



# **FERPA — Facts and Fictions**

**Nevada Association of School Boards — March 9, 2019**

**Ann M. Alexander, Ph.D., Esq., Erickson, Thorpe & Swainston, Ltd.**

# FERPA



- Overview of FERPA requirements
  - It's complicated ...
  - It depends ...
- “Facts” and “Fictions” about FERPA

# FERPA – Overview



- ***What does “FERPA” stand for?***
  - Family Educational Rights and Privacy Act of 1974 (9 amendments)
  - It is a “Spending Clause” statute – violations can result in loss of federal funds
- ***Why was it enacted?***
  - Information was contained in students’ cumulative files and other records that was potentially damaging to them later on. Parents could not examine those records and could not request that inaccurate information be corrected.
  - From the beginning, key rights for parents include the right to **inspect and review** education records and to **request amendment** of information that the parent believes is inaccurate, misleading, or in violation of the student’s rights of privacy.
- ***Districts must annually notify parents and eligible students of their FERPA rights***
  - By any means that are reasonably likely to inform all

# FERPA – Overview



- ***What is FERPA?***
  - FERPA is an **education records** law – applies to all students
  - FERPA is **not** a broad privacy law
    - Obligations to refrain from gossip and maintain confidentiality derive from professional responsibility, **not exclusively** from FERPA (although there can be overlap)
    - School districts may have additional policies regarding expectations of confidentiality
  - FERPA **does not control how education records are created or maintained**
    - FERPA just controls **access** to and **disclosure** of records that are directly related to a student and maintained by the district
  - The only **destruction** provision is that education records may not be destroyed if there is a pending request to inspect/review
    - Most destruction requirements exist in other federal and state statutes

# FERPA – Overview



- ***What are education records?***
  - Education records are:
    - Directly related to a student, and
    - Maintained by the school district or by a party acting for the school district
- ***What does “directly related to” mean? Contains personally identifiable information:***
  - Student and parent names, mother’s maiden name, address, date and place of birth, social security number, etc.
  - Other information that alone or in combination would allow a reasonable person in the school community to identify the student with reasonable certainty
  - Information requested by a person the district believes knows the identity of the student to whom the record relates

# FERPA – Overview



- ***What documents are not education records under FERPA?***
  - **Personal knowledge or first-hand observations**, *unless* that knowledge was obtained through official role in making a determination maintained in an education record about the student
    - A principal who took official action to suspend a student may not disclose that information, absent consent or an exception
    - A teacher who overhears a student making threatening remarks to other students may disclose the information to school officials, law enforcement officials, and parents
  - **Sole possession records** used as a personal memory aid, not shown to anyone else
  - (Maybe) **emails** – yes, if printed and maintained
    - No authoritative decision in the 9<sup>th</sup> circuit or in our Nevada federal courts

# FERPA – Overview



Whether a record is an education record or not, records related to students are generally subject to disclosure requests in litigation.

So even if FERPA does not require that these records be disclosed to parents, the records may be disclosed in a lawsuit.

**LESSON FOR STAFF:** Never write anything in an email that you would not want the parent or your boss to see, or the local news to publish or broadcast.

# FERPA – Right to inspect and review



- ***Are photos and videos education records?***
  - Ordinarily, a photo or video is not an education record because it is not directly related to a student, it is merely incidentally related to student – case-by-case analysis
- ***When is a photo/video “directly related”? Factors:***
  - School uses (or may use) photo or video for disciplinary action involving the student (and the victim)
  - Photo/video depicts an activity that shows
    - A student in violation of local, state, or federal law
    - A student getting injured, attacked, victimized, ill, or having a health emergency
  - Examples: video surveillance showing a fight, classroom video showing a student having a seizure, video showing a restraint of a student in violation of state law

# FERPA – Overview



- ***How does FERPA define parent and eligible student?***
  - **Parent:** a parent of a student, including natural parent, guardian, or an individual acting as a parent in the absence of a parent or guardian
    - School districts must give full rights to either parent, unless district has been provided with a court order, or a legally binding document regarding divorce, separation, custody that specifically revokes these rights
  - **Eligible student:** student who is 18 or attending postsecondary education institution
- ***What rights do parents/eligible students have?***
  - Right to **inspect and review** education records
  - Right to request **amendment** of education records
  - Right to prohibit **disclosure** of education records without consent, with certain exceptions
  - Right to file a **complaint** with the U.S. Department of Education

# FERPA – Right to inspect and review



- *What is the right to inspect and review?*
  - School must comply with a request to inspect and review education records **within 45 days**
  - **No right to copies unless** “circumstances effectively prevent parent from exercising right to inspect and review” (e.g., parent does not live within commuting distance)
    - Districts may have **policies** that state they will provide copies on request
  - Cannot destroy if request for access is pending

# FERPA – Right to inspect and review



- *What about records that are the education record of more than one student?*
  - If records contain information on more than one student, requesting parent may inspect, review, or be informed of **only the specific information about his or her child's records**
  - Sometimes redaction can work – but not necessarily if the requesting parent already knows the identity of the other student or if it destroys the meaning of the record
  - If a record (including a video or photo) is the education record of two students, and redaction/segregation is not feasible, both students' parents may inspect and review, but FERPA does not generally require school to provide copies

# FERPA – Right to request amendment



- ***What is the right to request amendment?***
  - **Parent identifies portion of the record** that is believed to contain inaccurate or misleading information
  - **School decides** within a reasonable period of time whether to amend as requested
    - If school agrees, amend record and inform parent in writing
  - If school decides not to amend, informs parent of **right to hearing**
  - After a hearing, if decision is still not to amend, parent has right to insert a statement in the record
- ***What information is not subject to amendment?***
  - **Disagreements** about grades, scores, or other substantive decisions or evaluative comments

# FERPA – Right to consent to disclosures



- *What is the right to consent to disclosures?*
  - Except for **specific exceptions**, parent must provide **signed and dated written consent** before a school may disclose education records. The written consent must:
    - Specify records that may be disclosed
    - State purpose for disclosure
    - Identify the party to whom disclosure may be made

# FERPA – Right to consent to disclosures



- *What are the specific exceptions that do not require written consent for disclosure? Some key exceptions:*
  - **Directory information** (if defined in annual FERPA notice)
  - To **school officials with legitimate educational interests** (if defined in annual FERPA notice)
  - To schools in which a student **seeks or intends to enroll** (must state the intention to do this without consent in annual FERPA notice)
  - To comply with a **judicial order or subpoena** (must notify parent before complying to give opportunity to quash)
  - To **authorized representatives** of federal, state, or local educational authorities conducting an audit, evaluation, or enforcement of education programs
  - In a **health or safety emergency**

# FERPA – Directory information



- ***What is directory information?***
  - Personally identifiable information that is not generally considered harmful or an invasion of privacy if disclosed
  - If school district intends to disclose directory information without consent, must define directory information in its annual FERPA notice, e.g.,
    - Student name, address, telephone listing, email address, photograph, date and place of birth, major field of study, grade level, enrollment status, dates of attendance (does not mean on a particular day), participation in activities/sports, weight/height of athletic team members, degrees/honors/awards received
  - Just because the district **may** disclose directory information, does not mean that it **must** do so (but do not discriminate)
  - Annual FERPA notice must give parents option to “**opt out**”
    - Usually by a certain date; usually all or nothing – not a “menu”
    - Opt-out does not prevent district from disclosing as otherwise permitted by law (e.g., cannot use opt-out to prevent district from reporting test scores to Nevada Department of Education)

# FERPA – Military recruiters



- ***What about military recruiters?***
  - Other federal laws (not FERPA) require that schools disclose (without consent) secondary students' names, addresses, and telephone numbers to military recruiters, upon request
  - Schools must notify parents they may opt out of non-consensual disclosure to military recruiters (can be a separate or combined “opt out” notice)
  - If a parent “opts out” of providing directory information, the opt-out relating to name, address, or telephone number applies to requests from military recruiters as well

# FERPA – School officials with legitimate educational interests



- *Who are school officials with legitimate educational interests?*
  - If the school district will allow non-consensual disclosure to school officials with legitimate educational interests, must define “**school officials**” in its annual FERPA notice. **For example**
    - Teacher, principal, superintendent, board member, related services providers, counselor, attorney, accountants, support and clerical personnel, etc.
    - Those to whom the school has “**outsourced**” tasks: contractors, consultants, volunteers, other third parties, so long as:
      - Performs functions that would **otherwise be done by employees**
      - **Under direct control** of district regarding use/security of records
      - Limited to use of records only for purpose for which disclosure was made, e.g., to promote school safety and physical security of students
      - Is identified in FERPA notice of “school officials with legitimate educational interests”

# FERPA – School officials with legitimate educational interests



- *What are legitimate educational interests?*
  - Must define what constitutes a “**legitimate educational interest**”
    - A school official has a legitimate educational interest if the official needs to review an education record to fulfill professional responsibility
  - These are interests in the student’s education not other matters (i.e., union reps have interests in the employee, not the student, so their presence is not permitted in IEP meetings or student discipline proceedings)

# FERPA – Health and safety emergencies



- ***What conditions apply to disclosure in health or safety emergencies?***
  - Must be an **articulable and significant threat** to the health and safety of a student or others
    - E.g., an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease
  - Disclosure to “**appropriate parties**” (law enforcement, public health officials, trained medical personnel) – persons whose knowledge is necessary to protect health or safety of the student or other persons
  - Disclosure limited to period of emergency, and not a blanket release
  - School district administrators decide if it is an actual emergency or not – must be able to document the “articulable and significant threat”
    - If there is a rational basis for the decision, the US Dept of Ed “will not substitute its judgment for that of the school in evaluating the circumstances and making its determination”
  - Must **record in the student’s record** the articulable and significant threat that formed the basis for the disclosure, and the **parties** to whom the information was disclosed

# FERPA – Threat assessment teams



- ***Can the school disclose education records without consent to a threat assessment team, even if the team includes persons who are not employees?***
  - Threat assessment teams are groups of officials that convene to identify, evaluate, and address threats or potential threats to school security
  - They can review threatening behavior by current and former students, parents, employees, and other individuals
  - They might assist the school in determining whether a health or safety emergency exists that permits further non-consensual disclosure of education records
  - If included as an “outsourcing” group in definition of school officials with legitimate education interests, then non-consensual disclosures of education records may be made to the group
    - They may only use information for its stated purpose
    - They may not re-disclose without parent consent, unless an exception applies (e.g., health or safety emergency)
    - A signed acknowledgment of responsibilities may be useful

# FERPA – Right to file complaint



- ***What is the right to file complaint?***
  - Parents may file written complaint with federal Family Policy Compliance Office (FPCO) within 180 days of alleged violation
    - Blistering 2018 report from Inspector General (years-long backlog, inadequate recordkeeping, average 2 years to investigate)
    - Generally corrective actions, although can withhold federal funds
  - FPCO is enforcement agency, not the Nevada Department of Education, except:
    - IDEA regulations incorporate FERPA by reference and thus give authority to NDE to investigate alleged violations in special education context
    - State confidentiality law also incorporates FERPA
  - There is no “private right of action” under FERPA
    - Parents cannot sue districts for damages under FERPA or as a civil rights violation
    - Parents can sue under state law torts (e.g., invasion of privacy)

# FERPA – FACTS and FICTIONS



- FERPA **does not** give parents an **automatic right to copies** of education records, unless failure to do denies right to inspect/review (school district policy may give this right)
- FERPA **does not** control **law enforcement** access to **students** (see district policy)
- FERPA **does** control **law enforcement** access to **education records**
  - Unless the situation is a health or safety emergency, compliance with subpoena/warrant requires parent consent, or notification to parent of intent to comply, to give opportunity to quash
  - **Disclosure in health or safety emergency requires:**
    - Articulable and significant threat; school decides
    - Necessary to protect health/safety of student or others

# FERPA – FACTS and FICTIONS



- FERPA **does not** require consent for disclosure to state and federal officials for “evaluations” (e.g., state testing results) – but there are provisions for written agreements to provide additional security for redisclosure, data sharing, etc.
- FERPA **does not** prohibit a school district from requiring that students wear an ID badge that displays a student ID number
- FERPA **does** allow non-consensual disclosure of disciplinary action taken for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community, **including to teachers and school officials in other schools**
  - School official knows that a student who has been disciplined for bringing a gun or knife to school or threatened to hurt students or teachers is planning to attend a school-sponsored activity at another high school. FERPA permits notifying the other school about the disciplinary action taken.

# FERPA – FACTS and FICTIONS



- FERPA **does** allow a stepparent to be considered a parent under FERPA (if the stepparent is present on a day-to-day basis with a natural parent, and the “other” parent is absent from that home)
- FERPA **does** allow a grandparent, or another caregiver who is acting in the absence of a parent to be considered a parent under FERPA
- FERPA **does not** give rights to the spouse of an 18-year-old “eligible student”
- FERPA **does** permit a legal representative to inspect/review education records, but does not require that copies of records be provided to legal representatives simply because the legal representative does not live within commuting distance, or for the convenience of the legal representative
- FERPA **does** permit the non-consensual disclosure of education records to Child Protective Services, but only to the extent necessary to report suspected abuse/neglect

# FERPA – FACTS and FICTIONS



- FERPA **does** permit notifying a victim in a student discipline matter of the type of discipline handed down to another student if:
  - the discipline **directly relates to the victim** (e.g., harassing student was ordered to stay away from victim)
  - the discipline was imposed for conduct that violates laws enforced by OCR (e.g., harassment based on gender, race, religion, national origin)
- If the school district is sued, FERPA **does** allow the district to make non-consensual disclosures to the **Court** that are relevant to its defense
  - Even if sued, FERPA **does not** allow non-consensual disclosures to the press, or to the public (as in a school board meeting)
  - Just because a parent discloses, there is no “implied consent” for the district to do so