

## Transcript: FERPA for Colleges and Universities

February 9, 2012

(Baron)

Slide 1:

Hello and welcome to the third in a series of webinars provided jointly by the Family Policy Compliance Office at the U.S. Department of Education and the Privacy Technical Assistance Center. This webinar is entitled, FERPA for Colleges and Universities. The intention of today's webinar is to provide participants with a basic overview of FERPA. We will cover *some* of the new regulatory changes during this webinar, but the primary focus will be on FERPA basics today.

We do not plan to take specific questions during this webinar, but we have solicited input from postsecondary officials in the field on the topics that are most on your mind, and we hope to cover those. If, after the webinar, you have follow-up questions or ideas about issues that need to be addressed, you can type in your question/issue in the chat box in the lower right hand corner and/or send a follow-up email to [FERPA@ED.Gov](mailto:FERPA@ED.Gov).

My name is Baron Rodriguez and I lead the Privacy Technical Assistance Center. With me, is Ellen Campbell, Acting Director of the Family Policy Compliance Office and Bernie Cieplak (cheeplack), an FPCO program analyst.

Slide 2

(Baron)

So now you know who we are, we'd like to understand a little better who YOU are. We've got several "polls" interspersed throughout this webinar to let us interact a little more.

Poll: Who is in the Audience?

Slide 3

(Baron)

Today's presentation will last approximately an hour. We will be muting participants, but we strongly encourage you to submit your questions to [ferpa@ed.gov](mailto:ferpa@ed.gov) or [privacyta@ed.gov](mailto:privacyta@ed.gov). We often use these questions as the basis for future trainings or guidance documents. Within a couple of weeks, we will post the archived webinar on both the PTAC and the FPCO website along with the PowerPoint.

Poll results: Who is in the Audience?

Slide 4

(Baron)

Question: Which answer best characterizes your prior experience with FERPA?

Turn over to Ellen

Slide 5

(Ellen)

Thank you, Baron. We are very pleased to present this basic FERPA training for postsecondary school officials. We routinely respond to questions from school official about how FERPA applies in various situations. Often in providing advice, there are many factors that we have to consider. And then there's the challenge of applying FERPA to an ever-changing and sometimes complex technological landscape.

Today, however, we are going to touch on the *fundamentals* of FERPA, reminding you of the basic requirements.

Congress passed the Family Educational Rights and Privacy Act (FERPA) in 1974 around the same time that other privacy statutes were passed. Congress has amended FERPA approximately 10 times since its original enactment. Typically, when Congress amends the statute, the Department issues new regulations reflecting those changes, as well as changes based on administrative experience. What we are going to talk about today are the FERPA regulations – by which the Department administers this important law.

Baron: (Poll results) Here are the results from our current poll:

Slide 6:

(Ellen)

FERPA is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.

When a student turns 18 years old, or enters a postsecondary institution at **any** age, the rights under FERPA transfer from the parents to the student, and he or she is known as an “eligible student” under FERPA. We will talk specifically about these rights as we get into this presentation.

This means that the parents no longer have “rights” under FERPA, but there are provisions in FERPA that will permit a college or university to disclose education records to parents.

(Baron)

So if my daughter (age 17) graduates early and moves on to a postsecondary institution, then she controls the rights to her records, correct?

(Ellen)

Yes, that is correct. However, the great majority of parents of 17 year olds want to remain a part of their academic lives – so FERPA does permit schools to disclose education records to parents of eligible students under several exceptions to the general consent rule. The main exception that typically applies permits schools to disclose a student’s education records to parents if that student is a dependent for IRS tax purposes. This is the case whether your daughter wants the school to disclose the information to you, her parent, or not.

Additionally, these days, a lot of high school students are taking courses at a local college before they graduate from high school – that is, they are “dually enrolled” in both the high school and the college. We get questions about to whom do the rights belong in that scenario. For example, a student is 16 or 17 years old and is still in high school is also but taking courses at the local community college. Under FERPA, the rights belong to the student with regard to the records over at the college, but the rights still belong to the parents with regard to the education records at the high school. In this situation, FERPA not only permits the college to disclose information to parents of the high school student if he or she is a dependent for Federal income tax purposes (which they probably are), but it also permits the high school and the college to share information because the student is enrolled in both schools.

Slide 7:

(Ellen)

On December 2, 2011, the Department issued final regulations making certain changes to the FERPA regulations. Here is a link to the *Federal Register* document on our website. You can also just go to the front page of FPCO’s website and see information about the amendments.

Listed here are some of the main highlights of what was amended, but today we will only be focusing on the changes to the “directory information” provisions in FERPA.

Slide 8:

(Ellen)

Understanding the various definitions in FERPA will help you understand how to apply FERPA to your particular situations. The most basic definition is the term “education records.” The term “education records” is broadly defined to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for agency or institution.

Slide 9:

(Ellen)

There are some exceptions to the definition of education records. That means they are not considered “education records” and, therefore, not subject to FERPA. They include –

Sole possession records used as a personal memory aid;  
Law enforcement unit records;  
Student employment records and  
“Treatment records.”

Of course, there are conditions that go with each of these provisions that make them exceptions.

(Baron)

Ellen, can you give an example of a “treatment record”?

Slide 10

(Ellen)

What we mean by “treatment records” is listed here on this slide. For example, many colleges and universities have health centers that treat students and faculty. If the school chooses, it may segregate out those records that are made, maintained, or used only in connection with treatment of students. These might include health or medical records that a university doctor maintains only in connection with the treatment of an eligible student.

These records are **not** subject to the HIPAA Privacy Rule because they are “treatment records” under FERPA. We go into much more detail about this in our joint guidance with HHS on the interplay of FERPA and HIPAA.

Slide 11:

(Baron)

Poll: **Which of the following is NOT considered Personally Identifiable Information (PII)?**

Slide 12 & 13:

(Ellen)

Another important definition to keep in mind is the definition of “personally identifiable information.” This works together with “education records” in determining what information must be protected from disclosure. In 2008, we amended the definition to include some more items. “Personally identifiable information” includes not only direct identifiers, obvious items such as name, address, SSN, but also indirect identifiers that would, as we see on the next slide, have the effect of identifying a student. The standard is, can a “reasonable person in the school community” – someone without personal knowledge of the circumstances – identify the student. Also, PII includes information requested by a person whom the school believes knows the identity of the student.

Slide 14:

(Bernie)

Directory Information is defined as PII that is not generally considered harmful or an invasion of privacy if disclosed. These are items that you might find in a school yearbook, a sports program, or a student directory.

(Baron)

Question: A lot of elements in your definition of PII are also part of school designated directory information? How do we reconcile the differences/similarities between PII and Directory Information when the definitions are so similar?

Let’s look at the poll results:

(Bernie)

Directory information is simply PII that can be designated and disclosed without consent. A school has to follow the requirements we will talk about in a few minutes found in section § 99.37 to designate certain information as directory information. There are some items listed under the PII definition that can NOT be considered directory information, such as a social security number.

Slide 15:

(Bernie)

As we just mentioned, directory information cannot include a student's social security number and generally may not include a student ID number.

Slide 16:

(Bernie)

In the regulations released on December 2<sup>nd</sup>, we amended the definition of "directory information" to include a student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records, except when used in conjunction with one or more factors that authenticate the user's identity.

(Baron)

Question: Does this mean that a student who opts out of directory information cannot use FERPA's opt out provisions to prohibit students from wearing ID badges?

(Bernie)

That's correct.

Slide 17:

(Ellen)

Now we are going to talk about the rights of eligible students under FERPA.

As previously mentioned, when a student turns 18 or enters college at any age, the rights under FERPA transfer from the parents to the student. However, nothing in FERPA prevents a college

or university from disclosing education records to parents under one of the exceptions that might apply.

Slide 18

(Baron)

How broad is the exception that permits school officials to disclose information to parents of dependent students? (Ellen)

FERPA permits disclosures to parents, without consent of the student, if the student is a dependent for IRS tax purposes. A postsecondary institution may – but is not required to – disclose **any** education records to parents under this exception to consent. It is up to the institution what their policy is about this matter. The important thing to remember is that it is a permitted disclosure, not required. Also, a student cannot prevent the school, under FERPA, from making a disclosure to a parent if the disclosure meets one of the exceptions. Another important thing to know about disclosures to parents is that FERPA does not generally protect information that is based observation or personal knowledge.

Slide 19:

(Baron)

**Pop Quiz: Which of the following is NOT required as part of the annual notification?**

**Now Bernie is going to tell you about annual notification requirements.**

Slide 20:

(Bernie)

Schools are required to annually notify students of their rights under FERPA. We have a model notification on FPCO's website that schools can download and adapt to their situation. The model notices have recently been updated.

Slide 21:

(Bernie)

Note here that the annual notification must include the criteria for who your school considers to be a school official and what you consider to be a legitimate educational interest. We have sample language for that in the model notice as well.

(Baron)

Generally these are provided in student handbooks or in yearly student registration information. A website notice alone is not generally sufficient to reach your student audience for consideration since some students may not have access to the Internet.

Slide 22:

(Ellen)

Now we are going to talk about an eligible students' right to access education records.

Schools must comply with a request for access within 45 days of receiving the request. You are not required to provide copies, unless, for example, the student no longer lives in commuting distance. If you provide copies, you may charge a fee – within reason—unless doing so effectively prevents the student from inspecting and reviewing his or her records.

It's important to understand that FERPA doesn't require that you maintain education records. A school can destroy records – unless there is an outstanding request for access.

Slide 23:

(Ellen)

And, schools need to be careful when a record contains information on more than one student – the student may see or be informed of only the specific information that relates to the student.

Slide 24:

(Ellen)

Another right under FERPA is the right to seek to amend information in education records.

(Baron)

Question: What are the general scenarios that you have seen this happen? For example is a grade amendment part of this procedure?

Poll results

A student doesn't have the right to AMEND records just to SEEK to amend the records.

(Ellen)

The right to seek amendment is not unlimited; a school is not required by FERPA to afford a student the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student. So, while FERPA affords student the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded.

Slide 25:

(Bernie)

This slide addresses FERPA's conditions for written consent. Another right afforded eligible students under FERPA is the student's right to provide consent before PII from education records is disclosed. Consent must be written, signed and dated, and must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made.

Slide 26

(Bernie)

As you can see here, consent under FERPA may be "electronic" under these conditions.

Slide 27 through 31:

(Ellen)

There are a number of exceptions to FERPA's general consent rule. Here are some that generally relate to colleges and universities.

The first one is to "school officials" which can include contractors and other outside parties to whom you have outsourced institutional services or functions.

Also, schools can disclose education records, without consent, to a new school in which the student seeks to enroll.

Other disclosures are listed here that I won't go into but if you have any questions about them, please contact us. We'll talk about the health or safety emergency provisions in a few minutes.

Slide 32:

(Ellen)

You need to be familiar with FERPA's recordkeeping requirements, which you can read about in § 99.32 of the FERPA regulations. Generally, you must record to whom you disclose PII from education records and that party's legitimate interest in obtaining that information. There are exceptions to recordation, such as disclosures made with consent and disclosures to school officials.

(Baron)

Many colleges and universities are either using or considering the use of electronic audit systems which can record who has accessed education records and when it was accessed. If the agencies ALSO capture a reason for the disclosures, would this be sufficient for meeting this requirement?

(Ellen)

It would – as long as eligible students can access that information should they request to do so.

Slide 33 –

(Ellen)

You should also be aware that there are limitations on the RE-disclosure of PII from education records, which are discussed in § 99.33. When you disclose PII to one of the parties listed in the exceptions to consent (§ 99.31), a school should inform the receiving party that it may not make further disclosures of the PII, except when the disclosure is to the parent or the eligible student, the third party makes disclosures on behalf of the school, the disclosure was made to comply with a court order or subpoena or in connection between litigation between the school and the eligible student, or it's a disclosure of directory information.

Slide 34:

(Ellen)

In the December regulatory changes to FERPA, we made several amendments to the audit or evaluation exception to FERPA's general consent rule. This is the exception under which LEAs typically disclose PII on students to the SEA – and a college or university might disclose to their State postsecondary authority.

Slide 35:

(Bernie)

In the last few years, we have gotten a lot of questions about disclosures that relate to health or safety emergencies. In 2008, we clarified that if a school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose PII to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. For example, a college may consider a parent to be an “appropriate party” and disclose the student's information to the parent in a health or safety emergency.

Slide 36:

(Bernie)

Based on the information available at the time and if there is a rational basis for the disclosure, the Department will not substitute its judgment for that of the school. However, school officials need to remember that this exception relates to emergencies. This provision cannot be used for disclosures on a routine, non-emergency basis, such as the routine sharing of non-directory information on students with the local police department (which is not allowed). We've written extensively about this in the final regulations issued in 2008 and in several guidance documents, which appear on our website and which are listed at the end of this webinar.

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(Ellen)

In order to address problems before they get to an emergency status, many schools (high schools as well as colleges and universities) are setting up Threat Assessment Teams. You can obtain information about how to do this from the Department's website. If you remember, we talked about the “school official” exception, including the fact that schools can outsource functions to outside parties, which include contractors as well as volunteers. So, the volunteers that serve on

a threat assessment team may be determined by the school to be “school officials” so that can have access to student education records. However, these team members may NOT redisclose PII from education records, unless the disclosure meets one of the exceptions to consent, such as the health or safety emergency exception.

Slide 38:

(Bernie)

Section 99.37 provides the conditions for disclosing directory information. Schools may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance concerning directory information.

Also, the FERPA regulations were amended to state that a student may not use the right to opt out of directory information in order to prevent a school from requiring the student to wear or otherwise display a student ID badge or card that exhibits information that has been properly designated by the school as directory information.

(Ellen)

The regulations were also amended to clarify that schools may adopt a limited directory information policy that allows for the disclosure of directory information to specific parties, for specific purposes, or both. The school must specify its limited directory information policy in the public notice to students.

(Baron)

Can a school make a policy that they will not disclose directory information to marketers, but will provide the directory for other explicit purposes such as yearbook information?

(Ellen)

Yes, but the school has to adhere to its stated policy in the directory information notice. If a school states in its directory information notice to students that it will not disclose directory information to marketers, for instance, it can't turn around and disclose directory information to those entities. The school could only do this by revising and reissuing its directory information notice and providing students another opportunity to opt out.

Slide 39:

(Ellen)

Here is a very brief review of FPCO's enforcement provisions. In the regulations published in December, we amended the enforcement provisions in FERPA so that if another entity that receives funds under a program administered by the Department has access to PII from student education records and violates FERPA (regardless if they have students in attendance), FPCO may bring an enforcement action against that entity.

We also clarified in the recent regulations that enforcement options against entities that receive funds under a program administered by the Department include: withholding payment, cease and desist orders, and compliance agreements. The regulations also clarified that the Department's options include the 5-year rule, which may be applied against any entity outside of the educational agency or institution whether or not such an entity receives funds under a program administered by the Department if the entity violates FERPA's re-disclosure provisions or the requirement under the studies exception to destroy the PII from education records when no longer needed for the purposes for which the study was conducted.

(Baron)

Can you give an example of the general enforcement progression that FPCO uses to bring agencies into FERPA compliance?

(Ellen)

Before we get to the point of recommending to the Secretary the enforcement options I just mentioned, FPCO works with educational agencies and institutions to bring them into compliance with FERPA. Should we find that a school violated FERPA through our investigation, FPCO would require that the school take certain measures to come into compliance with FERPA and provide us with assurance that it has done so.

Slide 40:

(Baron)

The Privacy Technical Assistance Center was put into place by the Department to be a resource for agencies collecting education data. We have a variety of resources to assist local education agencies, state education authorities, and postsecondary institutions such as those on this call today. Our resources include best practice guides, a help desk, checklists, on-site technical assistance, and regularly scheduled webinars similar to today's activity.

Slide 41:

PTAC's website also has links to the latest case studies, frequently asked questions and answers and links to archived webinars/trainings and presentations.

PTAC slides

Slide 42

(Bernie)

Here are some links for the relevant guidance documents we mentioned today, as well as for the FERPA regulations and the new model notice for colleges and universities.

Slide 43

(Bernie)

This provides instructions on how to sign up for FPCO's listserv. For those of you who are not members of our Listserv, we encourage you to follow these instructions to sign in and become a member in order that you may receive future regulatory updates and invitations to future training opportunities such as the webinar offered today.

Slide 44

(Baron)

Our last question of the day is an opportunity for you to provide feedback on how we did?

Slide 45

(Baron)

Thank you for attending today's webinar. Please take note of our contact information. Know that we PTAC and FPCO work jointly to provide resources, guidance, and timely training based on YOUR feedback. We hope you will join us for future webinars and trainings.

Slide 36:

(Baron)

Thank you for attending the webinar today. We appreciate your attention and look forward to your participation in the upcoming webinars. Please review our website for the most recently posted and upcoming webinars, guidance, and events at [www.ed.gov/ptac](http://www.ed.gov/ptac) and [www.ed.gov/fpc](http://www.ed.gov/fpc).