

WEBINAR MATERIALS

**“Understanding the Family Educational  
Rights and Privacy Act (FERPA)”**

**March 10, 2010**

*Presenter:*

**James Rosenfeld, Esq.**



**ABOUT THE PRESENTER:** James Rosenfeld, Esq. is Director of Education Law Programs at the Seattle University School of Law. In this capacity, he develops and implements outreaches to the local community concerning education matters, including the presentation of advocacy training programs for the parent community. He teaches a seminar on special education law and policy and directs the National Academy for IDEA Administrative Law Judges and Hearing Officers, which he founded at the Law School in 2002. Jim came to the Law School as a Visiting Professor in 2001, when he joined the Ronald A. Peterson Law Clinic to supervise students in their representation of parents of children with disabilities.

A member of the Washington State and District of Columbia bars, Jim is the Chairman of the Special Education Section of the National Association of Administrative Law Judiciary, reflecting his long interest in the IDEA hearing system and process. He testified before the President's Commission on Excellence in Special Education and the Subcommittee on Select Education of the Committee on Education and Labor of the U.S. House of Representatives, and has participated in the Danforth Foundation Program for Federal District Court Judges. He has made numerous presentations to national, regional, state and local special education governmental agencies and organizations.

Rosenfeld is the founder of COPAA (Council of Parent Attorneys and Advocates) and was the founding managing editor of IDELR (Individuals with Disabilities Education Law Report), the pre-eminent reporting service in special education law. He has authored two books – *Education Records: A Manual* and *Transporting Students with Disabilities* – and for ten years wrote a monthly newsletter reporting and analyzing developments in special education law. He received his B.A. (magna cum laude) from the University of Florida and his J.D. from New York University School of Law.

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## Understanding the Family Educational Rights and Privacy Act (FERPA)

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Director, Education Law Programs  
Seattle University School of Law



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## What Presentation Will Try to Do

- Focus on questions & concerns of parents & advocates
- Overview of legal structure, basic concepts & procedures, where to obtain detailed information
- Practical suggestions when working with schools

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2

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## What This Presentation Will Not Do

- Primary focuses: FERPA; elementary-secondary education – not before or after
- No state law references, but local practice very important
- No extensive look at litigation

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3

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### Agenda: Chronology of Presentation

- Why FERPA?
- Where Is the Law?
- Definitions
- Basic Procedures
- Records Subject & NOT Subject to FERPA
- Disclosure – Consent & NO Consent
- Corrections, Amendments, Destruction
- “Other Stuff” (Special Situations; Changes)

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4

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### Why FERPA? – A Brief History

- Prior to FERPA, access governed by state and common law, scattered case law and local, inconsistent policy.
- Information often inaccurate.
- Parents routinely denied access.
- Records often routinely shared.

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5

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### FERPA: What It Does and Doesn't

- Purposes
  - Protect privacy
  - Provide access
- Does
  - Specifies when disclosure permitted without prior consent
  - Excludes documents from coverage
- Doesn't
  - Require creation of records
  - Apply to oral discussions

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6

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### Sources: Where Is the Law?

- 20 USC §1232g
- 34 CFR Part 99
- 73 FR 74805-74855 (No. 237), Dec. 9, 2008
- FERPA Online Library [selected FPCO policy letters going back to 1992]  
<http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/index.html>
- FPCO [Family Policy Compliance Office]
- Usual suspects: Westlaw; Lexis; Google Scholar; Perry Zirkel

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7

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### Sources: Recent Changes

- Effective Jan. 8, 2009
- Implement a provision of the USA Patriot Act and the Campus Sex Crimes Prevention Act
- Implement two U.S. Supreme Court decisions interpreting FERPA
- Make changes to reflect Department's administrative experience

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8

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### Related Law

- Protection of Pupil Rights Amendment
- Federal Privacy Act
- Federal Freedom of Information Act
- Computer Matching and Privacy Protection Act
- General Education Provisions Act (GEPA §644)
- EDGAR regulations
- IDEA

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9

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## FERPA: Basic Mechanisms

- Two broad objectives
- Applicability: educational institutions receiving any Federal funds (directly/indirectly)
- Rights: inspection, review + related

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10

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## FERPA: Monitoring & Compliance



- Family Policy Compliance Office/USDoEd
- Termination of all federal funds
- Policy interpretation/guidance
- Occasional technical assistance
- New: FPCO may initiate investigation

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11

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## Basic Protections

- Inspection and review
- Notification of rights
- Consent to disclosure
- Opportunity for hearing
  - Amendment, deletion, explanation
- Record of access

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12

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## File Complaint

- Concerning failures to comply with FERPA requirements
- No right to obtain copy of SEA/LEA records policy

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15

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## Program Applicability

- Any education agency and institution
- Receives federal funds (recipient)
- Whether directly or indirectly
- *Grove City College v. Bell* (1984)

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14

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## Protected Parties

- Student: under 18 years old
  - Enforced by *parents*
- Eligible Student: 18 years old or enrolled in institution of post-secondary education
  - Enforced by *student*
  - Exception: listed as dependent on parents' tax return
- Education agency employees are not protected.

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15

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### Who Are “Parents”?

- Basic definition: natural, guardian, person acting as parent (§99.3)
- Rights vested in either divorced/separated parent (§99.4) . . . unless

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16

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### General Definitions

- Generally
- 34 CFR §99.3
  - Education Records
  - Personally Identifiable Information
  - Directory Information

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17

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### Email and Electronic Records

- No direct definition of email/electronic records per se
- References to electronic format re
  - Attendance
  - Directory information
  - Identifiers
  - Disclosure
  - Consent

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18

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## Records Subject to FERPA

- “Education records” = “records, files, documents and other materials” that
  1. contain information directly related to a student; and
  2. are maintained by an education agency or institution or by a person acting for such agency or institution.
- Broad interpretation intended
- Identification of student unnecessary

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19

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## Critical Elements

- Information is “recorded” in some format
- Information directly or indirectly related to student
- “Maintained” by education agency

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20

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## Disclosures Without Consent

- Disclosure in the identified situations is neither forbidden nor required
- Situations are identified only to enable disclosure at discretion of agency or institution.

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21

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### Disclosures Without Consent

- “School officials” (including teachers) having “legitimate educational interest”
- “School officials” may include contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions who may be considered a school official
  - (1) Acting in place of employee;
  - (2) Use of records under the direct control of the agency; and
  - (3) Won't use or redisclose without prior consent.

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22

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### Legitimate Educational Interest

- No guidance in statute/regulations re defining “legitimate educational interest”
  - DoEd has declined blanket definition
- Accountability for "Legitimate Educational Interests" - 34 CFR §99.31(a)(1)(ii)
  - Balancing of risk with likely threat/potential harm
  - School has burden of showing “legitimate educational interest”

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23

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### Disclosures Without Consent

- Applications for enrollment
  - Officials of another school, etc. where 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
- Provide certain procedural protections
- NCLB, §4155(b): states must have procedure to facilitate transfer of disciplinary records re suspension/expulsion

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### Disclosures Without Consent

- Disclosures for auditing, monitoring or compliance purposes
- Specified government officials
  - (i) The Comptroller General of the United States;
  - (ii) The Attorney General of the United States;
  - (iii) The Secretary; or
  - (iv) State and local educational authorities.
- Subject to the requirements of §99.35, e.g.
  - No personal identification
  - Destroyed after use

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25

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### Disclosures Without Consent

- To evaluate applications for financial aid
- Examples: information necessary to:
  - ✓ Determine eligibility for the aid;
  - ✓ Determine the amount of the aid;
  - ✓ Determine the conditions for the aid; or
  - ✓ Enforce the terms and conditions of the aid.
- *Financial aid* = payment of funds provided to an individual conditioned on the individual's attendance at educational institution.

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26

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### Disclosures Without Consent

- To certain state or local officials re juvenile justice system
- General purpose: provide more information to personnel of juvenile justice systems to help them tailor recommendations for rehabilitation program or sentencing.
  - Purpose of the exception was to grandfather in any pre-existing state statutes.
  - Exception is to be read strictly; the disclosures required by state law must be specifically required.

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27

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### Disclosures Without Consent

- Disclosures for Test Development and Validation
- To organizations (public/private)
- No personal identification; destroyed following completion of study
- Five year penalty for violations of agreement

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28

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### Disclosures Without Consent

- Disclosures for accreditation purposes
- Scholastic, athletic and other types of accrediting organizations to determine whether the educational agency or institution has complied with or met the organization's accrediting standards

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29

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### Disclosures Without Consent

- Disclosures to parent of dependent college student, per IRC §152
  - Student must be full-time
- Permit parents of college students who are still financially dependent to obtain access to their child's records
- Model notice from FPCO  
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html>

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30

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### Disclosures Without Consent

- Disclosures under
  - court order or
  - “lawfully issued subpoena”
- Reasonable effort of advance notification to enable protective order
- Three specified exceptions
- Litigation between agency & parent/student

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### Disclosures Without Consent

- Emergency health and safety disclosures
  - “necessary to protect health or safety of the student or other persons”
- Specified conditions (§99.36)
  - disclosures in connection with an emergency for health or safety reasons
  - disclosures concerning disciplinary actions in specified circumstances
- *Ex:* disclosing discipline re carrying weapon

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### Disclosures Without Consent

- Disclosures to parents or students
- The exemption codifies the general right of access provided by FERPA
- Disclosures to parents re suspected student physical/emotional problem?

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### Disclosures Without Consent

- Disclosures to alleged victims of crimes of violence
- Crimes of violence:
  - involves use, attempted use, or threatened use of physical force against the person or property of another, or
  - a felony and that, by its nature, involves a substantial risk of physical force

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### Disclosures Without Consent

- College disciplinary proceedings (final results) if student:
  - Is alleged perpetrator of violent crime or non-forcible sex offense, and
  - Has violated college rule/policy
- No names of other students

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### Disclosures Without Consent

- Parent of college student re alcohol/drug offenses if:
  - Student has committed disciplinary violation, and
  - Student under 21 at time of disclosure

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## Disclosures Without Consent

- Disclosures concerning registered sex offenders
- Information provided to education agency under "Megan's Law"

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37

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## Disclosures Without Consent

- Directory information: largest single category of information that can be disclosed without prior consent
- Statute identifies 5 specific types
- Regulation has generalized (and relative) approach
  - Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.
- Query: What's private under Facebook approach?

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38

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## Directory Information

- Specific inclusions
  1. the student's name, address, telephone listing, date and place of birth
  2. major field of study
  3. participation in officially recognized activities and sports, weight and height of members of athletic teams
  4. dates of attendance, degrees and awards received, and
  5. the most recent previous educational agency or institution attended by the student.
- Specific exclusions
  1. Social security number; or
  2. Student identification (ID) number, except ...
- Conditional exclusions

Student ID number, user ID, or other unique personal identifier unless it also requires user authorized code (PIN, password, etc.)

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39

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## Directory Information

- Prerequisites for disclosure of directory information
  - Designated as directory information
  - Right to refuse designation (individual basis)
  - Time to object
- No “opt out” for name, identified, school email
- No retroactive “opt out” for former students
- Standard consent required when SSN used

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40

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## Disclosures Without Consent

- De-identified (redacted) records and information
- Reasonable determination student not identifiable . . . taking into account other reasonably available information
- “Coded” redacted information for research purposes
- Reasonable methods to identify/authenticate identity of persons to whom disclosed

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41

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## “No Consent” → “Not Records”

- Recall: FERPA
  - Specifies when disclosure permitted without prior consent
  - Excludes documents from coverage
- We have been talking about first category
- Now switching to second category
  - Documents not covered because not “education records” under FERPA

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42

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### What Are NOT "Education Records"?

- Sole Possession Records
- Law Enforcement Records
- Employee Records
- "Eligible Student" Medical Records
- Post-Graduation Records
- Peer Grades

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43

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### What Are NOT "Education Records"?

- Sole Possession Records
- Three conditions must be met:
  1. private note created solely by the individual possessing it
  2. personal memory aid
  3. the information contained in the record not accessible/revealed to any other person (including the student) except the possessor's temporary substitute

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44

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### What Are NOT "Education Records"?

- Law Enforcement Records
  - Records of campus police subject to §99.8
  - §99.8
    - defines "law enforcement unit" and "records of a law enforcement unit"
    - states that education records and personally identifiable information do not lose their FERPA status while in the possession of a law enforcement unit, and
    - emphasizes that FERPA neither requires nor prohibits the disclosure of law enforcement unit records by an educational agency or institution.

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45

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### What Are NOT “Education Records”?

Term	Organization	Authorized to:
“Law enforcement unit”	1. individual, office, department, division or other component of educational agency or institution <b>AND</b> 2. officially authorized or designated by that agency or institution	1. enforce any local, state or Federal law or refer to appropriate authorities enforcement of any local, state or Federal law against any individual or organization except the agency or institution itself <b>OR</b> 2. maintain physical security and safety of the agency or institution
“Records” of a law enforcement unit	<u>Are “records” if:</u>	<u>Are not “records” if:</u>
(Records, files, documents or other materials)	1. created by law enforcement unit; 2. created for law enforcement purpose; <b>AND</b> 3. maintained by law enforcement unit,	1. maintained by component of educational agency or institution other than law enforcement unit <b>OR</b> 2. created and maintained exclusively for non-law enforcement purpose

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### What Are NOT “Education Records”?

- Employee Records
  1. Made and maintained in the normal course of business
  2. Relate exclusively to the individual in that individual's capacity as an employee and
  3. Are not available for use for any other purpose
- *But:* records of higher ed teaching assistants not exempt

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### What Are NOT “Education Records”?

- Eligible Student’s Medical Records
  - Protects college students’ medical records, e.g., created in school medical facilities
- All of the following conditions must be met:
  1. student at least 18 years old or in attendance;
  2. records made/maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional;
  3. record made in professional capacity;
  4. created, maintained or used only for treatment purposes; and
  5. not be available to anyone else.

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### What Are NOT “Education Records”?

- Post-Graduation Records
  - Individual no longer attending student
  - Record not directly related to attendance as student

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49

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### What Are NOT “Education Records”?

- Peer Grades (new §99.3)
- *Owasso ISD v. Falvo* (Sup. Ct. 2002)
  - No “maintenance” until collected and recorded by teacher

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50

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### Personally Identifiable Information

- Information that includes, but is not limited to:
  1. the student’s name;
  2. the name of the student’s parent or other family member;
  3. the address of the student or student’s family;
  4. a personal identifier, such as the student’s social security number, student number, or biometric record;
  5. other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
  6. 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
  7. 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.

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51

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## Personally Identifiable Information

- Check to see if your state has guidelines
- **Example:** N.Y. re redaction of hearing decisions:
  1. The student's name or initials
  2. The student's date of birth
  3. The name of the student's parent or other family member
  4. The address of the student or of the student's family
  5. A personal identifier, such as social security number or student number
  6. The specific school, unless it cannot be avoided (e.g., many districts have only one high school)
  7. The names of any school staff at the building level
  8. A list of personal characteristics that would make the student's identity easily traceable
  9. Other information that would make the student's identity easily traceable
  10. Any mention of HIV/AIDS

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52

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## Personally Identifiable Information

- Redislosures of personally identifiable information
- Recipient: use only for purpose disclosed
- Basic rule: disclosure to 3<sup>rd</sup> party only on the condition that it will not be disclosed to any other party without the prior consent of the parent or eligible student

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53

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## Personally Identifiable Information

- However . . . disclosure with expectation that recipient will make further disclosures IF certain procedures followed.
- Specific provisions for redislosures per:
  - Court order/subpoena
  - Campus Security Policy and Campus Crime Statistics Act (Clery Act)
- Five year access bar for illegal redislosures, failure to destroy

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54

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## Recent Changes - Redisclosures

- Redisclosure of Records - 34 CFR § 99.33
- General rule: disclosure of PII only if recipient will not redisclose without prior consent
  - Now OK: forwarding records to new school district for audit, evaluation or compliance & enforcement
  - Now OK: redisclosures for health/safety emergency, court order/subpoena
  - Now OK: disclosures re Clery Act (campus crime)

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55

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## Other Definitions

- Attendance
- Dates of attendance
- Biometric record
- Disciplinary action
- Disclosure
- Educational agency
- Postsecondary institution

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56

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## Notification of Rights

- When: annually
- How: any means reasonably likely to inform
  - Individual notice not required
- What: inspect/review; amend; consent; complaint
- Some adaptations required: disability; LEP
- **FPCO model notice**  
<http://www2.ed.gov/policy/gen/quid/fpco/ferpa/lea-officials.html>

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57

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### ... but Not Too Many Rights

- Right to see records policy?
- Information in violation of student's "other rights"

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58

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### Inspection and Review

- Inspection and review – not copies
- Provided within "reasonable period of time," but not more than 45 days
- Respond to "reasonable" requests for explanations/interpretations

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59

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### Scope of Right to Inspect

- Overwhelmingly used to inspect/review LEA, post-secondary records
  - Some more recent use to access records maintained by SEA
- Right vested in parents/eligible students, not necessarily proxies, *i.e.*, attorney
- FERPA doesn't prohibit disclosure to parents of eligible students claimed as IRS dependents

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60

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### Timeline, Procedures for Access

- Timeline: “reasonable period” but no more than 45 days from receipt of request
- “Best Practice” procedures
  - Be polite
  - In writing
  - Identify student & requestor
  - “all records wherever maintained”
  - Other desirable practices

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### Must Copies Be Provided?

- Governing language: 99.10(d) — bottom line is that there is no generalized right to copies
  - State law may be more expansive than FERPA
- Common reasons cited: distance; illness
- Is denial of copies interference with basic FERPA rights?
  - N.B. required disclosure in due process hearings

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### Imposition of Copying Charges

- Controlling language: §99.11
- Fees must be “reasonable”
- Copies available upon request under certain circumstances: §99.34

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### Record of Access (Log)

- Purpose: to see requested and actual access by others
- Who can see log?
- Where is log?
- What is recorded in log?
- What is NOT recorded in log?

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64

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### Other Limitations on Access

- Information on more than one student
- Postsecondary records
  - Financial records of parents
  - Confidential letters of recommendation

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65

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### Suggestions Concerning Access

- Key indicator of parent/school relationship
- Well-defined, public policy
- Clear explanations
- Responsive to requests
- Consistent application
- Adaptable to exceptional situations

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66

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### Amendment/Correction of Records

- Important reason for FERPA
- Request, not insist
- Specified grounds: “inaccurate, misleading, or otherwise in violation of student’s privacy rights”

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67

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### Amendment/Correction of Records

- Procedures for requesting amendment
  - Initiation – oral or written
  - Hearing
  - Decision – correction or explanatory statement

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68

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### Amendment/Correction of Records

- Hearing requirements
  - Timely (reasonable time after request)
  - Advance notice (date, time, place)
  - Hearing officer without direct interest in outcome
  - Full opportunity to present evidence
  - Timely decision in writing
  - Summary of evidence/reasons for decision

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69

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### Amendment/Correction of Records

- Decision – correction/explanatory statement
- Often not a “black or white” response
- Explanation becomes part of record

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70

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### Amendment/Correction of Records

- Special situations
- Disciplinary records
- Firearms
- “Informal” records – record of IEP meeting

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71

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### Amendment/Correction of Records

- Observations & suggestions
  1. Requests & procedures should be in writing
  2. Try informal resolution first
  3. Statement should be objective/factual
  4. Be cognizant of other retention requirements

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72

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## Rentention & Destruction of Records

- Basically, not governed by FERPA, but:
  - No records can be destroyed while the request to inspect or review is outstanding (§99.10)
  - Destruction following use for monitoring, research, use by redisclosed party
  - Parent explanatory statements (implied)
  - Access log (implied)
- Consult GEPA and EDGAR regulations
  - Documents retained for compliance/monitoring

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73

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## Destruction per IDEA

- § 300.624 Destruction of information.
  - Inform parents when personally identifiable information is no longer needed to provide educational services to the child.
  - Information must be destroyed at the request of the parents.
  - Certain information may be maintained indefinitely.

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74

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## Special Education Generally

- Some general observations
- Some specific situations
  - Destruction of records
  - IDEA regulations generally (300.610-300.627)
  - Test protocols
  - Access to classroom (observation)
  - Taping IEP meetings

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75

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## Special Education Regulations

- More detailed notice to parents (§300.612)
- Access rights (§300.613)
- Types, locations of information (§300.616)
- Disclosures to private schools (§300.622)
- Children's rights (§300.625)

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76

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## Test Protocols

- History of conflict between test publishers and parents
- Important to accurately define what is being sought
- Now clear that parents may inspect any document containing personally identifiable information, e.g., test instruments, question booklets, answer sheets, even if they include test questions.

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77

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## Access to Classroom

- Parent observation of student in class
  - Student privacy/confidentiality frequently used as reason to bar access
  - Separate letters from FPCO & OSEP show different focuses
  - Some state have enacted legislation to guarantee access
  - Litigation results have varied

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78

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### Selected Litigation

- Private right of action not explicitly authorized by statute
  - *Fay v. South Colonie C.S.D.* (2<sup>nd</sup> Cir. 1986)
- Disclosing university disciplinary records without students' consent violates FERPA
  - *U.S. v. Miami Univ.; Ohio State Univ.* (6<sup>th</sup> Cir. 2002)
- Peer grading decision
  - *Owasso ISD v. Falvo* (Sup. Ct. 2002)

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79

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### Recent Changes - Disclosure

- Disclosure to Parents of "Eligible Students"
- Disclosure without consent OK if:
  - Student is "dependent" [§99.31(a)(8)]
  - Connected to health/safety emergency [§99.36]
  - Alcohol/drug violation by post-secondary student [§99.31(a)(15)]

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80

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### Recent Changes - Contractors

- Expansion of the Definition of "School Officials"
  - The "Blackwater" situation

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81

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### Recent Changes – Disclosure Agreement

- Additional Requirements for Organizations Conducting Studies - 34 CFR § 99.31(a)(6)
  - Must be a written agreement with the organization that specifies the purpose of the study before disclosing without parental consent
  - Specific requirements on usage, retention, destruction of information

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82

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### Recent Changes – Sex Offenders

- Disclosure of Registered Sex Offenders - 34 CFR §99.31(a)(16)
  - School districts required to advise the school community where it can obtain information about registered sex offenders, such as a local law enforcement agency or a computer network address

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83

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### Recent Changes – Authenticate Identity

- Authentication of Identity - 34 CFR 99.31(c)
  - Of any party to whom records are disclosed

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84

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### Recent Changes – Safety Emergency

- Health and Safety Emergencies - 34 CFR §99.36
  - The “Virginia Tech” effect
  - “Rational” “articulable and significant threat” will not be second-guessed by U.S. DoEd

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85

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### Recent Changes – Directory Info

- Disclosure of Directory Information - 34 CFR 99.37
  - Continue to honor former student’s “opt out”
  - No use of SSN unless prior written consent

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86

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### Health Insurance Portability and Accountability Act (HIPAA)

- HIPAA establishes privacy standards for “protected health information (PHI)”
  - PHI may not be disclosed by “covered entities”
  - Most school districts are “covered entities”
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) [42 USC 201]
- HIPAA Privacy Rule [45 CFR Part 160]
- HHS website: <http://www.hhs.gov/ocr/hipaa/>.

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87

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## Protection of Pupil Rights Amendment (PPRA)

- PPRA (20 U.S.C. § 1232h; 34 CFR Part 98) protect the rights of parents and students in two ways:
  - ensure that schools and contractors make instructional materials available for inspection by parents if those materials will be used in connection with an ED-funded survey, analysis, or evaluation in which their children participate; and
  - ensure that schools and contractors obtain written parental consent before minor students are required to participate in any ED-funded survey, analysis, or evaluation that reveals specified types of information

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88

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