

Transcript: Intersection of FERPA & Part B of IDEA Confidentiality Provisions

March 2012

(Baron)

Slide 1:

Hello and welcome to our fourth in a series of joint presentations between the Privacy Technical Assistance Center and the Family Policy Compliance Office. My name is Baron Rodriguez and I am the director of the Privacy Technical Assistance Center. With me is Ellen Campbell, Deputy Director for the Family Policy Compliance Office and it is my honor to welcome Deborah Morrow, Special Assistant for Policy and Fiscal Issues within the Office of Special Education Programs. Today's webinar is entitled "Intersection of FERPA & Part B of IDEA Confidentiality Provisions". The goal of this webinar is to show how FERPA and IDEA confidentiality provisions intersect. The webinar will last approximately one hour.

(Baron)

Slide 2: (Poll)

(Ellen)

Slide 3:

Thank you, Baron. We are very pleased to present this webinar on the intersection of the Family Educational Rights and Privacy Act (FERPA) and the Confidentiality Provisions of the Individuals with Disabilities Education Act (IDEA). Deb and I will discuss important privacy requirements that affect the education records of students with disabilities receiving services under Part B of IDEA.

My office, the Family Policy Compliance Office (FPCO), routinely responds to questions from school officials 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, particularly as they relate to the IDEA requirements. After the webinar, if you have questions, you can email them to us at the address we will give you.

Congress passed FERPA in 1974 – around the same time that other privacy statutes were passed – and 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 & IDEA regulations – by which the Department administers these important laws.

You can see on this page the last two times that the Department amended the FERPA regulations. Both of these links are on our website.

(Deb)

Slide 4:

The IDEA was most recently amended in 2004 and implementing regulations were published in the Federal Register on August 14, 2006. Supplemental regulations were published in the Federal Register on December 1, 2008. The August 14, 2006, final Part B regulations include the confidentiality of information requirements. This slide includes the web locations where you can obtain the confidentiality regulations at §§ 300.610 through 300.627.

(Deb)

Slide 5:

Section 617(c) of the IDEA requires the Secretary of Education to take appropriate action, in accordance with FERPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies, or SEAs, and local educational agencies, or LEAs, under Part B of the IDEA. Today we will discuss many of those provisions, which are closely aligned with requirements in FERPA.

(Baron)

Slide 6: (Poll results)

(Ellen)

Slide 7:

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.

(Ellen)

Slide 8:

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.

(Baron)

What if my daughter (age 16) is taking classes at the local community college while she is still in high school – do I have a right as a parent to her education records over at the college?

(Ellen)

We get questions about what we call “dually enrolled students” a lot. That is, 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 records to the parents of the high school student (if he or she is a dependent for Federal income tax purposes), but it also permits the high school and the college to share information because the student is enrolled in both schools.

(Deb)

Slide 9:

Under the IDEA, States are permitted, consistent with 34 CFR § 300.520, to transfer all rights accorded to parents under Part B of the IDEA to children with disabilities when they reach the age of majority under the State law that applies to all children, except as noted in § 300.520. If the State elects to transfer these rights, confidentiality of information rights also transfer. Under § 300.625(c), notices that must be provided to parents, as well as children to whom rights have transferred, include, among others, prior written notice and the procedural safeguards notice.

(Baron)

Before Slide 10:

Before we get into discussing some of the definitions in FERPA and IDEA, let me ask you Ellen to explain the general applicability of FERPA. To which schools does FERPA apply?

(Ellen)

I’m glad you asked that, Baron, as I think it’s important to understand the applicability of FERPA, especially in the context of providing services to children with disabilities under IDEA.

FERPA applies to schools that receive funds under any program administered by the Department of Education. Most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.

I also want to point out that FERPA does not apply to a private school just because that school has students or teachers who receive services from a local or state education agency funded by programs administered by this Department. A number of Department programs serve private school students and teachers (as distinct from the private school itself). In those cases, the recipient of the financial assistance is not the private school because it receives no money, but the LEA or SEA. Thus, the private school would not be subject to FERPA unless it receives funds from any program administered by the U.S. Department of Education.

Also, if a student is placed in a private school under IDEA by a public agency, the placing public agency (typically the LEA) remains responsible under FERPA for that specific student's records and compliance with FERPA.

(Ellen)

Slide 10:

So, now, let's look at some definitions. Understanding the definitions in FERPA – as well as in IDEA – will help you understand how to apply the requirements of these regulations to your particular situations. The most basic definition is the term “education records.” Education records are 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. (By “educational agency or institution,” we mean the school district, school, or postsecondary institution where the student attends.)

(Deb)

The IDEA definition of “education records” refers to the FERPA definition.

(Ellen)

Slide 11:

And, as we always remind school officials (just in case there is any misunderstanding on their part), records maintained by a school subject to FERPA on a student with a disability receiving services under Part B of IDEA are “education records” subject to FERPA.

Also – and this is important to understand, too – health records on non-eligible students maintained by a school subject to FERPA are “education records” subject to FERPA.

(Baron)

In this instance, FERPA trumps HIPAA requirements, correct?

(Ellen)

As we see on the next slide ...

(Ellen)

Slide 12:

The Privacy Rule of HIPAA does not apply to records that are protected by FERPA. Other HIPAA rules might apply, such as the rule that has to do with the transmittal of health records. So, FERPA would only trump – as you put it – the HIPAA Privacy Rule. Whether the other rules under HIPAA would apply in their particular situations, schools officials would need to confer with their legal counsel. Also, at the end of the webinar, we will give folks a link to the Joint Guidance that this Department and the Department of Health and Human Services issued on the interplay of FERPA and HIPAA.

(Ellen)

Slide 13 & 14:

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, the Department amended the definition to include some more items. “Personally identifiable information” now includes not only direct identifiers, obvious items such as name, address, SSN, but also indirect identifiers that would, as we see on the next page, would 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.

(Baron Question, Slide 14)

Would a principal be considered a “reasonable” person?

(Ellen)

Typically, no. In legal terms, we mean a “reasonably prudent person” – and not that principals are not “reasonably prudent” but you have to look at the rest of what the definition says: “a reasonable person in the school community, *who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.*” So, in most cases, the

principal is going to have personal knowledge about a situation concerning a student, particularly if we are talking about a disability or discipline matter.

(Ellen)

Slide 15:

When we talk about the rights of parents, it's important to note that FERPA affords full rights to either parent, custodial or noncustodial, unless there is a legally binding document that states otherwise.

(Deb)

Slide 15:

The IDEA contains a similar provision, as you can see on this slide.

(Ellen)

Slide 16:

You can see here in the first bullet that FERPA requires annual notification to parents and eligible students in attendance of their rights under FERPA. There is a model notification on the FPCO website and a link to it at the end of this presentation.

(Deb)

States provide the notice described in section 300.612 annually, under the IDEA. Section 300.612(b) also requires that this notification be provided before any major identification, location, or evaluation activity, such as child find, and the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Ellen)

Slide 17:

One of the basic rights under FERPA is the right for a parent to inspect and review their child's education records – or for an eligible student to inspect and review their education records.

Section 99.10 of the FERPA regulations explains the access requirements. A school must comply with a request for access to education records within 45 days of receiving the request.

(Deb)

It is important to note that the requirement is for “access.” The IDEA provides parents, or an eligible child, with the right to inspect and review the child’s education records. Also, note that an LEA must comply with a parent’s request to inspect and review the education records relating to their child without unnecessary delay. This means that if an IEP Team meeting will occur within 20 days of the date of the parents’ request, the LEA must comply with that request before the meeting. So, although the LEA has up to 45 days to comply with a parent’s request, it must comply before any of the events mentioned on the slide occur. While many LEAs may be able to provide the parents with a copy of the records, they are not required to do so unless failure to provide the copy would effectively prevent the parents from exercising their right to inspect and review the record. A parent’s access rights also include the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records and the right to have a representative of the parent inspect and review the records.

(Ellen)

Slide 18:

Both FERPA and IDEA permit schools to charge a fee for copies of education records, as long as it doesn’t create a hardship for the parent. Generally, we are talking about a fee similar to what a copying service in your area would charge.

(Deb)

Under the IDEA, an LEA that provides parents with a copy of the child’s education record may charge a fee for copies of the record, if the fee would not effectively prevent the parents from exercising their right to inspect and review those records. Additionally, section 300.617(b) of the IDEA regulations states that a participating agency may not charge a fee to search for, or to retrieve, information under the IDEA.

(Ellen)

Slide 19:

FERPA states that if the records contain information on more than one student, the parent may inspect, review, or be informed of only the specific information about his or her child’s education records.

(Deb)

Under the IDEA, the issue described on this slide could arise regarding information about disciplinary procedures, where multiple children may be involved. It is important that staff understand this requirement prior to creating and preparing records containing information on

multiple children in order to document information in a way that makes it easier to provide the information to the individual parents of the children involved if requested.

(Ellen)

Slide 20:

Both FERPA and IDEA have similar requirements concerning seeking to amend education records. You can find the FERPA requirements in §§ 99.20 through 99.22 of our regulations. Our legislative history indicates that FERPA was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational institution."

Rather, FERPA was intended to require only that educational agencies and institutions conform to fair recordkeeping practices and not to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or special education programs and services. Thus, while FERPA affords parents 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.

(Deb)

Slide 21:

The hearing with regard to the amendment of records, referenced on this slide, is, under the IDEA, specific to a participating agency's refusal to amend the information in the child's education record in accordance with the parents', or eligible child's, request. The hearing, as indicated, must be conducted in accordance with the procedures in FERPA, at § 99.22, and is held to afford the parents the opportunity to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. This hearing is not intended to provide an opportunity for parents to have accurate information removed from their child's record because they would prefer that it not be included in the record.

(Baron)

Slide 22 – Quiz:

(Ellen)

Slide 23:

Now we are going to talk about the requirements for consent and the exceptions to consent. Under FERPA the general rule is that a parent or eligible student has to provide the school with a

signed, dated, written consent before the school can disclose PII from a student's education records. (There are exceptions to that general rule, which we'll go over in a minute.)

(Deb)

Part B of the IDEA generally requires parental consent before disclosing personally identifiable information about a student with a disability and also incorporates the FERPA exceptions to parental consent. However, the regulations also include two situations where parental consent is specifically required. Parental consent, or the consent of an eligible student who has reached the age of majority under State law, is required before personally identifiable information can be released to participating agency officials providing or paying for secondary transition services. This is particularly important where public agencies seek to invite an official of a participating agency to an IEP Team meeting where postsecondary goals and transition services are being discussed. The IDEA regulation also requires that if a child enrolls, or plans to enroll, in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between LEA officials where the child's parents reside and the LEA where the private school is located. This consent requirement would be particularly important if the parent is seeking equitable services for their child from the LEA where the private school is located. In order to determine if the child is eligible for equitable services, information from the LEA of the parents' residence likely would be relevant. The IDEA regulations require that parental consent must be obtained before the two LEAs may exchange and share personally identifiable information about the child.

(Ellen)

Slide 24:

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

The first one – and the one used most often – is to school officials with a legitimate educational interest. If you recall from slide 16, we reminded you that schools must annually notify parents and eligible students in attendance about their rights under FERPA. One of the requirements for notification is that you include the criteria for who you consider to be a “school official” within your school, and what you consider to be a “legitimate educational interest.” We have suggested language for that in our model notification.

The second one here is disclosures to another school where a student seeks to enroll.

Next, we list “authorized representatives of Federal, State, and local educational authorities.” Let's talk about this for a minute. This is the exception under which LEAs typically disclose PII from students' education records to their SEA.

Note that authorized representatives of SEAs (or the other specific entities or officials listed in the regulations that can receive information under this exception) may have access to PII from education records *only* in connection with an audit or evaluation of Federal or State supported education programs *or* for the enforcement of or compliance with Federal legal requirements which relate to those programs – such as the IDEA.

(Ellen)

Slide 25:

This slide lists some other exceptions to the general consent rule that apply to LEAs.

You should note that the regulations in December 2008 amended the studies exception to require a written agreement. You can read about those changes on our website.

(Ellen)

Slide 26:

In the last few years, we have received 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 from a student's education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(Ellen)

Slide 27:

Back to school officials. Another change the Department made in 2008 to the FERPA regulations was to clarify that the school official exception may include contractors, consultants, volunteers, or other parties to whom a school has outsourced institutional services or functions. You need to be aware of the requirements that relate to these disclosures.

(Ellen)

Slide 28:

This slide continues with the requirements for what we call “outsourcing” institutional services or functions.

(Ellen)

Slide 29 and 30:

On these next two slides, we list the requirements that “authorized representatives” must follow in protecting PII from education records.

You should know about the changes to this provision that we made in the December 2011 regulations.

You will find additional guidance about this on FPCO’s website.

(Ellen)

Slide 31:

Section 99.3 of the FERPA regulations includes a definition for “directory information.” Section 99.37 provides the conditions for disclosing directory information. A school may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance concerning directory information.

(Ellen)

Slide 32:

Also, the FERPA regulations were amended to state that a parent or eligible 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)

Slide 33:

The regulations were also amended in 2011 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 parents and students.

We had a school once ask us if they could comply with a request from an outside group for “directory information” on all students that had a certain disability. We explained that a school cannot disclose non-directory information linked to directory information.

(Baron/Allison)

Slide 34: Interactive Quiz Responses

(Baron)

Slide 35: Interactive Quiz Correct Answer

(Deb)

Slide 36:

Under the IDEA, States must report publicly on the progress of their LEAs in meeting the targets in the State performance plan, or SPP. However, a State or its LEAs may not publicly report information in a way that would allow for disclosure of personally identifiable information or that would allow individual children to be identified. Many States set an “n” size – the size of the group in various reporting categories – to ensure that personally identifiable information is not disclosed. Information reported to the Department, by SEAs, is aggregated data from all LEAs in the State and must be reported in every reporting category. The Department ensures that State data it publicly reports are not personally identifiable, and States must ensure that data they publicly report are not personally identifiable.

(Baron)

Ellen, under FERPA, is there a difference in reporting data publically and reporting data to the SEA or the Department of Education? On reporting back to state or federal agencies, there is much confusion in this area with states and districts. Some LEA’s and SEA’s believe that they are not required to report data back to state or federal agency without suppression in place. Is that true?

(Ellen)

There is a big difference in reporting data publically and reporting data to an authorized representative of your State department of education or the U.S. Department of Education.

FERPA does not permit schools, LEAs, SEAs – *or* the Department of Education – to report publically student information in personally identifiable form – unless it falls under an exception to FERPA’s general consent rule. One exception permits the public disclosure of properly designated directory information. But what you are asking about, Baron, I believe is the public reporting of information that would not be considered directory information, things like grades, disability status, etc.

In some cases, a school or LEA may be required to disclose PII from student education records to their State department of education. The SEA, in turn, may or may not be required to disclose information on students to the U.S. Department of Education in PII form. Most of the time, the Department does not require data in PII form – but if it does request student data in PII form, then the Department is under the same requirements to protect that information under FERPA and would not publically released it unless the data was properly suppressed.

(Ellen)

Slide 37:

You should be aware that FERPA does not generally require that you maintain students' education records – except to say that if the school has an outstanding request from a parent or eligible student to inspect and review the student's education record, that record cannot be destroyed before the parent or student has an opportunity to access the record.

(Deb)

Over time, enormous numbers of education records on individual children with disabilities are maintained. Many LEAs address this problem by converting the records for electronic storage. But it is important to note that the LEA can notify parents when records are no longer needed for purposes of providing special education and related services to the child, particularly when the child graduates. If the parent requests that their child's records be destroyed, the LEA must destroy them, or could give the records to the parents.

(Ellen)

Slide 38:

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.

(Deb)

For the IDEA, this provision means that LEAs must require individuals obtaining access to the education record of a child to complete the record of access. This provision does not apply to access by parents and authorized employees of the participating agency. It is not uncommon for SEA staff to access children's records in LEAs as part of its monitoring activities. These individuals are authorized to have access but must complete the record of access because they are not authorized employees of the participating agency, the LEA.

(Ellen)

Slide 39:

Here is a very brief review of FPCO's enforcement provisions. FPCO is the office in the Department that administers FERPA. We are the office that investigates complaints filed by

parents and eligible students and provide technical assistance to schools on FERPA. If we find that a school violated FERPA, we work with the school to bring them into compliance with FERPA.

(Deb)

Slide 40:

Under § 300.626, States are required to ensure that the confidentiality provisions are followed for the IDEA.

(Deb)

Slide 41:

Under the IDEA, alleged violations of the confidentiality requirements can be filed as State complaints with the SEA, through the process outlined in the regulations referenced on this slide. Generally, States are required to resolve such complaints within 60 days of receipt of the complaint by the SEA. The violation, under the IDEA, must have occurred not more than one year prior to the date the complaint is received by the SEA. If the SEA identifies violations, it could require corrective actions to achieve compliance.

(Baron)

Slide 42:

Here are links to some of the guidance documents we mentioned today, as well as to the FERPA regulations and the new model notices.

(Ellen)

Slide 43:

We are also have made it a priority this year to get guidance out on how FERPA applies to videotapes and emails, and we are working with the Department of Agriculture to develop joint guidance on FERPA and the Free & Reduced Price Lunch program data.

(Ellen)

Slide 44:

And here are instructions on how to sign up for FPCO's listserv. We use our listserv to alert school officials about new guidance.

(Ellen)

Slide 45:

Here is contact information for FPCO.

(Deb)

Slide 46:

This slide provides contact information for OSEP.

(Baron)

Close