



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

To: Registrar's Office; Department of Student Life; Provost's Office, IS&T; Affirmative Action; Disabilities Services; Judicial Affairs; Campus Safety; Campus 411; Department of Audits; and Alumni Affairs
Date: September 15, 2009
Re: FERPA Amendments

Effective January 8, 2009, FERPA regulations (the "regulations") were amended by the Secretary of the Office of Planning, Evaluation, and Policy Development of the Department of Education (DOE) to clarify the appropriate scenarios for education record disclosure. New requirements, clarifications and other significant changes are listed below. Please share this document with members of your office or department to ensure compliance with the amended law.

Significant Changes

Definitions

"Personally Identifiable Information" is amended by adding "biometric record" (see below) to the list of personal identifiers and any information requested by any person that CSU *reasonably believes* knows the identity of the student to whom the education record relates. Other indirect identifiers like date and place of birth and mother's maiden name were also added to the list of personally identifiable information.

"Education Records" is amended to:

1. clearly exclude peer graded assignments that have not been collected and recorded by a teacher or professor. Peer reviewed paper before collected and recorded by a teacher or professor will not be subject to consent and disclosure requirements;
2. clarify that, with respect to former students, the term educational records excludes records created or received after an individual is no longer a student in attendance and are not directly related to the individual's attendance as a student. An example of a record excluded from the definition would be alumni activities.

"Disclosure" is amended to exclude the act of returning an education record to the source of the education record. This is significant because FERPA regulates when and to whom education records may be disclosed.

“Directory information” is amended by stating that directory information **may not** include a student’s Social Security Number (SSN) or student ID number. Directory information **may** include a student’s user ID number or other unique identifier used by the student to access or communicate in electronic systems, but only if the electronic identifier cannot be used to gain access to education records except when used with other factors known only by the student (PIN number, password, etc.).

“Attendance” is amended to clarify that FERPA applies to the records of students receiving instruction by means that do not require physical presence in the classroom, including online study via videoconference, internet, satellite, or other electronic information and telecommunications technology.

“Biometric record” as used in the definition of “personally identifiable information” is a record of one or more measurable biological characteristics used in automated recognition (fingerprints, DNA, handwriting, etc.).

When is prior written consent not necessary to release education records containing personally identifiable information?

1. Prior written consent is not necessary to disclose education records to “school officials” that have a “legitimate educational interest”. Reasonable methods to limit access to education records must be used to ensure that school officials only have access to records of legitimate educational interest. Schools that do not use physical or technological barriers must ensure their administrative methods comply with the “legitimate interest” requirements.

- The regulations expand the school officials’ exception to include contractors, consultants, volunteers and other outside parties to whom CSU has outsourced to perform CSU services. The outsourced parties performing CSU activities must be under the direct control of CSU and perform services that would otherwise be done by CSU. Any outsourced party is subject to redisclosure requirements.

2. Prior written consent is not necessary if the disclosure is to another school system but must be related to the student’s enrollment or transfer to the school system.

- This was implemented in the wake of the Virginia Tech tragedy. The purpose is to clarify that all education records, including health and disciplinary records, may be disclosed in an attempt to facilitate good information sharing.

3. Prior written consent is not necessary before disclosing education records related to educational research; however, the organization conducting the study must agree in writing to:
 - a. describes the scope, purpose, duration, etc. of the study;
 - b. use the personally identifiable information only for purposes stated in the written agreement;
 - c. not allow any parent or student to be identified by anyone other than representatives of the study with legitimate interests; and
 - d. destroy or return all personally identifiable information to CSU.
4. Prior written consent is not necessary and CSU is not **required to make a reasonable effort to notify** student/parent where CSU is being requested to disclose educational records to the Attorney General in response to an *ex parte* court order as part of an investigation or prosecution related pertaining to terrorism.
5. Prior written consent is not necessary to conform to the requirements of the Campus Sex Crimes Prevention Act to release information CSU receives from a state community notification program about a student registered as a sex offender in the State.
6. CSU may release any disclosed records without consent once all personally identifiable information is removed. Parties releasing de-identified information must make a reasonable determination that the student's identity is not identifiable, even after multiple releases.
7. CSU may release education records for education research by attaching a code to each record that allows the recipient to match the information from the source. The code must only be used to identify a de-identified research record. The code must not be based on a SSN or student ID number. CSU must not disclose how the codes are generated or the method of code assignment. CSU must use reasonable methods to authenticate the identity of parties to whom educational records are disclosed, such as a secret pin or password, but not a SSN or date of birth.
8. Prior consent is not required to disclose personally identifiable information within educational records to state auditors.
9. Prior written consent is not required to disclose educational records to the student's parents if the student is a dependent for Federal Income Tax purposes. The parents should provide a copy of the IRS Form 1040 to prove the student is dependent.

Redisclosure of education records and Record keeping by State and local authorities and Federal officials and agencies

Redisclosure

CSU is required to keep records of parties who request access to personally identifiable information. The record must include the **names** and **legitimate education interests** of

state and local educational authorities and federal official and agencies that may make further disclosures of personally identifiable information without student consent.

- State and local educational authorities and federal officials that receive education records (US comptroller, US Attorney General, Secretary of Education, state/local education authorities “ hereinafter ‘Government Officials’”) are permitted to redisclose education records on behalf of CSU in accordance with redisclosure requirements in order to facilitate statewide data sharing systems and ease administrative burdens.

Recordation Requirements

CSU is required to obtain and make available to parents or students a copy of the record of further disclosures maintained by Government Officials upon request.

When education records are released for a health/safety emergency, CSU must record the **articulable** and **significant threat** to the health/safety of the student(s) and to whom the information was disclosed.

Any Government Officials making further disclosures on behalf of CSU must record the names and legitimate interests of the parties to which information was disclosed if the information was received from an educational institution/state/federal authority that has not recorded the disclosure. This amendment to FERPA provides clarity as to where the duty to record parties and legitimate interests falls when further disclosures of personally identifiable information are made by a party acting on behalf of CSU.

- **For Example**, the party (State Authority) disclosing the information must make a record of the names/interest of the party receiving the information (Federal Authority) IF the information was received from a party (CSU) that has not recorded the disclosure.

Any Government Officials recording further disclosures may maintain the record through means other than the student’s name (class, district, etc. or any other appropriate measure).

Government Officials must provide a copy of any further disclosures to CSU within a reasonable time (not to exceed 30 days) upon request.

Redisclosure limitations

The party receiving a subpoena to disclose an education record has the duty to notify the student/parents before complying with the subpoena.

If the DOE determines that the third party **failed to notify** the students or parent in the event of a subpoena or **improperly redisclosed** personally identifiable information CSU may not disclose any education record to that third party for at least **five years**.

- **For example**, X is conducting a study for CSU and needs access to education records containing personally identifiable information to complete the study. If the DOE determines X improperly redisclosed personally identifiable information or failed to notify a student about a subpoena, CSU must cut off X's access to the education records for at least five years.

CSU may disclose personally identifiable information with the understanding that (1) the party receiving the information may make further disclosures on behalf of CSU, (2) disclosure requirements are met and (3) the party receiving the information (Government Officials) has complied with the recordation requirements.

Sixteen (16) scenarios where consent is not needed to disclose education records containing personally identifiable information.

- o Disclosure of directory information
- o Disclosure to school officials
- o Disclosure to another educational institute where the student intends to enroll
- o Disclosure to the student
- o Disclosure to the parent of a student who is considered a tax dependant
- o Disclosure in the event of a health or safety emergency
- o Disclosures in compliance with a subpoena
- o Disclosure of relevant information in the context of a lawsuit between the student and CSU
- o Disclosure to the parents of a student who is under 21 and has violated drug or alcohol policies
- o Disclosure of the final results of a disciplinary proceeding against a student that CSU has determined violated a CSU rule in connection with alleged acts that would, if proven, constitute a crime of violence or non-forcible sex act
- o Disclosures of the final results of disciplinary proceedings to the victim concerning a violent crime or non-forcible sex act
- o Disclosure in connection with financial aid that the student has applied for or received
- o Disclosure to authorized representatives in connection with an audit of federal or state supported education programs
- o Disclosure to accrediting organizations
- o Disclosure to organizations conducting studies
- o Disclosure concerning sex offenders required under the Wetterling Act

CSU must inform any party to whom disclosures are made of the duty not to make any further disclosures without prior student consent, subject to the eight exceptions listed immediately below:

- 1) disclosure to parents of a dependent student as defined by IRS regulations;
- 2) disclosure as a result of judicial orders/subpoenas/lawsuit;
- 3) release of directory information;
- 4) disclosure to parents of non-eligible students;
- 5) disclosure of the results of a CSU disciplinary proceeding if the student is an alleged perpetrator of a crime of violence or non-forcible sex offense;
- 6) disclosure to a parent of a student violation related to the use or possession of alcohol or any controlled substance;
- 7) disclosure of individuals required to register as sex offenders; and
- 8) disclosure under the Cleary Act (disclosure to the accused and accuser regarding the outcome of any campus disciplinary proceeding alleging a sexual offense.

Information disclosure for Federal or State program purposes

The authority of US comptroller, Us Attorney General, Secretary of Education, state/local education authorities to conduct an audit, evaluation, or compliance must be established under State, Federal, or local authority. FERPA does not grant these agencies authority to conduct such activities.

Disclosures for health/safety emergency

Personally identifiable information may be disclosed to appropriate parties, including parents of an eligible student (one attending an institution of higher education), if necessary to protect the health and safety of the student or others.

If disclosing education records without consent due to an emergency situation, the “totality of the circumstances” may be taken into account when determining whether or not there is an “articulable and significant threat” that would warrant such disclosure. If CSU determines that there is an “articulable and significant threat” to the health or safety of a student or other individuals, it may disclose information from education records to third parties whose knowledge of the information is necessary to protect them.

Directory disclosure

CSU must continue to honor valid requests to opt out of directory information disclosure made while the student was in attendance at the school even when the individual is no longer a student.

The right to opt out of directory disclosure does not apply in the classroom setting. While enrolled in a class, students may not refuse to disclose their name, email address, etc. to the professor during the course of the class under the right to opt out of the directory disclosure.

Any directory information based on SSN must have written consent before disclosure.

What must CSU submit to the DOE when a violation is alleged to have occurred?

CSU may be required to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out enforcement responsibilities.

What you should know about a DOE investigation

- *Complaint/Investigation Procedure*

It is sufficient for a complaint to allege that CSU violated a FERPA requirement. The complaint need not allege the violation is the result of a policy or practice of the school.

The DOE may investigate on its own initiative, such as when a parent/student has withdrawn the complaint or even when no complaint has been filed. The DOE also has the right to determine whether or not CSU failed to comply with FERPA requirements and if so, whether the violation was based on CSU practice or policy.

- *Content of notice issued by DOE*

The notice from the DOE will direct CSU to submit a written response within a specified time period. The response should include any relevant information, including information about its policies and practices regarding education records.

- *Responsibilities of the DOE*

The DOE may find the failure to comply with FERPA requirements was based on a policy or practice.

- *How are decisions enforced?*

The Secretary of Education may take any legally available action to enforce DOE decisions in instances of non-compliance.

Please contact the Office of General Counsel (216-687-3543) with any questions that you may have regarding FERPA or its amendments.