticate the user's identity.<sup>58</sup>

FERPA imposes several procedural restrictions on the disclosure of directory information.

First, if a school intends to disclose directory information without parental consent, it must first decide what types of information it will treat as directory information. The school must then provide "public notice to parents of students in attendance and eligible students in attendance," explaining what will be treated as directory information.<sup>59</sup>

Second, FERPA allows parents to opt out of the release of directory information. Parents may refuse to let the school release "any or all of those types of information" regarding their child, by notifying the school in writing. The public notice must inform parents of their right to opt out. The public notice must also specify a "period of time" during which parents may opt out (e.g., each August for the ensuing school year).<sup>60</sup>

★ **NEW.** The new regulations add three more conditions for disclosing directory information.

First, if parents opted out while the student attended the school, and the student then leaves the school, the opt-out is perpetual "unless the *student* rescinds the opt-out request."<sup>61</sup>

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<sup>55</sup> Old 34 C.F.R. § 99.3, "Directory information."

<sup>56</sup> New 34 C.F.R. § 99.3, "Directory information," (a).

<sup>57</sup> New 34 C.F.R. § 99.3, "Directory information," (b)(1).

<sup>58</sup> New 34 C.F.R. § 99.3, "Directory information," (b)(2), (c).

<sup>59</sup> 34 C.F.R. §§ 99.31(a)(11), .37(a)(1). The regulations allow a school to disclose directory information about "former students" without providing that public notice. 34 C.F.R. § 99.37(b).

<sup>60</sup> 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37(a). Since FERPA does not require that a school disclose information, a school may refuse to disclose any directory information on a student when it is unsure whether parents have opted out. Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74809.

<sup>61</sup> New 34 C.F.R. § 99.37(b) (emphasis added).

Second, a parent who opts out may not prevent the school from “disclosing or requiring a student to disclose the student’s name, identifier or institutional e-mail address in a class in which the student is enrolled.”<sup>62</sup> *This clarifies that FERPA does not give students a right to anonymity in class.*<sup>63</sup>

Third, a school may not disclose or confirm directory information “if a student’s social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student’s records.”<sup>64</sup>

## 7. Disclosing nondirectory information without parent consent.

FERPA contains a long list of situations where a school may disclose educational records (or personally identifiable information from those records) without parental consent.<sup>65</sup> Unlike directory information, the information disclosed under these exceptions may be very private or sensitive. FERPA therefore imposes strict conditions when a school utilizes these exceptions.

What follows is a summary of exceptions that apply to elementary and secondary schools. Consult the regulations for further details. Remember that each exception allows a school to disclose education records without prior written parental consent.

**A. Disclosure to school officials with a legitimate educational interest.** FERPA allows a school to disclose education records to “other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.”<sup>66</sup> In other words, to qualify under this exception one must: 1) be a school official; and 2) have a legitimate educational interest in the information being disclosed.

If a school selects this option, its annual FERPA notice (discussed in Section 11 of this essay) must specify the criteria for determining who is a school official and what constitutes a legitimate educational interest.<sup>67</sup>

★ **NEW.** The new regulations add that a school must use “reasonable methods” to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. A school that does not use “physical or technological access controls” must ensure that its administrative policy for controlling

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<sup>62</sup> New 34 C.F.R. § 99.37(c).

<sup>63</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74847.

<sup>64</sup> New 34 C.F.R. § 99.37(d). The mere fact that a request for directory information includes a student’s social security number or other non-directory information does not bar the school from responding by disclosing directory information. However, if responding to the request for directory information implicitly discloses or confirms nondirectory information, the school may not disclose the directory information. Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74809. This rule is aimed at schools that require key nondirectory information (such as a social security number) in order for *school staff* to access directory information. *Id.*

<sup>65</sup> 20 U.S.C. § 1232g(b)-(c), (h)-(j); 34 C.F.R. § 99.31.

<sup>66</sup> 34 C.F.R. § 99.31(a)(1). *Accord* 20 U.S.C. § 1232g(b)(1)(A).

<sup>67</sup> 34 C.F.R. § 99.7(a)(3)(iii).

access to education records “is effective.”<sup>68</sup>

**B. Outside contractors acting as school officials.** The Family Policy Compliance Office has repeatedly advised that a school may treat outside contractors as school officials with a legitimate educational interest, but only if the school’s annual FERPA notice defines school officials to include outside contractors. Examples included “outside counsel, psychologists, or collection agents.”<sup>69</sup>

★ **NEW.** The new regulations codify that a school may treat outside contractors as school officials. However, they also impose new conditions. The new regulation reads as follows.

“A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.”<sup>70</sup>

Schools utilizing this exception should also mention outside contractors in their annual FERPA notices. This is because outside contractors are a subset of “school officials with a legitimate educational interest” and the annual FERPA notice must specify who is a school official.

**C. Officials of other schools where the student seeks or intends to enroll.** The statute allows a school to disclose education records to “officials of other schools or school systems in which the student seeks or intends to enroll.”<sup>71</sup>

The statute adds that, when a school discloses education records under this exception, it must notify the student’s parents of the “[records] transfer,” provide parents with copies of those records “if desired,” and give the parents an opportunity for a hearing to challenge the contents of the records.<sup>72</sup>

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<sup>68</sup> New 34 C.F.R. § 99.31(a)(1)(ii).

<sup>69</sup> *E.g.*, Letter to Oregon City School District, 104 LRP 49847 (Family Policy Compliance Office, 2004); Letter to Anonymous, 104 LRP 16355 (Family Policy Compliance Office, 2003). *Accord*, Larson v. Independent School District No. 361, 40 IDELR 231 (U.S. Dist. Ct., Minn., 2004).

<sup>70</sup> New 34 C.F.R. § 99.31(a)(1)(i)(B).

<sup>71</sup> 20 U.S.C. § 1232g(b)(1)(B).

<sup>72</sup> *Id.*

The regulations elaborate on those conditions. For example, they provide that a school need not notify parents of each records transfer, if the school's annual FERPA notice states that it may disclose records to schools that have requested records and in which the student seeks or intends to enroll.<sup>73</sup>

The statute, read literally, allows School A to send records to School B only *before* the student enrolls in School B, not *after* the student enrolls there.

★ **NEW.** The new regulations expand this exception. They allow a school to disclose personally identifiable information from a student's education records, without parental consent, to:

- 1) A school "where the student seeks or intends to enroll"; and
- 2) A school "where the student *is already enrolled*, so long as the disclosure is for purposes related to the student's enrollment or transfer."<sup>74</sup>

A school that sends records under this exception must include in its annual FERPA notice a statement that it forwards records to other schools "*that have requested the records* and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer."<sup>75</sup>

The italicized language in that notice requirement implies that School B must request records before School A may send them.

**D. Disclosures to federal, state and local authorities.** FERPA allows a school to disclose education records to authorized representatives of: 1) the Comptroller General of the United States; 2) the U.S. Secretary of Education; 3) state educational authorities; or 4) the Attorney General of the United States for law enforcement purposes.<sup>76</sup> The statute also allows disclosure to "local educational officials" when access "may be necessary in connection with the audit and evaluation of any federally or State supported education program."<sup>77</sup>

The statute and regulations impose conditions on how those outside agencies use the information.<sup>78</sup> The new regulations modify those conditions.<sup>79</sup>

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<sup>73</sup> Old and new 34 C.F.R. § 99.34(a).

<sup>74</sup> New 34 C.F.R. § 99.31(a)(2) (emphasis added).

<sup>75</sup> 34 C.F.R. § 99.34(a)(1)(ii).

<sup>76</sup> 20 U.S.C. § 1232g(b)(1)(C); 34 C.F.R. § 99.31(a)(3).

<sup>77</sup> 20 U.S.C. § 1232g(b)(5).

<sup>78</sup> 20 U.S.C. § 1232g(b)(3); 34 C.F.R. § 99.35.

<sup>79</sup> New 34 C.F.R. § 99.35.

**E. Reporting to state and local authorities in the juvenile justice system.** FERPA allows a school to disclose education records to “State and local officials to whom such information is specifically allowed to be reported or disclosed pursuant to State statute.” However, this exception applies only if the report or disclosure “concerns the juvenile justice system and such system’s ability to effectively serve, prior to adjudication, the student whose records are released.”<sup>80</sup> This includes, for example, state statutes requiring that schools report suspected child abuse or neglect.<sup>81</sup>

**F. Organizations conducting studies.** FERPA allows a school to disclose education records to “organizations conducting studies for, or on behalf of, educational agencies for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction.”<sup>82</sup> The term “organizations” in this provision “includes, but is not limited to, Federal, State, and local agencies, and independent organizations.”<sup>83</sup>

These studies must be conducted in a manner that will not permit “the personal identification of students and their parents by persons other than representatives of such organizations.” Moreover, “such information [maintained by the organization must] be destroyed when no longer needed for the purpose for which [the study] was conducted.”<sup>84</sup>

★ **NEW.** The new regulations require that a school enter into a written agreement with the organization conducting the study. The agreement must:

- 1) Require the organization to comply with the conditions recited above.
- 2) Specify the purpose, scope and duration of the study (or studies) and the information that the school will disclose.
- 3) Require the organization to use personally identifiable information from education records “only to meet the purpose or purposes of the study.”<sup>85</sup>

The organization may either return the records or destroy them; the agreement must specify “the time period” in which the information will be returned or destroyed.<sup>86</sup>

**G. Accrediting organizations.** FERPA allows schools to disclose education records to “accrediting organizations in order to carry out accrediting functions.”<sup>87</sup>

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<sup>80</sup> 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(5)(i).

<sup>81</sup> If the state statute was enacted after November 19, 1974, the officials and authorities to whom the information is disclosed must certify in writing to the school that the information will not be disclosed to any other party except as provided under state law. 20 U.S.C. § 1232g(b)(1)(E)(ii); 34 C.F.R. §§ 99.31(a)(5)(i)(B), .38.

<sup>82</sup> 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6)(i).

<sup>83</sup> 34 C.F.R. § 99.31(a)(6)(iv).

<sup>84</sup> 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6)(ii).

<sup>85</sup> New 34 C.F.R. § 99.31(a)(6)(ii)(C).

<sup>86</sup> *Id.* at § 99.31(a)(6)(C)(ii)(4).

**H. Parents of dependent students.** FERPA allows a school to disclose education records to “parents of a dependent student of such parents,” as those terms are defined in the Internal Revenue Code, 26 U.S.C. § 152.<sup>88</sup>

In other words, a school may disclose education records to an eligible student’s parents without seeking the student’s consent, if the parents claim the student as a dependent for federal income tax purposes.<sup>89</sup>

★ **NEW.** The new regulations do not amend that provision. However, they now reiterate the same point in the definition of “eligible student.”<sup>90</sup>

The U.S. Department of Education advises that these provisions allow, but do not compel, a school to disclose a dependent student’s records to parents without the eligible student’s consent.<sup>91</sup> Furthermore, if either parent claims the student as a dependent, the school may disclose records to *either* parent without the eligible student’s consent.<sup>92</sup>

A school that opts to disclose records to parents of dependent students may insist that these parents first submit copies of their most recent Federal income tax returns. “Parents may redact all financial and other unnecessary information that appears on the form, as long as the tax return shows the parent’s or parents’ names and the fact that the student is claimed as a dependent.”<sup>93</sup>

**I. Health or safety emergencies.** FERPA specifically directs the U.S. Department of Education to adopt regulations allowing schools to disclose education records to “appropriate persons” in connection with an “emergency” if “knowledge of such information is necessary to protect the health or safety of the student or other persons.”<sup>94</sup>

The old regulations implementing this exception, 34 C.F.R. § 99.36, set a high hurdle. Section 99.36(a) virtually parroted the statute. However, Section 99.36(c) stated that Section 99.36(a) “will be strictly construed.”

★ **NEW.** The new regulations significantly expand the exception for health or safety emergencies by amending 34 C.F.R. § 99.36(a) and (c). They add to paragraph (a) that appropriate persons include (but are not limited to) “parents of an eligible

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<sup>87</sup> 20 U.S.C. § 1232g(b)(1)(G); 34 C.F.R. § 99.31(a)(7).

<sup>88</sup> 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8).

<sup>89</sup> If only one parent claims the student as a dependent, the school may nevertheless disclose records to any parent. Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74813.

<sup>90</sup> New 34 C.F.R. § 99.5(a)(2).

<sup>91</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74813.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 20 U.S.C. § 1232g(b)(1)(I). Accord, 34 C.F.R. § 99.31(a)(10) (referring to 34 C.F.R. § 99.36).

student.”<sup>95</sup> They also rewrite paragraph (c), inserting the following in place of that admonition that paragraph (a) should be strictly construed.

“In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>96</sup>

The U.S. Department of Education’s comments accompanying the new FERPA regulations, published in the December 9, 2008 issue of the Federal Register, include helpful advice on what paragraphs (a) and (c) now allow.<sup>97</sup>

The new regulations also amend 34 C.F.R. § 99.32(a), what a school must record when it discloses personally identifiable information in a health or safety emergency. This amendment provides as follows:

“(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception . . .

:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.”<sup>98</sup>

**J. Subpoenas and court orders.** Two sections of FERPA allow a school to disclose education records pursuant to subpoenas and court orders. One section addresses subpoenas “issued for *law enforcement* purposes.”<sup>99</sup> The other section addresses judicial orders and *other* “lawfully issued” subpoenas.<sup>100</sup>

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<sup>95</sup> New 34 C.F.R. § 99.36(a).

<sup>96</sup> New 34 C.F.R. §99.36(c).

<sup>97</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74812, 74837-39.

<sup>98</sup> New 34 C.F.R. § 99.32(a)(5).

<sup>99</sup> 20 U.S.C. § 1232g(b)(1)(J) (emphasis added).

<sup>100</sup> 20 U.S.C. § 1232g(b)(2)(B).

The U.S. Department of Education addresses both sections of the statute in a single regulation. The regulation allows a school to disclose education records “to comply with a judicial order or lawfully issued subpoena.”<sup>101</sup> However, the school must ordinarily make a “reasonable effort to notify the parent or eligible student” of the subpoena in advance of compliance, so that the parent or eligible student may seek “protective action” (such as moving to quash the subpoena).<sup>102</sup>

The school need not notify the parents or eligible student if the court or “other issuing agency” has ordered that the subpoena (or information furnished in response to the subpoena) not be disclosed. If the subpoena emanated from a federal grand jury, only a court may issue such a nondisclosure order.<sup>103</sup>

**K. Legal actions where the school is a party.** The regulations allow a school to disclose education records in a “legal action” between the school and a parent or student.

- When a school initiates a legal action against a parent or student, it may disclose education records to the court without a court order or subpoena, if the records are “relevant for the [school] to proceed with the legal action as plaintiff.”<sup>104</sup>
- When a parent or eligible student initiates a legal action against a school, the school may disclose education records to the court without a court order or subpoena, if the records “are relevant for the [school] to defend itself.”<sup>105</sup>

**L. Registered sex offenders.** FERPA allows a school to disclose information provided to the school under 42 U.S.C. § 14071 “concerning registered sex offenders who are required to register under [Section 14071].”<sup>106</sup> The new regulations address this issue.<sup>107</sup>

**M. Discipline and behavior records.** FERPA allows a school to disclose certain behavior and discipline records “to teachers and school officials, including teachers and school officials in *other schools*, who have legitimate educational interests in the behavior of the student.”<sup>108</sup>

This statutory exception applies to only:

“information . . . concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students,

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<sup>101</sup> 34 C.F.R. § 99.31(a)(9)(i).

<sup>102</sup> 34 C.F.R. § 99.31(a)(9)(ii).

<sup>103</sup> 34 C.F.R. § 99.31(a)(9)(ii)(A)-(B); new 34 C.F.R. § 99.31(a)(9)(ii)(C).

<sup>104</sup> 34 C.F.R. § 99.31(a)(9)(iii)(A).

<sup>105</sup> 34 C.F.R. § 99.31(a)(9)(iii)(B).

<sup>106</sup> 20 U.S.C. § 1232g(b)(7)(A).

<sup>107</sup> New 34 C.F.R. § 99.31(a)(16).

<sup>108</sup> 20 U.S.C. § 1232g(h)(2) (emphasis added).

or other members of the school community.”<sup>109</sup>

The regulation implementing this statutory provision, 34 C.F.R. § 99.36(b), is strangely nested between 34 C.F.R. § 99.36(a) and (c), which address health or safety emergencies.

***N. De-identified records and information.***

★ **NEW.** The new regulations add a long section, 34 C.F.R. § 99.31(b), allowing a school (or a party that has received records or information from a school) to release records “after the removal of all personally identifiable information.” The process of removing personally identifiable information is called “de-identification.”

***O. Restrictions on redisclosure and use.*** When a school discloses education records without parental consent, 34 C.F.R. § 99.33(a) imposes the following general restrictions on the recipient of that information.

1. The party to whom the information is disclosed cannot “disclose the information to any other party without prior consent of the parent or eligible student.”
2. “[O]fficers, employees, and agents of a party that receives information may use the information, but only for the purposes for which the disclosure was made.”<sup>110</sup>

★ **NEW.** The new regulations amend Section 99.33.

- Section 99.33(a), establishing the general rule, remains unchanged.
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- Section 99.33(b) imposes new restrictions governing how and when a third party, having received education records from a school, may redisclose them without parental consent.
- Section 99.33(c) exempts certain disclosures from Section 99.33(a).<sup>111</sup>
- Section 99.33(d) requires that a school disclosing education records notify the records recipient of the requirements of Section 99.33(a), except in certain limited circumstances.<sup>112</sup>

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<sup>109</sup> 20 U.S.C. § 1232g(h)(1).

<sup>110</sup> 34 C.F.R. § 99.33(a).

<sup>111</sup> This exemption applies when the disclosure falls within any of the eight categories listed in footnote 112.

<sup>112</sup> A school need not notify the records recipient of the requirements of Section 99.33(a) when disclosing records: 1) to a dependent student’s parent; 2) to comply with a court order or lawfully issued subpoena; 3) as directory information; 4) to the student; 5) to the parent of a student who is not an eligible student; 6) in connection with a disciplinary proceeding at a postsecondary school involving a crime of violence or a non-forcible sexual offense; 7) pursuant to the FERPA regulation governing sex offenders and others required to register under the Violent Crime Control and Enforcement Act of 1994; or 8) to the accuser and the accused, as required by the Clery Act, 20 U.S.C. § 1092(f), regarding the outcome of a postsecondary school’s disciplinary proceeding alleging a sexual offense.

## 8. Recording disclosures of nondirectory information without parent consent.

A school must maintain a record of each request for access to, and each disclosure of, personally identifiable information from a student's education records.<sup>113</sup> For brevity, this essay refers to that record as the "log."

The log must include, for each request or disclosure: (i) the parties who requested or received personally identifiable information; and (ii) the "legitimate interests" the parties had in requesting or obtaining information.<sup>114</sup>

The school must file the log with the student's education records and must keep the log as long as it keeps education records on the student.<sup>115</sup> The log may be inspected by: a) parents; b) the school official responsible for custody of the records (and his or her assistants); and c) certain local, state, and federal officials responsible for the school's auditing and recordkeeping procedures.<sup>116</sup>

The school need not log requests from or disclosures to the following parties: 1) the student's parents; 2) school officials with a legitimate educational interest; 3) any party when parents furnished written consent for disclosure; 4) a party seeking directory information; or 5) a party seeking or receiving records in certain law enforcement proceedings, if the court or agency issuing the subpoena ordered that the existence or contents of the request or disclosure remain confidential.<sup>117</sup>

★ **NEW.** The new regulations include significant amendments to 34 C.F.R. § 99.32, governing recording requirements concerning requests and disclosures.

First, each student's log must now include an additional element: "the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b)." <sup>118</sup> The purpose of this amendment is to notify parents and students reviewing the log that those local, state, and federal agencies, upon receiving records from the school, may have redisclosed the records without parental consent. This will "alert parents and students to the need to ask for access to this additional information." <sup>119</sup>

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<sup>113</sup> 34 C.F.R. § 99.32(a)(1).

<sup>114</sup> 34 C.F.R. § 99.32(a)(3).

<sup>115</sup> 34 C.F.R. § 99.32(a)(2).

<sup>116</sup> 34 C.F.R. § 99.32(c). This is the only section of the FERPA regulations that mentions a school official responsible for the custody of education records.

<sup>117</sup> 34 C.F.R. § 99.32(d).

<sup>118</sup> New 34 C.F.R. § 99.32(a)(1).

<sup>119</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008), at 74824. When such a local, state or federal agency in fact rediscloses information from education records pursuant to § 99.33(b), it must record for the school the names of the recipients and their legitimate interests in the information. Upon request of the school, the agency must then provide a copy of that record of redisclosures to the school within a reasonable time not to exceed 30 days. New 34 C.F.R. § 99.32(b)(2). When a parent asks a school for that record of redisclosures, the school must obtain a copy from the local, state or federal agency and make it available to the parent. New 34 C.F.R. § 99.32(a)(4).

The regulation, read literally, requires that the log recite all of the aforementioned officials and agencies to whom the school may potentially disclose personally identifiable information, regardless of whether the school actually disclosed anything to them. However, the Family Policy Compliance Office has orally advised us that the regulation applies only if the school district actually disclosed personally identifiable information to such an official or agency.

Second, when a school discloses personally identifiable information from education records under the exception for health or safety emergencies, it must record the following in the student's log: (a) "[t]he articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure"; and (b) the parties to whom the school disclosed the information.<sup>120</sup>

Third, the log shall not include ex parte orders obtained by the U.S. Attorney General (or certain designees) concerning investigations or prosecutions of offenses listed in 18 U.S.C. § 2332b(g)(5)(B) or acts of domestic or international terrorism as defined in 18 U.S.C. § 2332.<sup>121</sup>

## 9. Verifying the identity of persons who receive education records.

★ **NEW.** The new regulations state that a school must use "reasonable methods" to "identify and authenticate the identity of parents, students, school officials, and any other parties to whom the [school] discloses personally identifiable information from education records."<sup>122</sup>

## 10. Requests to amend records.

FERPA gives parents three related rights when they believe that a student's education records are "inaccurate, misleading, or otherwise in violation of the privacy rights of students." Parents may: 1) "challenge" the "content" of the records by requesting "correction or deletion"; 2) request a hearing; and 3) insert into the records their own written explanation.<sup>123</sup>

The federal regulations operationalizing those rights have not been amended.<sup>124</sup>

► **PRACTICE TIP.** Sometimes student records contain very sensitive information that parents would like to delete, but which the school may need in the future. One practical compromise is to store these records in a special file accessible to only a select group of school administrators. The student's regular file should then note the existence of this special file, so that the special file is not overlooked if a need to consult it arises.

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<sup>120</sup> New 34 C.F.R. § 99.32(a)(5).

<sup>121</sup> New 34 C.F.R. § 99.32(d)(5).

<sup>122</sup> New 34 C.F.R. § 99.31(c).

<sup>123</sup> 20 U.S.C. § 1232g(a)(2).

<sup>124</sup> 34 C.F.R. §§ 99.20-.22.

## 11. Annual notice of FERPA rights.

The statute requires that schools “effectively inform” parents and eligible students of their FERPA rights. (Postsecondary schools must notify *all* students.)<sup>125</sup> The regulations describing this notice remain unchanged.

The regulations direct school to *annually* notify parents of students currently in attendance (and eligible students currently in attendance) of their FERPA rights.<sup>126</sup> A school “may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.”<sup>127</sup>

Although the regulations do not give examples, common methods for providing annual notice at the primary and secondary school level include publication in a local newspaper of general circulation or in a student handbook (assuming that the handbook reaches parents).

The regulations imply that a school may have to customize the method of providing notice to two populations. First, the school must “effectively notify parents or eligible students who are disabled.”<sup>128</sup> (This presumably means disabled parents and disabled eligible students.) Second, primary and secondary schools must “effectively notify parents who have a primary or home language other than English.”<sup>129</sup>

The notice must include the following information:

- That parents and eligible students have a right to inspect the student’s education records.
- A description of the procedure for them to inspect and review education records.
- That they have the right to seek amendment of education records which they believe are inaccurate or misleading or which otherwise violate the student’s privacy rights.
- A description of the procedure for requesting amendment of records.
- That they have the right to consent to disclosures of personally identifiable information contained in the student’s education records, except to the extent that the statute and 34 C.F.R. § 99.31 authorize disclosure without consent.
- That they may file a complaint with the U.S. Department of Education under 34 C.F.R. §§ 99.63 and 99.64 concerning the school’s alleged failures to comply with FERPA.<sup>130</sup>

If the school selects certain options under FERPA, the annual notice must also address those points. Specifically:

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<sup>125</sup> 20 U.S.C. § 1232g(e).

<sup>126</sup> 34 C.F.R. § 99.7(a)(1).

<sup>127</sup> 34 C.F.R. § 99.7(b).

<sup>128</sup> 34 C.F.R. § 99.7(b)(1).

<sup>129</sup> 34 C.F.R. § 99.7(b)(2).

<sup>130</sup> 34 C.F.R. § 99.7(2), (3).

- If the school has a policy of disclosing education records without parental consent to school officials with a legitimate education interest, the annual notice must specify the criteria for determining who is a school official and what constitutes a legitimate educational interest.<sup>131</sup>
- Thus, if the school treats outside contractors as school officials with a legitimate educational interest, its annual FERPA notice should say so.<sup>132</sup> It suffices for the policy to mention “contractors and other outside parties serving as school officials,” without listing all of the categories of contractors and outside parties.<sup>133</sup>
- If the school has a policy of not seeking parental consent before disclosing records to other schools that have requested records (i.e., schools in which the student seeks or intends to enroll or is already enrolled), it must describe that policy in its annual FERPA notice (unless it makes a reasonable effort to personally notify a student’s parents of each disclosure).<sup>134</sup>
- If the school discloses directory information without parental consent, its annual notice should: 1) specify the types of information that the school has designated as directory information; 2) explain that a parent may refuse to let the school designate any or all of that information as directory information for his or her child; and 3) specify the period of time when a parent must notify the school in writing that such information should not be treated as directory information.<sup>135</sup>

The U.S. Department of Education has posted two model annual notices on its Web site, one for postsecondary schools<sup>136</sup> and the other for elementary and secondary schools.<sup>137</sup> These model notices illustrate the degree of specificity that the Department recommends for describing who is a school official with a legitimate educational interest and when outside contractors qualify as school officials.

A copy of the model notice for public elementary and secondary schools is attached to these materials as Appendix A.

**NOTE:** Both model notices seem deficient in one respect. The new regulations allow a school to disclose education records to a school in which the student seeks or intends to enroll, or has already enrolled,<sup>138</sup> if the annual FERPA notice includes an adequate warning.<sup>139</sup> The model notices

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<sup>131</sup> 34 C.F.R. § 99.7(a)(3)(iii).

<sup>132</sup> Federal Register, Vol. 73, No. 237 (Dec. 9, 2008) at 74815.

<sup>133</sup> *Id.*

<sup>134</sup> Old and new 34 C.F.R. § 99.34(a)(1)(ii).

<sup>135</sup> 34 C.F.R. § 99.37(a). Technically, the notice concerning directory information can be separate from the school’s annual notice of FERPA rights. The regulation governing directory information, § 99.37, merely requires “public notice to parents of students in attendance and eligible students in attendance.” This regulation does not refer to the § 99.7, which describes the annual notification of FERPA rights. Nor does § 99.7 mention directory information. However, many schools consolidate the two notices by addressing directory information in the annual notice of FERPA rights.

<sup>136</sup> <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html>.

<sup>137</sup> <http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>.

<sup>138</sup> New 34 C.F.R. § 99.31(a)(2).

posted on the Department's Web site fail to mention the possibility of disclosing records to a school in which the student has already enrolled. *Schools using the model notices should edit them by mentioning that possibility.*

## 12. Complaints to the Family Policy Compliance Office.

A parent may file a written complaint with the Family Policy Compliance Office alleging a violation of FERPA.<sup>140</sup> The regulations describe the procedure for resolving complaints.<sup>141</sup>

★ **NEW.** The new regulations include several minor modifications to the complaint procedure.<sup>142</sup> The most noteworthy change clarifies that the Office's jurisdiction is not confined to "policies and practices" that violate FERPA. The Office may investigate and order corrective action when a school commits even a single isolated violation.<sup>143</sup>

## 13. What about HIPAA?

Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to "improve the efficiency and effectiveness of the health care system through the establishment of national standards and requirements for electronic health care transactions."<sup>144</sup> In addition, HIPAA endeavors to protect "the privacy and security of individually identifiable health information."<sup>145</sup> The U.S. Department of Health and Human Services has issued complex regulations implementing that statute.<sup>146</sup>

The HIPAA regulations apply to "covered entities," which include health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions. "Health care providers" include hospitals, physicians, dentists, and other practitioners.<sup>147</sup>

Public schools need to remember just two points when dealing with HIPAA.

First, HIPAA ordinarily does not apply to records maintained by public elementary and secondary schools. HIPAA does not even cover records maintained by school nurses.<sup>148</sup> This is because the HIPAA

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<sup>139</sup> New 34 C.F.R. § 99.34(a)(1)(ii) (emphasis added).

<sup>140</sup> 34 C.F.R. §§ 99.63, .64.

<sup>141</sup> 34 C.F.R. §§ 99.64-.67.

<sup>142</sup> New 34 C.F.R. §§ 99.62, .64-.67.

<sup>143</sup> New 34 C.F.R. §§ 99.64(a), .66(c).

<sup>144</sup> U.S. Department of Health and Human Services and U.S. Department of Education, "Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records" (Nov. 2008) (hereafter "Joint Guidance"), at 2. This document is on the Web at <http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf>.

<sup>145</sup> *Id.*

<sup>146</sup> 45 C.F.R. Parts 160, 162, 164.

<sup>147</sup> "Joint Guidance," at 2.

<sup>148</sup> *Id.* at 4.

regulations explicitly exempt records that qualify as “education records” under FERPA.<sup>149</sup>

Second, HIPAA bars covered health care providers from disclosing patient records to third parties (including schools) unless the patient signs a permission form that complies with 45 C.F.R. § 164.508. If the patient is a minor, the patient’s parent should sign the permission form.

Appendix B of this essay is a HIPAA-compliant permission form that schools may use when seeking records from health care providers. Beware that some health care institutions, such as hospitals, have created their own HIPAA-compliant forms and will not honor any substitutes.

► **PRACTICE TIP.** When a public school seeks records from a hospital, physician, or psychologist, it should ask the student’s parent to sign a HIPAA-compliant permission form.

#### 14. New Hampshire statutes echoing FERPA.

**A. RSA 189:1-e.** This state statute imperfectly paraphrases the FERPA provisions governing directory information. RSA 189:1-e provides as follows.

- Every school district “may provide information designated as directory information consistent with the Family Educational Rights and Privacy Act (FERPA).”
- Each school district must annually “give parents public notice of the types of information designated as directory information.”
- The statute defines directory information as “information not generally considered harmful or an invasion of privacy if disclosed.” The statute goes on to say that directory information “may include: I. Name and address of a student. II. Field of study. III. Weight and height of athletes. IV. Most recent previous school attended. V. Date and place of birth. VI. Participation in officially recognized activities and sports. VII. Date of attendance, degrees and awards.”
  - It is unclear whether RSA 189:1-e allows a school district to designate other categories of information as directory information. We assume that the statute was not intended to override FERPA, which gives school districts broader discretion to define directory information.
- Like FERPA, RSA 189:1-e allows parents to annually opt out of the disclosure of any or all directory information (by filing a written request before the deadline specified in the annual notice).

**B. RSA 194:31-a.** This statute *requires* that any elementary or secondary school “furnish a school record” to any other elementary or secondary school that requests the records.

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<sup>149</sup> *Id.* at 3; 45 C.F.R. § 160.103, “Protected health information,” (2)(i). The HIPAA regulations also exempt medical and mental health records maintained by postsecondary schools, even when those records do not fall within the FERPA definition of “education records.” 45 C.F.R. § 160.103, “Protected information,” (2)(ii), referencing 20 U.S.C. § 1232g(a)(4)(B)(iv).

- This statute applies only if the parent or student “authorizes” the records transfer.
- The statute applies to both public schools and private schools.
- FERPA *allows* disclosure, *without* prior written parental consent, to a school in which the student “seeks or intends to enroll.” In contrast, RSA 194:31 *requires* disclosure when the conditions described above are satisfied.
- According to RSA 194:31-a, the school sending records may not charge for sending them.

► **PRACTICE TIP.** When School A sends records to School B, it is best practice for School A to keep a complete set. Otherwise, if the student later initiates a legal proceeding, School A will not have the records it needs to defend itself.

**C. RSA 193-D:8.** This statute, which is part of the Safe School Zones Act, requires that all elementary and secondary schools, public and private, “furnish a complete school record for the pupil transferring into a new school system” upon “request of the parent, pupil, or former pupil.”

- Like RSA 194:31-a, this statute *requires* that records be transferred and conditions the transfer on parental consent (or the student’s consent).
- “Such record [sic.] shall include, but not be limited to, records relating to any incidents involving suspension or expulsion, or delinquent or criminal acts, or any incident reports in which the pupil was charged with any act of theft, destruction, or violence in a safe school zone.” RSA 193-D:8.

## 15. What does the IDEA say about student records?

The IDEA authorizes the U.S. Department of Education to adopt regulations “in accordance with [FERPA] to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by” school districts in the course of implementing the IDEA. 20 U.S.C. § 1417(c).

The IDEA also gives parents a right to “examine *all* records” regarding their child. 20 U.S.C. § 1415(b)(1) (emphasis added). The U.S. Department of Education’s IDEA regulations clarify that provision by giving parents a right to “inspect and review any *education* records relating to their child that are collected, maintained, or used by the agency under this part.” 34 C.F.R. § 300.613(a) (emphasis added). The regulations define “education records” as “the type of records covered under the definition of ‘education records’ in [FERPA].” 34 C.F.R. § 300.611(b). *The regulations thereby exempt from inspection records in the sole possession of the maker.*

The U.S. Department of Education’s IDEA regulations exceed FERPA in the following respects.

- If parents request to inspect records, the school district must comply before any meeting regarding an IEP or any due process hearing. 34 C.F.R. § 300.613(a). According to New Hampshire’s state rules, when an IEP team meets as an evaluation team to review the results of

educational assessments for the purpose of determining eligibility for special education, “Upon request from the parents, the LEA shall provide access to test results and other relevant educational records 5 days prior to the IEP team meeting.” Ed 1107.04(d).

- Parents have a right to have *representatives* “inspect and review” the records. 34 C.F.R. § 300.613(b)(3). (Representatives have no right to copies.)
- A school district must provide parents “on request” with a list “of the types and locations of education records collected, maintained, or used by the agency.” 34 C.F.R. § 300.616.
- FERPA allows parents to request that a district amend records that are “inaccurate, misleading, or in violation of the student’s rights of privacy.” 34 C.F.R. § 99.20(a). The U.S. Department of Education’s IDEA regulations allow parents to request that a district amend special education records that are “inaccurate or misleading or [that violate] the privacy *or other rights* of the child.” 34 C.F.R. § 300.618(a) (emphasis added).
- One official in each school district “shall assume responsibility for ensuring the confidentiality of personally identifiable information.” 34 C.F.R. § 300.623(b).
- “All persons collecting or using personally identifiable information must receive training or instruction regarding the State’s policies and procedures [regarding student records] under § 300.123 and 34 CFR part 99.” 34 C.F.R. § 300.623(c).
- Each school district must maintain for public inspection “a listing of the names and positions of those employees within the agency who may have access to personally identifiable information.” 34 C.F.R. § 300.623(d).
- Each state *may* adopt a policy requiring that school districts include current or previous discipline records whenever they transmit disabled students’ educational records, provided such discipline records are transmitted with the educational records of nondisabled students. 34 C.F.R. § 300.229(a). If the state adopts such a policy and a disabled child transfers from one school to another, “the transmission of the child’s records *must* include both the child’s current individualized education program and any statement of current or previous disciplinary action that has been taken against the child.” 34 C.F.R. § 300.229(c) (emphasis added).
  - New Hampshire has adopted that option for both current and previous discipline records. Ed 1119.04(a). See also RSA 193-D:8, discussed above.
- A school district must inform parents when personally identifiable information collected, maintained or used under the IDEA “is no longer needed to provide educational services to the child.” 34 C.F.R. § 300.624(a).<sup>150</sup> The information “must be destroyed at the request of the parents,” except that the school district may retain “without time limitation” a permanent record of the student’s name, address, phone number, grades, attendance record, classes attended, grade

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<sup>150</sup> When adopting this regulation, the U.S. Department of Education observed that giving notice before the school district destroys records allows parents “to exercise their right to access those records and request copies of the records they will need to acquire post-school benefits in the future,” such as “public and private insurance coverage.” Federal Register, Vol. 64, No. 48 (Mar. 12, 1999), at 12643.

However, the school district must notify parents when personally identifiable information is no longer needed, not when records are about to be destroyed. Letter to Breecher, 17 IDELR 56 (Office of Special Education Programs 1990). The U.S. Department of Education has ducked the question of whether notice by publication in a newspaper would suffice. *Id.*

level completed, and year completed.” 34 C.F.R. § 300.624(b).

- The U.S. Department of Education’s IDEA regulations do not prohibit a school from “reporting a crime committed by a child with a disability “to appropriate authorities.” 34 C.F.R. § 300.535(a).
  - A school reporting a crime committed by a child with a disability “must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities” to whom the school reports the crime. 34 C.F.R. § 300.535(b).
  - On the other hand, the school may transmit copies of the student’s special education and disciplinary records “only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.” 34 C.F.R. § 300.535(c). This means that the school must first obtain written parental consent to transmit special education and disciplinary records, unless one of the FERPA exceptions applies (i.e., the exceptions for health and safety emergencies, subpoenas and court orders, etc.).<sup>151</sup>

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<sup>151</sup> *E.g., Baltimore County Public Schools*, 51 IDELR 201 (Maryland Dept. of Educ., 2008).

## APPENDIX A

### MODEL ANNUAL NOTIFICATION OF FERPA RIGHTS

#### *FOR ELEMENTARY AND SECONDARY SCHOOLS*

Written by the U.S. Department of Education

*posted at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>*

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records. These rights are:

(1) The right to inspect and review the student's education records within 45 days of the day the School receives a request for access.

Parents or eligible students should submit to the School principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The School official will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.

(2) The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate.

Parents or eligible students may ask the School to amend a record that they believe is inaccurate. They should write the School principal [or appropriate school official], clearly identify the part of the record they want changed, and specify why it is inaccurate. If the School decides not to amend the record as requested by the parent or eligible student, the School will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. A school official is a person employed by the School as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the School Board; a person or company with whom the School has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

[Optional] Upon request, the School discloses education records without consent to officials of another school district in which a student seeks or intends to enroll. [NOTE: FERPA requires a school district to make a reasonable attempt to notify the parent or student of the records request unless it states in its annual notification that it intends to forward records on request.]

(4) The right to file a complaint with the U.S. Department of Education concerning alleged failures by the *School District* to comply with the requirements of FERPA. The name and address of the Office that administers FERPA are:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-5901

[NOTE: In addition, a school may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification of rights under FERPA.]

## APPENDIX B

### PERMISSION TO DISCLOSE RECORDS (HIPAA-COMPLIANT)

I, \_\_\_\_\_, parent and legal guardian of \_\_\_\_\_, a minor (DOB \_\_\_\_\_) hereby authorize \_\_\_\_\_ to disclose all records in his/her/its/their possession to the \_\_\_\_\_ School District, with offices at \_\_\_\_\_.

This authorization allows the above individuals and/or organizations to copy and send records to the School District and allows representatives of the School District to inspect the records.

This authorization encompasses *all* records pertaining to the minor, including but not limited to correspondence, notes, reports, questionnaires, application forms, contracts, billing records, payment records, work samples, test protocols, computer records, electronic records, magnetic recordings, medical and health records, and "*third party records*" created by any other individuals or organizations. The term "records" includes information recorded, maintained or preserved in *any* medium, including but not limited to printed, handwritten, magnetic, or electronic.

Any costs for photocopying these records for the School District, or for mailing these records to the School District, shall be at the School District's expense.

Pursuant to HIPAA, the following are specified as part of this authorization:

- a. The purpose of disclosure is to help the School District identify the minor's needs and provide appropriate educational services.
- b. This authorization expires one year after the date it is signed.
- c. The parent signing this permission form understands that he or she may revoke this authorization at any time by providing written notification to the School District or to the individuals and organizations listed above, except to the extent that this authorization has already been relied on.
- d. The parent signing this form has been informed that the individuals and organizations listed above may not condition treatment, payment, enrollment, or eligibility for benefits on whether the parent signs this authorization.
- e. The parent signing this form has been informed of the potential for information disclosed pursuant to this authorization to be subject to redisclosure by the recipient and to be no longer protected by HIPAA. The parent signing this form is also aware that any information disclosed to the School District may be subject to other state and federal privacy laws.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Parent