



# **Update from the Family Policy Compliance Office on Privacy Issues and Recent Guidance**

**NCES Forum  
Webinar  
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# **Webinar Agenda**

- **Hot Topics**
- **Guidance**
- **Letters of significance**
  - **Letter to University of Massachusetts**
  - **Letter to Nevada Department of Education**
  - **Letter to North Carolina**
- **Ebola and Health and Safety emergency exception**
- **New Website**
  - **FAQs**
  - **Community of Practice**
  - **FPCO letters**



# Hot Topics

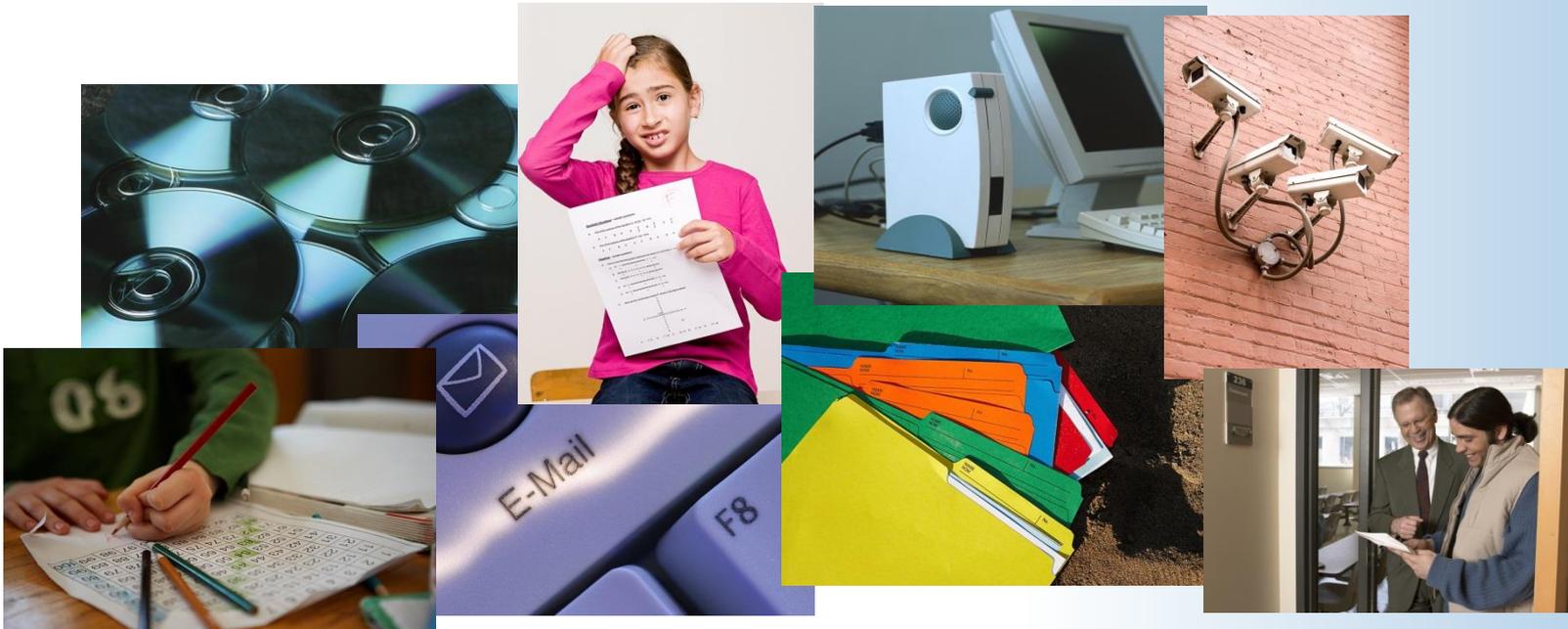
- Privacy is a *hot* national topic
- State legislatures passing privacy laws
- Electronic Privacy Information Center (EPIC) FOIA request
- Outsourcing education services to vendors
- Educational Apps in the classroom
- Data mining by third parties and their using information for advertising purposes
- Ebola and Health and Safety Emergency
- Definition of education records (i.e., emails, text messages, video, etc.)



# What are education records?

“Education records” are records that are –

- directly related to a student; and
- maintained by an educational agency or institution or by a party acting for the agency or institution.





# Guidance

- **FERPA and Disclosures to Community-Based Organizations**
- **Guidance on Uninterrupted Scholars Act**
- **Protecting Student Privacy While Using Online Educational Services**
- **Letters of significance**
- **FERPA and IDEA Part B and C crosswalk**



# Sharing Information with Community-Based Organizations

- CBOs include such entities as volunteer organizations, professional organizations, foundations, faith-based organizations and other public or private nonprofit organizations.
- Partner with schools and LEAs to administer vital academic, social, recreational, and vocational programs to students during the day, after school, and during the summer.
- Offer extracurricular activities such as tutoring and academic enrichment, parent and family engagement, nutrition education, daycare, physical fitness, and job-readiness to youth and parents.



# Sharing Information with Community-Based Organizations

- **Is prior written consent of the parent or eligible student required to disclose information to community-based organizations?**
- In most cases, yes. Written consent is generally required before PII from students' education records may be disclosed to community-based organizations.



# Sharing Information with Community-Based Organizations

- **May a school or LEA disclose directory information to a community-based organization without written consent?**
- Generally yes. FERPA allows schools and LEAs that have adopted directory information policies to disclose properly designated directory information without consent on students whose parents (or eligible students) have not opted out of the disclosure of such directory information. See §§ 99.31(a)(11) and 99.37(a).



# Sharing Information with Community-Based Organizations

- **May a school or LEA disclose de-identified data to a community-based organization?**
- Yes. Schools and LEAs do not need to obtain written consent or to inform parents or eligible students when releasing properly de-identified information. For additional information on de-identified data and recommended practices, see § 99.31(b)(1) of the regulations and a relevant case study released by the Department, [Case Study #5: Minimizing Access to PII: Best Practices for Access Controls and Disclosure Avoidance Techniques.](#)



# Sharing Information with Community-Based Organizations

- Are there ways that a school or LEA may disclose PII from education records to a community-based organization without obtaining written consent of the parent or eligible student?
- Yes. If the disclosure meets one of the exceptions set forth in § 99.31 of the regulations, a school or LEA may disclose PII from an education record of a student without consent to a community-based organization.



# Sharing Information with Community-Based Organizations

- When does the school official exception allow a school or LEA to non-consensually disclose education records to a community-based organization?
- A community-based organization may be considered a “school official” *only* if it:
  - Performs an institutional service or function for which the school or LEA would otherwise use employees;
  - Is under the direct control of the school or LEA with respect to the use and maintenance of education records; and
  - Is subject to the requirements of § 99.33(a) governing the use and redisclosure of PII from education records.
  - Meets the criteria specified in the school’s or LEA’s annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.



# Sharing Information with Community-Based Organizations

- Are there any limitations as to what education records may be disclosed to a community-based organization to which a school or LEA has outsourced an institutional service under the school official exception?
- Yes. The school or LEA is required to use reasonable methods to ensure that school officials, (including community-based organizations) obtain access to *only* those education records in which they have legitimate educational interests. While a school may disclose education records to a community-based organization in order to outsource institutional services or functions, it is important for the school to only share the information which is necessary for the service or function to be performed by the community-based organization.



# Sharing Information with Community-Based Organizations

- **May the school or LEA non-consensually disclose PII from education records to a community-based organization that is conducting a study for the school or LEA?**
- Yes, so long as the study is for a covered purpose and subject to specified conditions. The studies exception allows for the disclosure of PII from education records without consent to community-based organizations conducting studies for, or on behalf of, the school or LEA. FERPA limits the purposes of the studies conducted under this exception to: (1) developing, validating, or administering predictive tests; (2) administering student aid programs; or (3) improving instruction. See 34 CFR § 99.31(a)(6)(i).



# Sharing Information with Community-Based Organizations

- **Must the school or LEA have a written agreement with the community-based organization conducting the study?**
- Yes. Written agreements are required under the studies exception, §99.31(a)(6)(iii)(C), and must—
  - Specify the purpose, scope, and duration of the study and the information to be disclosed.
  - Require the CBO to use PII from education records only to meet the purpose(s) of the study as stated in the written agreement.
  - Require the CBO to conduct the study in a manner that does not permit the personal identification of parents and students by anyone other than representatives of the organization with legitimate interests.
  - Require the CBO to destroy all PII from education records when the PII is no longer needed for the purposes for which the study was conducted, and specify the time period in which the PII must be destroyed.



# Sharing Information with Community-Based Organizations

- **May an LEA non-consensually disclose PII from education records to a community-based organization in order to conduct an audit or evaluation of the school system's education programs?**
- Yes. FERPA's audit or evaluation exception allows an LEA (as a local educational authority) to designate a community-based organization as its authorized representative (see Q.8.) and disclose PII from education records without consent of parents or eligible students to audit or evaluate a Federal- or State-supported education program (see Q.7.), or to enforce or comply with Federal legal requirements that relate to those education programs (audit, evaluation, or enforcement or compliance activity). See 34 CFR § 99.35.



# Sharing Information with Community-Based Organizations

- May the LEA disclose PII from education records to a community-based organization under the audit or evaluation exception for the purpose of the community-based organization evaluating its own program?
- Generally no. The audit or evaluation by an community-based organization of its own program (i.e., to determine whether or not the organization's program is effective) in most cases would *not* be permitted under the audit or evaluation exception because the audit or evaluation exception only permits the audit or evaluation of Federal- or State-supported education programs.



# Disclosures to Child Welfare Agency (CWA) or Tribal Organizations





# **Uninterrupted Scholars Act**

**New exception to the general consent rule passed by Congress January, 2013, P.L. 112-278.**

- **Disclosure permitted to: “agency caseworker or other representative” of a State or local child welfare agency (CWA) or tribal organization who has the right to access a student’s case plan**
- **Disclosure permitted when: the CWA or tribal organization is “legally responsible ... for the care and protection of the student”**



# **Disclosure to Child Welfare Agency**

- 1. Are schools required to disclose personally identifiable information from education records to a child welfare agency or tribal organization?**
- 2. A high school gets a request from the local child welfare agency (CWA) for all school records relating to certain students who are in foster care. Does the high school have to turn over all of these records, or just the information that the high school thinks the child welfare agency needs to see?**
- 3. May a CWA use education records for purposes other than addressing a foster child's educational needs? For example, could the agency use these records to conduct investigations of child abuse or conduct research?**
- 4. Can schools also disclose special education records to CWAs, such as Individualized Education Programs (IEPs) under this exception?**



# Protecting Student Privacy While Using Online Educational Services

This guidance relates to the subset of education services that are:

- Computer software, mobile applications (apps), or web-based tools;
- Provided by a third-party to a school;
- Accessed via the Internet by students and/or parents;  
AND
- Used as part of a school activity.



*This guidance does not cover online services or social media used in a personal capacity, nor does it apply to services used by a school that are not accessed by parents or students.*



# The Challenge of Online Educational Services

- Schools and institutions are increasingly contracting out their functions
- We have new types of data, and much more of it!
- Many online services do not utilize the traditional 2-party written contractual business model
- Increasing concern about the commercialization of personal information and behavioral marketing
- We need to use that data effectively and appropriately, and still protect students' privacy
- Click-wrap agreements



# Use written contracts when possible

- When drafting and reviewing these contracts, the Department recommends the inclusion of certain provisions:
  - Security and Data Stewardship Provisions.
  - Collection Provisions.
  - Data Use, Retention, Disclosure, and Destruction Provisions.
  - Data Access Provisions. Modification, Duration, and Termination Provisions.
  - Indemnification and Warranty Provisions.



# The Challenge of Online Educational Services

- Schools and districts sometimes can't negotiate agreements with providers of consumer apps, and are faced with a choice to accept the providers' TOS or not use the app.
- Extra caution and extra steps are warranted before employing Click-Wrap consumer apps:
  - Check Amendment Provisions.
  - Print or Save the TOS.
  - Limit Authority to Accept TOS.



# Is student information used in online educational services protected by FERPA?



It depends!

Some data used in online educational services is protected by FERPA.

Other data may not be.

*Schools will typically need to evaluate the use of online educational services on a case by case basis to determine if FERPA-protected information is implicated.*



# What about metadata?

“Metadata” are pieces of information that provide meaning and context to other data being collected, for example:

- Activity date and time
- Number of attempts
- How long the mouse hovered before clicking an answer

Metadata that have been stripped of all direct and indirect identifiers are not protected under FERPA

(NOTE: School name and other geographic information can be indirect identifiers in student data)

Properly de-identified metadata may be used by providers for other purposes (unless prohibited by other laws or by their agreement with the school)



# Letter to the University of Massachusetts (11/22/2013)

- The Issue—
  - Maryland State law requires all institutions that operate within the State, with certain exceptions, to register with the Maryland Higher Education Commission. As of July 1, 2012, state law requires that every 100% online institution that has Maryland students also must register with the Commission.
  - Further, Maryland State law requires online institutions that provide distance learning to Maryland students must submit student-level enrollment data, degree data, and financial aid data to the Maryland Longitudinal Data System Center (Center).
  - The University of Massachusetts questioned whether they can disclose the requested PII from education records to the Center.



# Letter to the University of Massachusetts (11/22/2013)

- The Facts—
  - Maryland Higher Education Commission is the postsecondary “educational authority” within the State.
  - State law specifically designates the Center as an “authorized representative” of the Commission
  - The Center uses the data compiled “to improve the State’s education system and guide decisionmaking by State and local governments, educational agencies, institutions, teachers, and other educational professionals.”
  - Massachusetts is registered as an online institution with the Commission



# Letter to the University of Massachusetts (11/22/2013)

- The Conclusion—
  - The Commission is an postsecondary educational authority
  - University of Massachusetts must determine that the Commission properly designated the Center as it authorized representative through a written agreement before disclosing education records to the Center.
  - Massachusetts must determine that the disclosure is in connection with an audit or evaluation of a Federal- or State- supported education program, or to enforce or comply with Federal legal requirements that relate to those education programs
  - State law stating that the Center is an authorized representative is insufficient. FERPA would require the Commission to properly designate the Center is an “authorized representative” of the Commission.
  - Massachusetts is not required to formulate a written agreement with the Commission before disclosing the requested information to the Center.



# Letter to University of North Carolina at Chapel Hill (4/28/14)

- The Issue—
  - A newspaper requested access to certain information on student athletes maintained by the University of North Carolina at Chapel Hill under the State's Public Records Act.
  - The newspaper filed lawsuit against University seeking a copy of a spreadsheet which includes a data set on athletes that includes: Personal identification number, student name, sport, course title, degree date, student major field of study hours earned toward degree, and GPA.
  - The spreadsheet was an internal document related to student athletes who participated in courses offered by the University's Department of African and Afro-American Studies.



# Letter to University of North Carolina at Chapel Hill (4/28/14)

- The Facts—
  - University believes the spreadsheet is either already “linked or linkable to specific students” with reasonable certainty and if made public the information it contains, in combination with other information publicly available, would allow members of the University community to identify with reasonable certainty individual student athletes who took a course.
  - The requested newspaper has previously filed over 60 related public records requests with the University.



# Letter to University of North Carolina at Chapel Hill (4/28/14)

- The Conclusion—
  - FPCO concluded that even if the University removed the students' names and other direct identifiers from the spreadsheet and disclosed the other requested information, it appears based on the information provided by University, that disclosing the information would be identifiable to some students.
  - The University is in the best position to make the determination.
  - A student's identity may be personally identifiable, even after removal or redaction of nominally identifying information from student-level records. This may be the case with a highly publicized disciplinary action, or case of a well known student, where a student could be easily identified even after record has been scrubbed of identifying data.
  - The court ruled in favor of the University



# Letter to Nevada Superintendent of Public Instruction (7/28/14)

- The Issue—
  - Parent requested to view his children’s data in the State’s longitudinal data system (SLDS).
  - State Department of Education (SDE) asked whether the SLDS data are “education records” under FERPA. Whether SDE can fulfill the request by allowing the parent to view the data by providing the parent a copy of the SDE’s data dictionary and explaining to the parent the data in the SLDS; and whether SDE has to write a computer program costing the State thousands of dollars interpreting the data in the SLDS in order to respond to the parent’s request to inspect and review education records.



# Letter to Nevada Superintendent of Public Instruction (7/28/14)

- The Facts—
  - Parents have the right to review education records maintained by an SEA on their children who are or have been in attendance at any school subject to FERPA.
  - Data from schools are automatically uploaded into SLDS on a nightly basis.
  - Since students generally are not in attendance at an SEA, it follows that most FERPA provisions generally do not directly apply to SEAs, except, for example, such provisions regarding redisclosure and recordation which do apply.
  - Congress amended FERPA in 1994 as part of the Improving America's Schools Act so that parents would have the right to inspect and review education records maintained by an SEA.



# Letter to Nevada Superintendent of Public Instruction (7/28/14)

- The Conclusion—
  - Data received from schools and maintained by the State's SLDS are education records
  - The SEA can fulfill the parent request for access by allowing the parent to view requested data included in the SLDS data fields; providing parents a copy of the data dictionary; and, if requested to do so, by providing a reasonable explanation of the children's data included in the SLDS to the parent.
  - The SEA would not have to create a new, interpretive record or document for the parent in response to a request to access his children's education records.
  - The SEA may ask for legal certification denoting parenthood, such as a birth certificate, if needed to authenticate identify of individual requesting access



# Ebola and the Health and Safety Emergency Exception

- On October 27, 2014, CDC issued updated guidance outlining recommendations for individuals with possible exposure to Ebola, guidance that details symptom monitoring and travel restrictions for these individuals. [Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure](#)
- [Advice for Colleges, Universities, and Students about Ebola in West Africa](#)
- HINI Guidance: <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf>



# Health or Safety Emergencies Exception



**What conditions apply to disclosure of information in health or safety emergencies?**

- Disclosure is necessary to protect the health or safety of the student or others.
- There is an articulable and significant threat to the health or safety of a student or other individuals.
- Appropriate parties typically means local, State, or federal law enforcement, trained medical personnel, public health officials, and parents.
- Must be related to an actual, impending, or imminent emergency.



# FPCO New Resources Website

- <http://familypolicy.ed.gov/>
- New resources website
- Organized to be more customer friendly
- FAQs
- Guidance and Resources
- Finding letters of significance
- E-complaint form
- Submit questions
- Community of Practice



# Contact Information



Privacy Technical  
Assistance Center

## Family Policy Compliance Office

Telephone: (202) 260-3887

Email: [FERPA@ed.gov](mailto:FERPA@ed.gov)

FAX: (202) 260-9001

Website: [www.ed.gov/fpco](http://www.ed.gov/fpco); or  
<http://familypolicy.ed.gov>

## Privacy Technical Assistance Center

Telephone: (855) 249-3072

Email: [privacyTA@ed.gov](mailto:privacyTA@ed.gov)

FAX: (855) 249-3073

Website: [www.ed.gov/ptac](http://www.ed.gov/ptac)