

October 28, 2002

Recent Changes Affecting FERPA & PPRA

The following document presents a general explanation of the recent changes to the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA) made by Congress. It also provides a general description of the two U.S. Supreme Court cases involving FERPA, and a recent decision by the U.S. Court of Appeals for the Sixth Circuit. The Department will issue guidance and/or regulations to provide the public with interpretations of these changes, as necessary.

U.S. Supreme Court Ruling

On February 19, 2002, the U.S. Supreme Court ruled in Owasso ISD v. Falvo that peer grading does not violate FERPA. The Department is currently reviewing the Court's ruling and may issue additional guidance or regulations to further clarify the scope of the term "education records."

U. S. Supreme Court Ruling

On June 20, 2002, the U.S. Supreme Court ruled in Gonzaga University v. John Doe. In the Gonzaga case, a student brought litigation against the University for disclosing personally identifiable information, without his consent, in violation of FERPA. The Supreme Court ruled that students and parents may not sue for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act (FERPA).

U.S. Court of Appeals for the Sixth Circuit

On June 27, 2002, the 6th Circuit Court of Appeals unanimously affirmed a lower court's ruling that university disciplinary records are "education records" under FERPA and that disclosing such records without students' consent constitutes a violation of FERPA. In 1998, the Department asked a federal district court in Ohio to enjoin Miami University and the Ohio State University from disclosing records containing the names of student victims and accused students as prohibited under FERPA. On March 20, 2000, the U.S. District Court for the Southern District of Ohio permanently enjoined the two Ohio universities from disclosing their on-campus disciplinary records to the public under the State's open records law.

In affirming the ruling, the circuit court concluded that continued release of student disciplinary records "will irreparably harm the United States" and the Department. This is important for three reasons: 1) the court agreed with the lower court that the Student Right-to-Know and Campus Security Act provides parents and students with statistical information about the type and amount of crimes on campus; 2) the court reaffirmed the Department's broad reading of the term "education records" and stated that Congress, in amending FERPA in 1998 to allow

postsecondary institutions to disclose the final results of disciplinary proceedings, must have intended that disciplinary records be education records or this amendment would be “superfluous”; and 3) the court held that the Department was within its right in seeking an injunctive relief in this case because none of the administrative remedies authorized by FERPA would have stopped the violations. In effect, the court held that the Department can take preemptive actions in enforcing FERPA, rather than only after violations occur.

Background on FERPA

FERPA is a federal law that applies to educational agencies and institutions that receive federal funds under any program administered by the Secretary of Education. Generally, FERPA prohibits the funding of an educational agency or institution that has a policy or practice of disclosing a student’s “education record” without the consent of the parent or eligible student. The FERPA statute is found in 20 U.S.C. § 1232g and the regulations (not yet amended to reflect the most recent legislative changes) are found in 34 CFR Part 99.

No Child Left Behind Act of 2001

Sec. 1061 Annual Notification Requirements for the Secretary of Education

The Secretary is now required to annually inform each SEA and each LEA of their obligations under both FERPA and PPRA. This provision is found in § 1061(c)(5)(C), which are the amendments to PPRA, discussed below. The Family Policy Compliance Office (FPCO) is in the process of finalizing the notices to be provided to SEAs and LEAs. The information will also be posted on our Web site.

Sec. 4155 Transfer of School Disciplinary Records.

FERPA currently permits schools to transfer any and all education records, including disciplinary records, on a student who is transferring to another school. See § 99.31(a)(2) and § 99.34 of the FERPA regulations. This new provision requires States that receive funds under the Elementary and Secondary Education Act (ESEA), within two (2) years, to provide an assurance to the Secretary that the State “has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.”

FPCO is including an announcement in the notice to SEAs and LEAs about this new provision so that SEAs and LEAs can start to implement the new requirement.

Sec. 9528 Armed Forces Recruiter Access to Students and Student Recruiting Information.

FERPA currently allows schools to designate and disclose without consent certain items of information as “directory information.” The FERPA regulations define “directory information”

under § 99.3 of the regulations and set forth the requirements for implementing a “directory information” policy under § 99.37 of FERPA. Generally, “directory information” may be disclosed by a school to any party, provided the requirements of FERPA are followed.

Congress passed a provision in the *No Child Left Behind Act* that addresses the disclosure of directory-type information (students’ names, addresses, and telephone listings) to military recruiters. Congress also included similar language in the *National Defense Authorization Act for Fiscal Year 2002*. Both laws, with some exceptions, require schools to provide directory-type information to military recruiters who request it. Typically, recruiters are requesting names, addresses, and telephone listings on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military.

The Department, in consultation with the Department of Defense, has developed guidance on the provisions contained in these two laws. The guidance has been made available to SEAs and LEAs, as well posted on our Web site: http://www.ed.gov/offices/OM/fpco/hot_topics/ht_10-09-02.html.

Sec. 1061 Student Privacy, Parental Access to Information, and Administration of Certain Physical Examinations to Minors.

The *No Child Left Behind Act* contains a major amendment to PPRA that gives parents more rights with regard to the surveying of minor students, the collection of information from students for marketing purposes, and certain non-emergency medical examinations. PPRA has been referred to as the “Hatch Amendment” and the “Grassley Amendment” after authors of amendments to the law. Now, school officials may hear the law referred to as the “Tiahrt Amendment” after Congressman Todd Tiahrt, who introduced the changes regarding surveys to the PPRA. The statute is found in 20 U.S.C. § 1232h and the regulations (not yet updated) are found in 34 CFR Part 98.

U.S. Department of Education Surveys

Subsection (a) of the legislation was not changed. Subsection (b) added an additional category (see bold below) and made minor changes to the existing seven categories. This provision applies to surveys funded in whole or part by any program administered by the U. S. Department of Education (ED). PPRA provides:

- 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
- that schools and contractors obtain prior written parental consent before minor students are required to participate in any ED-funded survey, analysis, or evaluation that reveals information concerning:
 1. political affiliations or beliefs of the student or the student’s parent;
 2. mental and psychological problems of the student or the student’s family;

3. sex behavior or attitudes;
4. illegal, anti-social, self-incriminating, or demeaning behavior;
5. critical appraisals of other individuals with whom respondents have close family relationships;
6. legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. **religious practices, affiliations, or beliefs of the student or student's parent;**
or
8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

Subsections a and b of PPRA generally apply when a survey is funded, at least in part, by any program administered by the Secretary of Education.

Surveys Funded by Sources Other than U.S. Department of Education

The new provisions (contained in subsection c) apply (as does FERPA) to educational agencies or institutions that receive funds from any program of the Department of Education. Thus, public elementary and secondary schools are subject to the new provisions of PPRA. Here are the new requirements:

- Schools are required to develop and adopt policies – in conjunction with parents – regarding the following –
 1. The right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students.
 2. Arrangements to protect student privacy in the event of the administration of a survey to students, including the right of parents to inspect, upon request, the survey, if the survey contains one or more of the same eight items of information noted above.
 3. The right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students.
 4. The administration of physical examinations or screenings that the school may administer to students.
 5. The collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling, or otherwise providing the information to others for that purpose.
 6. The right of parents to inspect, upon request, any instrument used in the collection of information, as described in number 5.
- Local educational agencies (LEAs) must “directly” notify parents of these policies and, at a minimum, shall provide the notice at least annually, at the beginning of the school year. The LEA must also notify parents within a reasonable period of time if any substantive change is made to the policies.
- In the notification, the LEA shall offer an opportunity for parents to opt out of (remove their child) from participation in the following activities:

- Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information, or otherwise providing that information to others for that purpose.
 - The administration of any third party (non-Department of Education funded) survey containing one or more of the above described eight items of information.
 - Any non-emergency, invasive physical examination or screening that is: 1) required as a condition of attendance; 2) administered by the school and scheduled by the school in advance; and not necessary to protect the immediate health and safety of the student, or of other students.
- In the notification, the LEA shall notify parents the specific or approximate dates during the school year when these activities are scheduled.
 - An LEA is not required to develop and adopt new policies if the State educational agency (SEA) or LEA has in place, on the date of enactment of the *No Child Left Behind Act of 2001*, policies covering the requirements set forth in this law.
 - The requirements concerning activities involving the collection and disclosure of personal information from students for marketing purposes do not apply to the collection, disclosure, or use of personal information collected from students for the exclusive purpose of developing, evaluating, or providing educational products or services for, or to, students or educational institutions, such as the following:
 - College or other postsecondary education recruitment, or military recruitment.
 - Book clubs, magazines, and programs providing access to low-cost literacy products.
 - Curriculum and instructional materials used by elementary schools and secondary schools.
 - Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students.
 - The sale by students of products or services to raise funds for school-related or education-related activities.
 - Student recognition programs.
 - This law is not intended to preempt applicable provisions of State law that require parental notification.
 - This law does not apply to any physical examination or screening that is permitted or required by State law, including such examinations or screenings permitted without parental notification.

- The requirements of PPRA do not apply to a survey administered to a student in accordance with the Individuals with Disabilities Education Act (IDEA).
- These requirements do not supersede any of the requirements of FERPA.
- The rights provided to parents under PPRA transfer from the parent to the student when the student turns 18 years old or is an emancipated minor under applicable State law. The law applies to LEAs, but does not apply to postsecondary institutions.
- An SEA or LEA may use funds provided under part A of title V of the ESEA to enhance parental involvement in areas affecting the in-school privacy of students.

Definition of some terms used in PPRA –

“Instructional Material” – instructional material that is provided to a student, regardless of format, including printed or representational materials, audio-visual materials, and materials in electronic or digital formats (such as materials accessible through the Internet). The term does not include academic tests or academic assessments.

“Invasive Physical Examination” – any medical examination that involves the exposure of private body parts, or any act during such examination that includes incision, insertion, or injection into the body, but does not include a hearing, vision, or scoliosis screening.

“Personal Information” – individually identifiable information including: 1) a student or parent’s first and last name; 2) home address; 3) telephone number; or 4) social security number.

The Department will issue regulations to reflect the changes in FERPA and PPRA. The Family Policy Compliance Office (FPCO) in the Department of Education administers both FERPA and PPRA. Informal inquiries may be sent to FPCO via the following email addresses: FERPA@ED.Gov and PPRA@ED.Gov.