

Information Sharing Guide for K-12 Public Schools

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Purpose

In the current school climate, the health and safety of students, staff, and visitors has become paramount. Commensurate with this concern is the need for school and law enforcement personnel to have the ability to access and share critical student educational, health and safety related information while balancing this need with the student's protected right of privacy. To that end, this information sharing guide is intended to serve as a resource for school and law enforcement personnel to help them identify issues for discussion with their legal counsel when considering how they can share and/or access pertinent student information in an effective and timely manner.¹ This guide focuses on the ways in which administrators, teachers, counselors, threat assessment teams, and members of law enforcement can work with their legal counsel to carry out their mission of risk reduction, while respecting the requisite confidentiality of the student.

Accordingly, this guide focuses primarily on the Family Educational Rights and Privacy Act (FERPA), which protects the confidentiality of student education records and the personally identifiable information (PII) contained therein, as well as attendant Virginia law that serves as the basis for student record confidentiality. The Health Insurance Portability and Accountability Act (HIPAA), which protects the confidentiality of student medical records, rarely applies to public schools since most school records, to include counseling and school nurse records, are covered by FERPA. Therefore, the primary thrust of this guide is geared towards FERPA as **FERPA provides students with certain privacy rights, but also gives schools and divisions flexibility to disclose PII, in health and safety emergencies and other specified circumstances, as summarized below and described in more detail in applicable regulations. The purpose of this guide is to highlight questions about how FERPA applies to schools' and divisions' disclosures of PII from student education records to school officials, school security units, outside law enforcement entities, school resource officers (SROs), other schools, and otherwise.**

FERPA affords schools and divisions flexibility when responding to circumstances that could threaten the health or safety of individuals in their school community. Understanding the provisions of FERPA relative to such circumstances will facilitate conversations between school officials and their legal counsel, so that decisive, quick action can be taken when challenges arise. The following frequently asked questions detail how FERPA may apply in these circumstances. Although this guidance is focused on FERPA, there may be other federal and state laws, such as civil rights and privacy laws that are also relevant to decision-making about students. At the federal level, for example, public elementary and secondary schools are subject to federal civil rights laws, including laws that prohibit discrimination based on: disability (the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973); race, color, and national origin (Titles IV and VI of the Civil Right Act of 1964); sex (Title IX of the Education Amendments of 1972); and religion (Title IV of the Civil Rights Act of 1964). Information disclosure decisions are not likely to implicate these laws, however, so long as decisions are made in a non-discriminatory manner. Also, state educational agencies and local educational agencies must comply with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) in educating children with disabilities, including IDEA's confidentiality of information requirements.

The second part of this guide focuses on **Mental Health Care Providers: The Duty to Warn** in terms of the types of records that relate to the health and medical treatment of a student, including their physical as well as their mental health. It also delineates the circumstances under which school personnel, including threat assessment team members and law enforcement personnel, may access

¹ This guide is not intended to provide legal advice, and should not be viewed as a substitute for legal advice from legal counsel consulted specifically by schools, divisions and/or law enforcement entities to provide such advice regarding the legal rules and considerations that apply in particular circumstances. Schools, divisions and law enforcement entities are encouraged in all cases to seek legal advice from their own counsel regarding the types of issues that are highlighted, in introductory, summary form only, in this guide.

otherwise confidential student medical records, and under what conditions that information can be shared and with whom.

Finally, this guide sets forth practical considerations for developing a **Memorandum of Understanding** between schools and law enforcement that addresses key information sharing issues.

I. Understanding and Navigating the Family Educational Rights & Privacy Act (FERPA) – Frequently Asked Questions

A. What is FERPA and who does it apply to?

FERPA is a federal law the purpose of which is to protect the rights and privacy interests of both parents and students in regard to the student’s education records. FERPA regulations are found in Title 34 of the Code of Federal Regulations, Part 99. FERPA was designed **to protect the education records of the student maintained by educational agencies or institutions.**

Educational agencies and institutions generally refers to local educational agencies, elementary and secondary schools, and post-secondary institutions.

Federal Law – FERPA

Statute: 20 USC § 1232(g)

Regulations: 34 C.F.R. Part 99

Virginia Law

Virginia Education Code: Title 22.1, Chapter 14, Article 5: Pupil Records

Board of Education Regulations: Administrative Code, Chapter 150: Management of the Student’s Scholastic Record in the Public Schools of Virginia – § 10 (Definitions), § 20 (Management of Records), § 30 (Access)

B. What are the rights of parents under FERPA?

The main thrust of FERPA was essentially to provide four basic rights:

- To provide the parent the right to inspect and review their child’s education record.
- To allow the parents the right to request an amendment to those records by way of a specified process.
- To provide the parent with some right of control over the disclosure of information from those education records by requiring the school division to obtain the “prior consent” of the parent before such information is disclosed, unless an exception applies.
- To provide the student the right, upon turning 18 or upon entering college, to have the parent’s control over the record transferred with all existing rights to the student. The student, upon turning 18 or entering college, becomes “an eligible student” thereby obtaining full rights over the records.

FERPA also requires school divisions to notify parents and eligible students on an annual basis of their specific rights under the Act.

For more detailed information, please see Question 4 of Appendix A.

C. What is included in the “education record” of the student?

FERPA defines Education Records as: records that are (1) directly related to the student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.²

The term “education record” **can** include the following examples:

- Assessments
- Correspondence between schools about students
- Disciplinary records
- Health records
- Information about parents
- Personally identifiable information (PII) on students – e.g.: student’s name, parents/family members names; address; social security number and other personal identifiers; indirect identifiers such as date and place of birth and mother’s maiden name; 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 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.

NOTE: The general rule is that schools must obtain prior, written consent of a parent to disclose PII, and must make a record of the consent, as well as a record of the disclosure of that information without consent when an exception to the consent requirement applies.

For more detailed information, please see Questions 8–12 of Appendix A.

- Report cards
- Surveys that yield personally identifiable information
- The education record of the student may also include other materials such as films, tapes, video recordings or photographs containing information directly related to a student and that are maintained by an educational agency or institution or person acting for the agency.

For more detailed information, please see Question 5 of Appendix A.

Examples of what are NOT education records:

- Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- Records of a law enforcement unit of an educational agency or institution subject to the provisions of Section 99.8 of the FERPA regulations. Please note: a “law enforcement unit” for FERPA purposes may be represented by a school resource officer or other sworn law enforcement officer, but that need not necessarily be the case. Under FERPA, “law enforcement unit” means “any individual, office, department, division, or other component of

² In *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002), the U.S. Supreme Court references the ordinary definition of “maintain” and cites it to mean “to keep in existence or continuance; preserve, or retain.” The Court further states that as this definition applies to education records maintained by a school, the word “maintain” “suggests that FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent, secure database perhaps even after the student is no longer enrolled.” The Court cites as an example a school registrar maintaining a student’s folder in a permanent file. Of course, these are only examples, and other means of maintaining records could also result in “maintained” education records covered by FERPA.

an educational agency ... such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency ... to- ... Maintain the physical security and safety of the agency ... A component of an educational agency ... does not lose its status as a 'law enforcement unit' if it also performs other, non-law enforcement functions for the agency ... including investigation of incidents or conduct that constitutes or leads to disciplinary action or proceedings against the student." 34 C.F.R. § 99.8. A February, 2019 U.S. Department of Education Privacy Technical Assistance Center ("PTAC") publication, "School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)" (attached as Appendix A) gives the example that while some larger school districts may have their own fully equipped police units, others may have "smaller security offices," and "[o]ther schools designate a vice principal or other school official to act as the law enforcement unit officer." Appendix A at Q. 18. Thus, any individual, office or other component of a school officially authorized or designated by a school to, among other duties, maintain the security and safety of the school, can be a "law enforcement unit" for FERPA purposes.

Reference: 34 C.F.R., Section 99.3; 20 U.S.C. 1232g(b)(3)b(5). See also Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records (Dec. 2019) at Q 23 (available at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf).

D. What does FERPA protection of a record mean?

FERPA protection, in its simplest terms, means that an individual or entity requesting disclosure of a student education record may only be permitted access to it if one of three conditions has been met:

- The individual or entity has obtained the prior, written consent of the parent to access that particular record if the student is under the age of 18.
- The individual or entity has obtained the prior, written consent of the student to access that particular record if the student is 18 or older.
- Disclosure is permitted under one of the conditions in which prior consent is not required to disclose information. (*see Question F: Under What Conditions is Prior Consent Not Required to Disclose Student Education Record Information?*)

Example: A local employer who regularly hires high school students visits the high school to request a copy of a student's grade transcript. The student had filled out an application for employment but did not attach their transcript as requested. None of the FERPA disclosure without consent conditions (discussed more below) apply, so therefore, the employer must obtain the prior, written consent of the parent if the student is under the age of 18, or the student if the student is 18 or older, before the transcript can be disclosed.

E. What are examples of types of information that are not covered by FERPA (i.e., no parental consent required for release)?

Example 1: Investigative Statements Acquired from Students

- For FERPA purposes, any verbal statement acquired from a student or witness during the course of a school investigation or in another context that is not reduced to writing or otherwise recorded (electronically or otherwise) would not be an education "record" and

could therefore be shared with law enforcement officers, parents or others as necessary and appropriate.

- If the statement is obtained during the course of a school disciplinary investigation for school disciplinary purposes and documented in any form, it may not be shared with law enforcement officers for the purpose of pursuing a criminal investigation and determining whether the statement contains any evidence of criminal activity or involvement in a crime, absent a subpoena or other applicable exception.

Example 2: School Cameras – Students on Film

- Schools across Virginia have exercised their right to place cameras in legally approved areas within the three school authority zones in Virginia, which are school buildings and grounds, school buses and other official school transportation vehicles, as well as school-sponsored activities. The purpose of the camera system is to gather evidence of school violations which may or may not be criminal acts.
- Schools own the cameras and the film or digital video files. Film or digital files which contain images of students and the actions recorded are not FERPA records if the camera and recording system are maintained by a component that is responsible for maintaining the security and safety of the school and are created for a law enforcement purpose (i.e., they are “law enforcement unit records”, as defined above). In such circumstances, the film may be used as evidence for purposes of a criminal prosecution, and may be shared with outside law enforcement officers without a subpoena or other FERPA exception. Further, if such records were not created by a law enforcement unit exclusively for a non-law enforcement purpose (i.e., they were created at least in part for a law enforcement purpose), they may be shared by the law enforcement unit with school officials for disciplinary or other purposes at the discretion of the law enforcement unit; such records would be education records covered by FERPA in the hands of such school officials.
- If film or digital video files are maintained by an individual or office other than a school’s law enforcement unit they are covered by FERPA. As such, they may be reviewed by school officials with a legitimate educational interest (which may include a school resource officer acting in the capacity of a school official as discussed below), but are otherwise only subject to disclosure if a FERPA exception (e.g., health or safety emergency, subpoena, etc.) applies.

Example 3: Personal Observations

- Because FERPA applies to the disclosure of education records and PII from education records maintained by a school, FERPA does not prohibit a school official from releasing information that was obtained through that school official’s personal knowledge or observation, or verbally from another person based on the other person’s personal knowledge or observation, rather than from the student’s education records. It should be noted, however, that this general rule does not apply where a school official learns of information about a student through their role in making a determination (e.g., a disciplinary decision) about the student that is maintained in an education record.

For more detailed information, please see Questions 36–37 of Appendix A.

NOTE: It is important to remember that because FERPA governs record access only, it does not cover oral communications, observations, oral history, reactions, or opinions that are related to a student, the things they say to school officials, or their observed actions.

Where not derived from education records maintained by the school and falling instead within the scope of personal observation and knowledge described here, information about the following topics, among others, may be exchanged by school and law enforcement personnel:

- Communicated threats of violence
- Harassment, intimidation and/or bullying
- Stalking
- Suicidal ideation
- Threatening behavior
- Unusual or significantly disruptive behavior

Of course, the health and safety emergency exception and other exceptions summarized in this guide may also permit the sharing of information about such issues, even if that information is maintained in education records.

Example 4: Evidence Acquired from School Searches and Investigations

Information derived from school searches of the student’s person and/or their belongings, which may or may not yield evidence of a school violation or violation of law, including texts, emails, pictures, symbols, drawings, substances, liquids, and devices, to the extent it is limited to personal observations, would fall outside the scope of FERPA. Therefore, such information obtained from a school search may be disclosed verbally to appropriate school officials and law enforcement, if applicable, without the prior consent of the parent.

NOTE: It is important to emphasize however that documents created by a school regarding such searches would become student education records, and therefore could only be disclosed if a FERPA exception applies.

F. Under What Conditions is Prior Consent Not Required to Disclose Student Education Record Information?

No prior parental consent is required to disclose student education records, or information from such records, under numerous conditions specified by FERPA. Some notable examples are described here.

- **School Officials:** FERPA-protected records and information from such records may be disclosed to and shared with other school officials, including but not limited to teachers, within the school or school division who have been determined to have legitimate educational interests in reviewing the records and information. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

See § 99.31 (a) (1) of Appendix B.

NOTE: A school official may include but is not limited to a teacher, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, school attorney, accountant, human resources professional, information systems specialist, and support or clerical personnel.

As discussed briefly at Question G, a law enforcement officer may be considered a school official under the requirements set forth under the Law Enforcement Section of Appendix A.

A contractor, consultant, volunteer or other party to whom a school has outsourced institutional services or functions may also be considered a school official for purposes of FERPA provided that such outside party:

- Performs an institutional service or function for which the school or division would otherwise use employees; and
- Is under the direct control of the school or division with respect to the use and maintenance of the education records;
- Are subject to FERPA's use and re-disclosure requirements set forth in 34 CFR § 99.33(a); and
- Must satisfy the criteria specified in the schools' or divisions' annual notification of FERPA rights for being "school officials" with "legitimate educational interests" in the education records.

NOTE: The focus of the "direct control" criterion is that such outside party must be under the direct control of the school with respect to their handling of education records. The person receiving the information does NOT have to be under the control or employment of the school for all purposes. If an outside individual meets the criteria specified above and is bound by an agreement between the school and the individual and/or the individual's employer that defines how the individual may and may not access and disclose FERPA-covered education records, that would satisfy the direct control requirement for FERPA purposes.

For an extensive list of additional persons who may qualify, and other more detailed information, please see Question 13 of Appendix A.

- **Officials of Other Schools:** If certain notice and procedural requirements are satisfied, FERPA-protected records and information in such records may be disclosed to officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll.

For detailed information on the rules that govern schools' disclosing education records of a student or transferring certain student disciplinary records to other schools, please see Questions 33–34 of Appendix A. See also §§ 99.31(a)(2) and 99.34 of Appendix B.

- **Juvenile Justice System:** FERPA-protected records and information from such records may be disclosed to state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are being released. (See §§ 99.31(a)(5) and 99.38 of the FERPA regulations).

See also Title 22 of the Virginia Education Code, 22.1-287.1, which is discussed in detail in the Law Enforcement Section and Question 35 of Appendix A.

- **Subpoenas and Court Orders:** FERPA-protected records and information in them may be disclosed in order to comply with a judicial order or lawfully issued subpoena. The regulations direct the school to make a reasonable effort to notify the parent or eligible student of the court order or subpoena in advance of compliance. This notification requirement is eliminated for instances in which a court or other agency issues either a Federal Grand Jury subpoena or a subpoena for a law enforcement purpose and the court or issuing agency has ordered the school not to disclose the existence of the subpoena.

See § 99.31(a)(9) of Appendix B and Question 32 of Appendix A.

- **Health or Safety Emergencies:** FERPA-protected records and information in them may be disclosed in connection with a health or safety emergency. (See § 99.31(a)(10) of the FERPA regulations). This type of an emergency pertains to a specific and articulable threat such as a campus threat, a natural disaster, a terrorist attack, or disease outbreak. Information may be communicated in such circumstances not only to law enforcement and other emergency personnel but also to other appropriate parties in connection with an emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals. It should be noted that the school official exception allows the school to share personally identifiable information about the student with an individual acting as a school official with a legitimate educational interest (e.g., a threat assessment team member or a school resource officer who qualifies as a school official with a legitimate educational interest) to determine whether or not a health or safety emergency exists, and otherwise to school officials who have a legitimate educational interest in the behavior of the student.

NOTE: Although the U.S. Department of Education will not substitute its judgment for that of the educational agency or institution when there is a rational basis for a determination that a health or safety emergency existed, this exception only applies DURING the health or safety emergency and only allows the sharing of those records necessary to address the emergency, which may not be sufficient to support release of information to allow ongoing resolution of a threat case. Although this is one path of information sharing that could be used by a threat assessment team, it should not be the ONLY or the primary one. Threat assessment teams should be well versed in other FERPA exceptions as well.

For more detailed information, please see Questions 25–30 of Appendix A.

- **Disciplinary Action for Conduct that Posed a Significant Risk:** To teachers and school officials in other schools who have legitimate educational interests in the behavior of the student when the information concerns disciplinary action taken against the student 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.

For further explanation and example, please see Question 31 of Appendix A. See also § 99.36 of Appendix B.

- **Directory Information:** Under FERPA, “directory information” may generally be disclosed without consent if certain conditions are met, even though it is personally identifiable (Virginia law, however, imposes certain restrictions).

See § 99.37 of Appendix B.

FERPA defines directory information as information contained in a student's record that would not generally be considered harmful or an invasion of privacy if disclosed, such as the following:

- The student's name
- The student's address and telephone number³
- The student's date and place of birth
- The student's major field of study
- Official activities that the student participates in, such as officially recognized sports and other school-related activities
- The student's dates of attendance at that particular school, including enrollment date and leave date which would also include date of graduation, if applicable
- The weight and height of the student if the student is a member of an athletic team
- Degrees, honors and awards received by the student
- Name and address of most recent school or educational institution that the student had previously attended
- A photograph of the student

A school or division may disclose directory information without the parent or eligible student's written consent to third parties, including law enforcement officials, if it has given public notice to those parents or students of:

- The types of personal information that it has designated as directory information;
- The right of the parent or eligible student to restrict the disclosure of such information;
- The period of time within which a parent or eligible student has to notify the educational agency or institution in writing that they do not want any or all of that information listed as directory information.

If a parent or eligible student follows a school's procedures to notify the school that they do not want any or all of that information listed as directory information, the school must respect that request and only disclose such information without consent if another FERPA exception allows disclosure.

For more information, please see Questions 7 and 23 of Appendix A and § 99.37 of Appendix B.

- **Law Enforcement Unit Record:** Law enforcement unit records are exempt from FERPA protection and no prior consent from the parent or eligible student is required for them to be released. (See Section C for definition of "education records").
 - **Law Enforcement Unit:** As noted above, a "law enforcement unit" for FERPA purposes is any individual, office, department, or division of a school that is designated to enforce the law and/or maintain the physical security of the school, and may include law enforcement officers, security guards, or designated school officials. Schools may use non-school employees, such as local law enforcement officers and SROs, as their designated law enforcement unit.

³ It should be noted however, that while the *Code of Virginia* likewise permits the disclosure of some FERPA-designated directory information if FERPA notice and opt-out procedures are followed, it also provides: "However, no school shall disclose the address, telephone number, or email address of a student pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) unless the parent or eligible student has *affirmatively consented in writing to such disclosure*. Additionally, except as required by state or federal law, no school shall disclose the address, telephone number, or email address of a student pursuant to 34 C.F.R. § 99.31(a)(11) unless (a) the disclosure is to students enrolled in the school or to school board employees for educational purposes or school business and the parent or eligible student has not opted out of such disclosure in accordance with this subsection and school board policy or (b) the parent or eligible student has affirmatively consented in writing to such disclosure." *Code of Virginia* § 22.1-287.1 (emphasis added). Thus, a student's address, telephone number and email address must be treated with additional care notwithstanding that FERPA permits their disclosure if a parent does not opt out; instead, they may only be disclosed given the requirements of Virginia law if a parent affirmatively consents in writing to such disclosure.

For more information, please see Questions 18–24 of Appendix A and § 99.8 of Appendix B .

NOTE: An individual or group of individuals who serve as a law enforcement unit may be considered a school official with a legitimate educational interest in reviewing FERPA-covered records without parental consent if they meet all of the requirements of school official under FERPA as set forth previously.

For more information, please see Questions 13–15 of Appendix A.

- **Law Enforcement Unit Record:** A law enforcement unit record is a record that is:
 - Created by a law enforcement unit
 - Created at least in part for a law enforcement purpose (such as the prevention of violence)
 - Maintained by the law enforcement unit

For more detailed information, please see Questions 18–22 of Appendix A.

G. How can law enforcement officers gain access to student records under FERPA?

- **Title 22 Virginia Education Code:** Under Section 22.1-287 of the *Code of Virginia*, a school official **may** permit local law enforcement to access a student’s record for the purpose of seeking information related to the duties of that particular law enforcement officer and also may disclose identifying information from a student’s record for the purpose of furthering the ability of the juvenile justice system to effectively serve the student prior to adjudication.⁴
- **Court Order/Subpoena Exception:** A LEO can access protected FERPA information from a school record if the requirements of this exception are met as previously discussed.
- **Health or Safety Emergency Exception:** A LEO can access protected FERPA information from a school record if the circumstances presented qualify under this exception as previously discussed.
- **LEO Acting as School Official Exception:** If a LEO meets all of the requirements of being a school official, they can access protected FERPA information from a school record; however, they generally cannot provide protected student education record information to their home police agency unless another exception (e.g., the subpoena exception) applies that would allow any other school official to do so.

For more detailed information and the definition of a school official, please see Questions 13, 14, 15, 22, & 24 of Appendix A.

⁴ In a 2013 advisory opinion, Virginia’s attorney general stated that Section 22.1-287 could be reconciled with FERPA where FERPA’s health or safety emergency exception applies, on the following rationale: “The disclosure permitted under § 22.1-287(A)(5) falls within the scope of FERPA’s parallel emergency-related exception to nondisclosure. As noted, the exception at subsection (A)(5) permits disclosure to State or local law-enforcement or correctional personnel seeking information in the course of his duties. An educational agency could comply with both FERPA and this state law provision if it were to disclose information to law enforcement personnel in connection with an emergency, when the knowledge of such information is necessary to protect the health or safety of the student or other persons.” Office of the Attorney General, Commonwealth of Virginia, Opinion No. 12-096, 2013 WL 1942389 (Va. A.G.) (May 3, 2013). The advisory opinion noted, however, that disclosure to law enforcement is however permissive and it is up to the school to decide whether FERPA’s health or safety exception applies under the circumstances at issue. Specifically, the advisory opinion states: “If, however, upon taking into account the totality of existent circumstances, the educational agency does not conclude that the facts meet the criteria for the FERPA exception, information about the pupil may not be released.” *Id.*

H. What is a “threat assessment team”?

Generally, a threat assessment team is a group of individuals who collaborate to identify, evaluate, and address threats or potential threats to school or campus safety. Teams review incidents of current and former threatening behavior by students, parents, school or campus employees, or other individuals.

For more information, please see Question 16 of Appendix A and reference Title 22 of Virginia Education Code (§ 22.1-79.4).

I. What does Virginia law provide with respect to threat assessment teams?

For public schools in Virginia, the Virginia Education Code dictates what backgrounds team members must possess. For K-12 schools, team members must consist of (at a minimum) individuals with expertise in, school administration, instruction, counseling/mental health, and law enforcement.

Title 22 of Virginia Education Code § 22.1-79.4 contains provisions regarding the oversight and purpose of a threat assessment team.

Members of the team may gain access to individual (including student) health records and adult or juvenile criminal history records if the individual/student:

- poses a threat of violence to themselves or others.
- exhibits significantly disruptive behavior.
- demonstrates a need for assistance*.

**Although not explicitly defined, the “need for assistance” has included the need for parental notification and involvement, behavioral intervention, evaluation and management, and in-house counseling or outside referral.*

Members of a threat assessment team may NOT re-disclose any criminal history or health records, and may not use the record(s) for any purpose beyond the purpose for disclosure to the threat assessment team.

Juvenile criminal history records may NOT be placed in student educational records.

Under FERPA, if threat assessment team members are functioning as “school officials with a legitimate educational interest” (i.e., they need to review or learn information from student education records in order to fulfill their professional responsibilities as threat assessment team members) they may also access all student education records on the same terms that other school officials may do so.

See also Title 19 of Virginia Code, § 19.2-389 and 19.2-389.1 (Juvenile Criminal History Records) and Title 32 of Virginia Code, § 32.1-127.1:03 (Health Records).

J. Does FERPA permit schools and divisions to allow access to educational records without prior consent to members of the school’s threat assessment team?

Yes, under certain conditions. The Department of Education has long encouraged schools and divisions to implement a threat assessment program that relies on teams composed of a wide

variety of individuals, including outside law enforcement officials, mental health officials, and other experts in the community in addition to members of the team who serve as school officials. The school division may disclose personal identifiable information (PII) from education records without the prior consent of the parent to threat assessment team members, so long as each member qualifies as a “school official with a legitimate educational interest” who meets the institutional service or function, “direct control”, annual notification and re-disclosure requirements outlined in Question F above.

For more detailed information, please see Question 17 of Appendix A.

K. How does FERPA apply to the Virginia school threat assessment process?

It is only when there is an attempt to access information obtained directly from a student’s education record that FERPA protection applies. Consider the following:

Scenario: A student posts a threat on Facebook and references a recent school shooting. The student was involved in a prior altercation and specifically related to that altercation, he informed another student he would bring a gun to school to settle the score, which led to the resulting Facebook posting.

In response to this posed threat, school and law enforcement officials may act immediately and cultivate information from what they hear, see, and otherwise sense regarding the incident. They may also consider prior observations and communications of the student, the reaction of the student once confronted, and the atmosphere within the school related in any way to the incident.

Some key law enforcement options are:

- Interviewing students, parents, and witnesses;
- Obtaining a lawful search warrant, if circumstances permit, to search the student’s house; and
- Conducting a lawful search of the student based upon probable cause before the student re-enters the school zone.

Some key school options are:

- Interviewing students and witnesses;
- Meeting with the parents to gain an understanding of the student’s home environment and circumstances surrounding the incident;
- Performing a lawful search of the student and/or their belongings based upon reasonable suspicion of a potential school violation that is related to the incident; and
- Determining the appropriate process for handling the incident through the school’s threat assessment team protocols.

NOTE: Beyond information regarding a social media threat and direct observations/knowledge, the school officials who are TAT members may also review school records to determine if there are other issues that would inform understanding of the threat posed and how best to manage it in an ongoing fashion. Further, as noted above, FERPA may allow disclosure of education record information if the health or safety emergency exception is deemed to apply, if a subpoena is received, or if another FERPA exception applies.

II. Mental Health Care Providers: The Duty to Warn

L. Do mental health service providers working in schools (i.e. school counselors, social workers, psychologists) have a duty to release information when a third party may be at risk?

Yes, under *Code of Virginia* Title 54.1, Chapter 24, § 54.1-2400.1. Mental Health Service Providers; Duty to Protect Third Parties; Immunity. Subsection B states the following:

A mental health service provider has a duty to take precautions to protect third parties from violent behavior or other serious harm only when the client has orally, in writing, or via sign language, communicated to the provider a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or persons, if the provider reasonably believes, or should believe according to the standards of his profession, that the client has the intent and ability to carry out that threat immediately or imminently. If the third party is a child, in addition to taking precautions to protect the child from the behaviors in the above types of threats, the provider also has a duty to take precautions to protect the child if the client threatens to engage in behaviors that would constitute physical abuse or sexual abuse as defined in § 18.2-67.10. The duty to protect does not attach unless the threat has been communicated to the provider by the threatening client while the provider is engaged in his professional duties.

Subsection C of § 54.1-2400.1 provides that the duty to take precautions to protect third parties may be satisfied by: 1) seeking involuntary admission of the client under applicable Virginia law; 2) making reasonable attempts to warn the potential victims or the parent or guardian of the potential victim if the potential victim is under the age of 18; 3) making reasonable efforts to notify a law-enforcement official having jurisdiction in the client's or potential victim's place of residence or place of work, or place of work of the parent or guardian if the potential victim is under age 18, or both; 4) taking steps reasonably available to the provider to prevent the client from using physical violence or other means of harm to others until the appropriate law-enforcement agency can be summoned and take custody of the client; 5) providing therapy or counseling to the client or patient in the session in which the threat has been communicated until the mental health service provider reasonably believes that the client no longer has the intent or the ability to carry out the threat; and/or 6) in the case of a registered peer recovery specialist, or a qualified mental health professional who is not otherwise licensed by a health regulatory board at the Department of Health Professions, reporting immediately to a licensed mental health service provider so that they can take one or more of the actions set forth above.

NOTE: In *Virginia Code* Section 54.1-2400.1 "Mental health service provider" or "provider" refers to any of the following: (i) a person who provides professional services as a certified substance abuse counselor, clinical psychologist, clinical social worker, licensed substance abuse treatment practitioner, licensed practical nurse, marriage and family therapist, mental health professional, physician, physician assistant, professional counselor, psychologist, qualified mental health professional, registered nurse, registered peer recovery specialist, school psychologist, or social worker; (ii) a professional corporation, all of whose shareholders or members are so licensed; or (iii) a partnership, all of whose partners are so licensed.

Although School Counselors are not defined in legislation as mental health service providers, in Virginia, they are governed by the Ethical Standards for School Counselors (ASCA 2016),

section A.2.e. of which states that counselors must “Keep information confidential unless legal requirements demand that confidential information be revealed or a breach is required to prevent serious and foreseeable harm to the student. Serious and foreseeable harm is different for each minor in schools and is determined by students’ developmental and chronological age, the setting, parental rights and the nature of the harm.” The ASCA standards also provide that “[s]chool counselors [should] consult with appropriate professionals when in doubt as to the validity of an exception.” School Counselors are also bound by mandated reporter guidelines, which reinforce the duty to inform of potential harm.

Reference Virginia Code Section 54.1-2400.1 available at
<https://law.lis.virginia.gov/vacode/title54.1/chapter24/section54.1-2400.1/>.

III. Memorandums of Understanding and Information Sharing

M. What is the key to making information sharing work?

The key is a viable Memorandum of Understanding, which serves as a vital tool for school and law enforcement personnel to share health and safety-related information and other information as permitted by FERPA without violating the student's/patient's right of privacy.

Memorandums of Understanding, for purposes of information sharing, should be substantive in nature and serve as an operational template to be utilized on a daily basis. It is suggested that the following components should be considered:

- School and law enforcement personnel have broad discretion to, at the very least, immediately share information regarding a potential health or safety emergency where doing so is necessary to protect the health or safety of a student or other individuals.
- There should be a consensus on what general criteria will provide school personnel with a comfort level to allow law enforcement to access necessary student records with the understanding that the access to those records can be limited by statutory protection at both the Federal and Commonwealth levels for both parties, consistent with the principles summarized above and outlined in more detail in Appendix A and Appendix B.
- In accordance with § 22.1-79.4 of the *Code of Virginia*, which authorizes and requires schools to establish threat assessment policies and procedures, form a threat assessment team (for which law enforcement representation is required), and provide guidance to students and staff on recognizing and reporting threatening or aberrant behavior.
- Emphasize the provision of § 8.01-47 of the *Code of Virginia*, as it grants immunity from civil liability to any person who, in good faith, reports to authorities actions or behavior that may pose a threat to others.
- Recognize that electronic devices may hold key insights into the mindset of students when behaviors resulting in threats to safety are exhibited. School officials are therefore encouraged to incorporate a clear policy and procedure for the seizure and search of electronic devices and the requisites for doing so under criminal law by a law enforcement officer, and under civil law by a school official. Information gathered by law enforcement is not protected by FERPA, but is subject to laws as they pertain to seizure and search in the Commonwealth.
- Understand that while school officials and law enforcement should reach agreement on sharing information whenever circumstances allow, especially when time is of the essence, a subpoena, search warrant, and/or court order may be necessary to obtain the information sought in some instances.

For more detailed information, please see Appendix C.

Summation

FERPA and Virginia law clearly allow school personnel the discretion to share information, including student education record information, with law enforcement under conditions summarized above and detailed in appendices A and B, and to take steps to prevent, reduce, and/or respond to safety concerns that arise within the school environment or originate from outside the school environment. The bottom line is that school and law enforcement officials should have a common understanding that prioritizes the safety of students, staff, and officers while protecting student privacy rights, and should develop a formula for exchanging critical information that includes disclosure of records when appropriate and necessary. It is critical to leverage the many options afforded under FERPA and Virginia law, as set forth above and in the appendices, that can reduce the risk to all and promote school safety.

Appendices

Appendix A

School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA) developed by U.S. Department of Education established the Privacy Technical Assistance Center (PTAC).



School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)

About PTAC

The U.S. Department of Education established the Privacy Technical Assistance Center (PTAC) as a “one-stop” resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems and other uses of student data. PTAC provides timely information and updated guidance through a variety of resources, including training materials and opportunities to receive direct assistance with privacy, security, and confidentiality of student data systems. More PTAC information is available at <https://studentprivacy.ed.gov>. PTAC welcomes input on this document and suggestions for future technical assistance resources relating to student privacy. Comments and suggestions can be sent to PrivacyTA@ed.gov.

Introduction

School officials routinely seek to balance the interests of safety and privacy for students. While the Family Educational Rights and Privacy Act (FERPA) generally requires written parent or “eligible student”¹ consent before an educational agency (district) or institution (school) discloses student education records and the personally identifiable information (PII) contained therein, FERPA gives schools and districts flexibility to disclose PII, under certain limited circumstances, in order to maintain school safety. The purpose of this guidance is to address questions about how FERPA applies to schools’ and districts’ disclosures of PII from student education records to school security units, outside law enforcement entities, School Resource Officers (SROs), and other schools. While the information in this guidance is applicable to all educational agencies and institutions that receive funds under any program administered by the Secretary of the U.S. Department of Education (Department), the discussion is generally focused on health or safety emergencies faced by public elementary and secondary schools.

Many schools and school districts have their own security units to monitor safety and security in and around school campuses. In FERPA, these entities are called “law enforcement units” if certain conditions are met. Some schools designate a particular school official or office to be responsible for referring potential or alleged violations of law to local law enforcement authorities. Other schools contract with off-duty police officers to provide school security, while still others utilize the services of an SRO, who serves as an on-site law enforcement officer and liaison with the local police or sheriff’s department for reporting offenses and filing charges. Still others utilize a hybrid system combining one or more of the preceding methods.

FERPA affords schools and districts flexibility when responding to circumstances that threaten the health or safety of individuals in their school community. Understanding the provisions of FERPA relative to such circumstances will empower school officials to act decisively and quickly when challenges arise. The following frequently asked questions detail how FERPA may apply in these circumstances. Although this guidance is focused on FERPA, there may be other federal and State laws, such as civil rights and privacy

¹ When a student turns eighteen years of age, or enrolls in a postsecondary institution at any age, the student becomes an “eligible student” (34 CFR §99.3 “eligible student”) and all rights under FERPA transfer from the parent to the student. 34 CFR §99.5(a)(1)



laws, that are relevant to decision-making regarding when and with whom schools and districts may disclose, without appropriate consent, student information. At the federal level, for example, public elementary and secondary schools are subject to federal civil rights laws, including laws that prohibit discrimination based on: disability (the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973); race, color, and national origin (Titles IV and VI of the Civil Right Act of 1964); sex (Title IX of the Education Amendments of 1972); and religion (Title IV of the Civil Rights Act of 1964). Also, State educational agencies and local educational agencies must comply with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) in educating children with disabilities, including IDEA’s confidentiality of information requirements.²

² See 20 U.S.C. 1417(c) and 34 CFR §§300.610-300.626.



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General Requirements of the Family Educational Rights and Privacy Act (FERPA) Applicable to this Guidance

Q.1. Do any laws other than FERPA address the disclosure of personally identifiable information (PII) from students' education records or other disclosures of information on students?

Yes. As noted in the “Introduction” section, there may be other federal and State laws, as well as local policies that address information sharing on students, including laws concerning the civil rights of students.³ In addition, the education records of students who are children with disabilities are not only protected by FERPA but also by the confidentiality of information provisions in the Individuals with Disabilities Education Act (IDEA).⁴ (See Q.5) Among other laws, student records may, under some circumstances, also be covered by the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or the Richard B. Russell National School Lunch Act.⁵

Q.2. What is FERPA and to which entities does it apply?

FERPA is a federal law that protects the privacy of student education records, and the PII contained therein, maintained by educational agencies or institutions or by a party acting for the agencies or institutions. The FERPA statute is found at 20 U.S.C. § 1232g and its implementing regulations are set forth at 34 CFR Part 99. FERPA applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of the U.S. Department of Education (Department).⁶ The term “educational agencies and institutions” generally refers to local educational agencies (LEAs), elementary and secondary schools, and postsecondary institutions. Private schools at the elementary and secondary levels generally do not receive funds from the Department and are, therefore, not subject to FERPA, but may be subject to other data privacy laws such as HIPAA. In this guidance, when we refer to LEAs, school districts, or schools, we mean “educational agencies and institutions,” as applicable, subject to FERPA. A copy of the regulations may be found on our website at:

<https://studentprivacy.ed.gov/>

Q.3. To whom does the information in this guidance apply?


The information in this guidance applies to all educational agencies and institutions. That said, the guidance generally focuses on addressing health or safety emergency situations faced by the elementary and secondary school community. For additional information on FERPA’s application to health or safety emergency situations in the postsecondary institution context, please refer to

³ Many State laws provide greater privacy protections than FERPA does, however FERPA establishes a minimum federal standard governing the privacy of education records and the PII contained therein.

⁴ For additional information on the interaction of FERPA and IDEA confidentiality provisions, please refer to previously issued Department guidance entitled, “IDEA and FERPA Confidentiality Provisions,” issued in June 2014, available at: <https://studentprivacy.ed.gov/resources/ferpaidea-cross-walk>.

⁵ For information relating to the interaction of FERPA and HIPAA with respect to student health records, please refer to the “Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records” issued by the U.S. Department of Education and the U.S. Department of Health and Human Services in November 2008, available at: <https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records>

⁶ 34 CFR § 99.1



previously issued Department guidance entitled, “Addressing Emergencies on Campus,” issued in June 2011, available at: <https://studentprivacy.ed.gov/resources/addressing-emergencies-campus>. Additionally, the Department has released several guides for developing emergency operations plans for elementary and secondary schools, school districts, and postsecondary institutions. These guides may be found at: https://rems.ed.gov/Resource_Plan_Basic_EOP.aspx.

Q.4. What are the rights of parents and students under FERPA?

FERPA affords parents certain rights with respect to their children’s education records maintained by schools and school districts to which FERPA applies. These include the right to inspect and review their children’s education records, the right to seek to have the education records amended, and the right to have some control over the disclosure of PII contained in the education records.⁷ These rights transfer to the student when he or she reaches the age of 18 years or attends a postsecondary institution at any age (and thereby becomes an “eligible student” under FERPA).⁸

Q.5. What are “education records”?

The term “education records” is defined, with certain exceptions, as those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution, or by a party acting for the agency or institution.⁹ Records on children with disabilities who receive evaluations, services, or other benefits under Part B of the IDEA are subject to IDEA’s “Confidentiality of Information” requirements, in addition to being considered “education records” subject to FERPA.¹⁰

Q.6. Are there any types of records or documents that are specifically excluded from the definition of “education records” under FERPA?

Yes. There are several categories of records that may be maintained by an educational agency or institution that are not “education records” under FERPA.¹¹ One such category of records – records of a “law enforcement unit” – is particularly relevant to school safety and is discussed in detail in Qs 18 and 19, below.

Q.7. What is “directory information” and is it protected by FERPA?

FERPA defines “directory information” as information contained in a student’s education record that would not generally be considered harmful or an invasion of privacy if disclosed.¹² Directory information may include, but is not limited to, the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; dates of attendance; participation in officially recognized activities and sports; weight and height

⁷ 20 U.S.C. §§ 1232g(a)(1) and (2), (b), (h), (i), and (j); 34 CFR Part 99, Subparts B, C, and D.


⁸ 34 CFR §§ 99.3, “Eligible student,” and 99.5

⁹ 34 CFR § 99.3, “Education records.”

¹⁰ 34 CFR §§ 300.610 – 300.626

¹¹ Please refer to the definition of “education records” set forth in FERPA at 20 U.S.C. § 1232g(a)(4) and the implementing regulations at 34 CFR § 99.3 for further information on the types of records that are not considered “education records.”

¹² 34 CFR § 99.3, “Directory information.”



of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.¹³

The disclosure of appropriately designated directory information, under certain specified conditions, is one of the exceptions to FERPA's general written consent requirement.¹⁴ A school or district may disclose directory information, without the parent or eligible student's written consent, to third parties, including law enforcement officials, if it has given public notice to parents and eligible students of (1) the types of PII that it has designated as "directory information," (2) the right of the parent or eligible student to restrict the disclosure of such information, and (3) the period of time within which a parent or eligible student has to notify the educational agency or institution in writing that he or she does not want any or all of those types of information designated as "directory information."¹⁵ In addition, a school or district may implement a limited directory information policy by specifying in its public notice to parents and eligible students that its disclosure of appropriately designated directory information will be limited to specific parties (and not others), for specific purposes, or both.¹⁶

Q.8. What is "personally identifiable information" under FERPA?

Personally identifiable information (PII) is defined to include not only direct identifiers like the student's name and Social Security number, but also indirect identifiers such as the student's date and place of birth and the mother's maiden name.¹⁷ PII also includes "[o]ther 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."¹⁸ That is, in some cases, a record may not contain a direct or even an indirect identifier, but would still contain PII under FERPA. For example, when an event at a school generates significant publicity, otherwise permissible non-consensual disclosures of redacted education records may no longer be permissible under FERPA because the publicity would allow a reasonable person in the school community to identify with reasonable certainty the student(s) involved. PII also includes any information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education records relates.

Q.9. Who must provide consent for the disclosure of PII from a student's education records?

In general, with certain exceptions, before an educational agency or institution discloses PII from a student's education record, the student's parent or the eligible student must provide a signed and dated written consent. That consent must specify the education records (or the PII contained in those records) that may be disclosed, must state the purposes of the disclosure, and must identify the party or class of parties to whom the disclosure may be made.¹⁹

¹³ *Id.*; 20 U.S.C. § 1232g(a)(5)(A).

¹⁴ 34 CFR §§ 99.31(a)(1) and 99.37

¹⁵ 34 CFR § 99.37(a)

¹⁶ 34 CFR § 99.37(d)

¹⁷ 34 CFR § 99.3, "Personally Identifiable Information."

¹⁸ *Ibid.*

¹⁹ 34 CFR § 99.30

Q.10. Are there exceptions to FERPA’s general written consent requirement that permit schools and districts to disclose PII from education records without consent?

Yes. While FERPA generally requires parents or eligible students to provide a school or district with written consent before the school or district discloses PII from a student’s education records, there are a number of exceptions to this prior written consent requirement.²⁰ For example, assuming that certain conditions are satisfied, FERPA permits a school or district to disclose education records under the “health or safety emergency” exception without obtaining prior written consent.²¹ Several of these exceptions to the consent requirement that are most relevant in the school safety context are discussed below. Additionally, as explained more fully in Q.19 below, because “law enforcement unit records” are not “education records,” they, therefore, may be disclosed, without the parent or eligible student’s consent, to outside parties under FERPA. Similarly, while IDEA generally also requires prior written consent from the parent (or from a student who has reached the age of majority under State law, if parental rights have transferred to the student) for disclosure of PII from education records, IDEA generally incorporates the FERPA exceptions to the prior consent requirement.²²

Q.11. Are schools and districts required to record the disclosure of PII from students’ education records whenever they make disclosures?

Subject to certain exceptions addressed below, schools and districts must maintain a record of each request for access to and each disclosure of PII from the education records of each student, as well as the names of State and local educational authorities and federal officials and agencies listed in 34 CFR § 99.31(a)(3) that may make further disclosures of PII from the student’s education records without consent.²³ The school or district must maintain the record of disclosure with the education records of the student as long as the education records are maintained.²⁴

For each request or disclosure, the record of disclosure must include: (1) the parties who have requested or received PII from the education records; and (2) the legitimate interests the parties had in requesting or obtaining the information (*i.e.*, under which exception to FERPA’s general written consent requirement the disclosure was made).²⁵ As explained in the answer to Q.30 below, the school or district must record additional information whenever it discloses, without appropriate consent, PII from a student’s education records under FERPA’s health or safety emergency exception.²⁶ There are additional requirements that relate to recording further disclosures made by State and local authorities and federal officials and agencies listed under 34 CFR § 99.31(a)(3) with which schools and districts should also be familiar.²⁷

Schools and districts do not have to record requests for PII from education records from, or disclosures of PII from education records that were made to: (1) the parent or eligible student; (2) a school official under 34 CFR § 99.31(a)(1); (3) a party with written consent from the

²⁰ 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR § 99.31

²¹ 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36

²² 34 CFR § 300.622


²³ 20 U.S.C. § 1232g(b)(4)(A); 34 CFR § 99.32(a)(1)

²⁴ 34 CFR § 99.32(a)(2)

²⁵ 34 CFR § 99.32(a)(3).

²⁶ 34 CFR § 99.32(a)(5)

²⁷ 34 CFR §§ 99.32(a)(4) and (b)(2)



parent or eligible student; (4) a party seeking directory information; or (5) a party seeking or receiving records in accordance with the provisions in FERPA related to non-consensual disclosures pursuant to certain types of lawfully issued subpoenas or court orders.²⁸ However, in the interests of promoting greater transparency, the Department considers it a best practice for schools and districts to voluntarily record such disclosures in certain situations, such as when records are produced pursuant to certain lawfully issued subpoenas or court orders.

Disclosures of PII from Students' Education Records Without Written Consent

General

Q.12. When are schools or districts required by FERPA to disclose PII from a student's education records?

FERPA does not contain any provisions that *require* schools or districts to “disclose” PII from a student's education records. The disclosures discussed in this guidance document describe the conditions under which a school or district *may* disclose education records without the parent or eligible student's consent. That said, FERPA does require schools and districts as well as state educational agencies (SEA) and their components to provide parents and eligible students with the opportunity to “inspect and review” the student's own education records.²⁹ Further, if circumstances effectively prevent the parent or eligible student from exercising this right to inspect and review, the educational agency or institution, or SEA or its components, must provide the parent or eligible student with a copy of the education record requested or make other arrangements for the parent or eligible student to inspect and review the education record.³⁰

School Officials

Q.13. Who qualifies as a “school official” under FERPA, and to whom may schools and districts disclose education records under the school official exception to FERPA's general written consent requirement?

FERPA permits schools and districts to disclose education records (and the PII contained in those records) without appropriate consent, to “school officials” provided that the school or district has determined that these school officials have “legitimate educational interests” in the education records.³¹ Under FERPA, a school or district must include in its annual notification of FERPA rights the specific criteria they use for determining who constitutes a “school official” and what constitutes a “legitimate educational interest.”^{32,33,34} A “school official” may include,

²⁸ 34 CFR §§ 99.31(a)(9)(ii)(A)-(C); 34 CFR § 99.32(d)

²⁹ 20 U.S.C. § 1232g(a)(1)(A) and (B); 34 CFR § 99.10(a)


³⁰ 34 CFR § 99.10(d)

³¹ 20 U.S.C. § 1232g(b)(1)(A); 34 CFR § 99.31(a)(1)(i)(A).

³² 34 CFR § 99.7(a)(3)(iii)

³³ The Department has created a “Model Notification of Rights under FERPA for Elementary and Secondary Schools,” available at: <https://studentprivacy.ed.gov/resources/ferpa-model-notification-rights-elementary-secondary-schools>

³⁴ This notification must be distributed by a school or district every year through a means that is likely to be viewed by parents and eligible students, such as a student handbook, school website, or a direct letter to parents, and must inform parents and eligible students of their rights under FERPA.



but is not limited to, a teacher, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, attorney, accountant, human resources professional, information systems specialist, and support or clerical personnel.

Contractors, consultants, volunteers, or other third parties to whom a school or district has outsourced certain functions may be also be considered “school officials.”³⁵ Schools and districts may disclose education records (and the PII contained in those records), without appropriate consent to such school officials provided that they (1) perform an institutional service or function for which the school or district would otherwise use employees; (2) are under the “direct control” of the school or district with respect to the use and maintenance of the education records; (3) are subject to FERPA’s use and re-disclosure requirements set forth in 34 CFR § 99.33(a); and (4) satisfy the criteria specified in the school or district’s annual notification of FERPA rights for being “school officials” with “legitimate educational interests” in the education records.³⁶

Typically, a school official would have a “legitimate educational interest” if he or she needs to review an education record in order to fulfill his or her professional responsibilities. Please note that schools and districts must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests.³⁷ If a school or district does not use physical or technological access controls, it must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with FERPA’s legitimate educational interest requirement.³⁸

Q.14. Can law enforcement unit officials who are school employees be considered school officials with legitimate educational interests?

Yes, if certain conditions apply. A law enforcement unit official who is an employee of a school or district generally would be considered a school official to whom the school or district may disclose, without consent, education records (or PII contained in those records), if the law enforcement unit official meets the criteria specified in the school or district’s annual notification of FERPA rights to parents and eligible students for being a “school official” with a “legitimate educational interest” in the education records. In several questions below we discuss how the school official exception to FERPA’s general written consent requirement applies in situations in which the law enforcement unit is not comprised of school employees.

Q.15. Can law enforcement unit officials who are off-duty police officers or SROs be considered school officials under FERPA and, therefore, have access to students’ education records?


Yes, if certain conditions are met. Under FERPA, schools and districts may consider law enforcement unit officials, such as off-duty police officers and SROs, to be “school officials” if the school or district has outsourced the function of providing safety and security for the school or

³⁵ 34 CFR § 99.31(a)(1)(i)(B)

³⁶ 34 CFR § 99.31(a)(1)(i)

³⁷ 34 CFR § 99.31(a)(1)(ii)

³⁸ Ibid



district to the law enforcement unit officials.³⁹ Law enforcement unit officials could qualify as “school officials” under FERPA if they:

1. Perform an institutional service or function for which the school or district would otherwise use employees (e.g., to ensure school safety);
2. Are under the “direct control” of the school or district with respect to the use and maintenance of the education records (e.g., through a memorandum of understanding (MOU) that establishes data use restrictions and data protection requirements);
3. Are subject to FERPA’s use and re-disclosure requirements in 34 CFR § 99.33(a), which provides that the PII from education records may be used only for the purposes for which the disclosure was made (e.g., to promote school safety and the physical security of students), and which limits the re-disclosure of PII from education records; and
4. Meet the criteria specified in the school or district’s annual notification of FERPA rights for being school officials with legitimate educational interests in the education records.⁴⁰

The best practice to ensure compliance with these provisions is for the school and the law enforcement unit to enter into a MOU that specifically addresses these issues.⁴¹

As indicated in the listing above, off-duty police officers and SROs who qualify as “school officials” may only use PII from education records for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of the students.⁴² In addition, these officers are subject to FERPA’s re-disclosure requirements in 34 CFR § 99.33(a). This means that an off-duty police officer or SRO who is acting as a “school official” under FERPA may not re-disclose, without appropriate consent, PII from education records to outside parties, including other employees of his or her police department who are not acting as school officials, unless the disclosure satisfies an exception to FERPA’s general written consent requirement, as further discussed below (e.g., if the re-disclosure is made pursuant to a lawfully issued subpoena or court order⁴³ or to appropriate parties under the health and safety emergency exception).

Threat Assessment Teams

Q.16. What is a threat assessment team?

A threat assessment team is a group of individuals who convene to identify, evaluate, and address threats or potential threats to school security. Threat assessment teams review incidents of threatening behavior by students (current and former), parents, school employees, or other individuals, and, based on the information received, relying on their collective expertise, provide guidance to school officials on how to respond to the potential threat. These


³⁹ 34 CFR § 99.31(a)(1)(i)(B)(1)-(3),

⁴⁰ 34 CFR § 99.31(a)(1)(i)

⁴¹ For additional information about memoranda of understanding, see the Final Report of the Federal Commission on School Safety (2018), Chapter 13, “Training School Personnel to Help Ensure Student Safety” available at <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>

⁴² 34 CFR §§ 99.31(a)(1)(i)(B)(3) and 99.33(a)(2)

⁴³ Subject to certain exceptions, FERPA requires the disclosing entity to make a reasonable effort to notify the parent or eligible student in advance of compliance with the subpoena or order. 34 CFR § 99.31(a)(9)(ii)



expertise, provide guidance to school officials on how to respond to the potential threat. These teams are more common in university settings but are also being instituted in elementary and secondary schools.

Some schools may need assistance in determining whether a health or safety emergency exists in order to know whether a disclosure to appropriate parties (e.g., emergency responders or law enforcement) may be made under FERPA's health or safety emergency exception. Accordingly, members of a threat assessment team include individuals who can assist in making such decisions, such as school principals, counselors, educators, and school law enforcement unit officials, as well as outside medical and mental health professionals and local law enforcement officers.

In July 2004, the Department and the U.S. Secret Service jointly issued a booklet entitled, "Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates," which includes guidance on the formation of threat assessment teams on pages 37-38. Information on establishing a threat assessment program, including a link to this booklet and other helpful resources for emergency situations, can be found on the Department's website at: <http://www.ed.gov/admins/lead/safety/edpicks.jhtml>.


For additional information on threat assessment teams, please also refer to joint guidance issued in 2013 by the Department and several federal agencies entitled, "Guide for Developing High-Quality School Emergency Operations Plans," available at: http://rems.ed.gov/docs/REMS_K-12_Guide_508.pdf.

Q.17. Does FERPA permit schools and districts to disclose education records, without consent, to outside law enforcement officials, mental health officials, and other experts in the community who serve on a school's threat assessment team?

Yes, if certain conditions are met. The Department has long encouraged schools and districts to implement a threat assessment program that relies on teams, composed of a wide variety of individuals, to gather information, evaluate facts, and determine whether a health or safety emergency exists.⁴⁴ The members of the threat assessment team should meet the criteria for constituting school officials under FERPA, so that they may assist the institution in gathering information (including PII from education records), evaluating facts, and making institutional determinations, such as whether a health or safety emergency exists, and how the school or district should respond. Under FERPA, a school or district may disclose PII from education records, without appropriate consent, to threat assessment team members who are not employees of the school or district to determine whether there is a health or safety emergency if they:

1. Perform an institutional service or function for which the school or district would otherwise use employees;
2. Are under the "direct control" of the school or district with respect to the use and maintenance of the education records;

⁴⁴ "Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates," pages 37-38. <http://www.ed.gov/admins/lead/safety/edpicks.jhtml>.

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3. Are subject to FERPA's use and re-disclosure requirements in 34 CFR § 99.33(a), which provide that the PII from education records may be used only for the purposes for which the disclosure was made, and which limits the re-disclosure of PII from education records; and
 4. Qualify as "school officials" with "legitimate educational interests." See Q.14 for more information.

While not a requirement of FERPA, one way to ensure that members of the team are aware of the FERPA requirements related to the use and re-disclosure of PII obtained from education records is to require members of the threat assessment team to sign an acknowledgement of their responsibilities for safeguarding student information under FERPA.

Schools and districts are reminded that members of a threat assessment team may only use PII from education records for the purposes for which the disclosure was made, *i.e.*, to conduct threat assessments, and are subject to FERPA's re-disclosure requirements in 34 CFR § 99.33(a). For example, a representative from the city police who serves on a school's threat assessment team generally could not give the police department any PII from a student's education records to which he or she was privy as a member of the team, unless the disclosure meets an exception to consent, such as a disclosure in connection with a health or safety emergency, and any applicable recordation requirements in FERPA are met. While school officials must make the ultimate determination as to whether information about a threat is sufficiently significant and articulable to warrant disclosure without consent to appropriate parties under the health and safety emergency exception, schools and districts may, at their discretion, grant non-employees serving as school officials on the threat assessment team the ability to make this determination on their behalf.⁴⁵ See Q25-26 for more information on the health and safety emergency exception to consent.

Law Enforcement Unit & Law Enforcement Unit Records

Q.18. What is a "law enforcement unit"?

Under FERPA, "law enforcement unit" means any individual, office, department, division, or other component of a school or district, such as a unit of police officers or security guards, that is officially authorized or designated by that school or district to (1) enforce any local, State, or federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or federal law, against any individual or organization other than the agency or institution itself; or (2) maintain the physical security and safety of the agency or institution.⁴⁶

Schools vary in who is authorized or designated to be their law enforcement unit, usually depending upon school size and resources. Some larger school districts have their own fully equipped police units, while others have smaller security offices. Other schools designate a vice principal or other school official to act as the law enforcement unit officer. Other schools may – as discussed in Qs 21-24 – use non-school employees such as local police officers and SROs as their designated law enforcement unit officers.

⁴⁵ 34 CFR §§ 99.31(a)(10) and 99.36

⁴⁶ 34 CFR § 99.8(a)(1)



Q.19. What is a law enforcement unit record?

Law enforcement unit records are records that are: (1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit.⁴⁷ Law enforcement unit records are not protected by FERPA because they are specifically excluded from the definition of “education records” and, thus, from the privacy protections afforded to parents and eligible students by FERPA.⁴⁸ Therefore, investigative reports and other records created and maintained by law enforcement units that meet this definition are not considered “education records” subject to FERPA and may be released subject to school policy, State law, and other applicable laws.

When members of a school’s law enforcement unit are school officials with access to students’ education records (or to PII contained in those records), they may not re-disclose the records or PII they receive as school officials under FERPA without appropriate consent or except as permitted under FERPA (see Q.20), such as if the re-disclosure is to other school officials, or under the health and safety emergency exception. It is, therefore, advisable for law enforcement units to maintain law enforcement unit records separately from education records.

Q.20. When can law enforcement unit officials serve as “school officials?”

In order for law enforcement unit officials to be considered school officials, they must meet the criteria for who constitutes a school official that are set forth in the school or district’s annual notification to parents and eligible students of their rights under FERPA and preferably defined in an MOU for non-school employees.⁴⁹ As explained in Qs 13-15, schools and districts must also determine that the school official’s interest in accessing the education records meets the criteria for legitimate educational interests, as set forth in the school’s or district’s annual notification of FERPA rights. A school official typically would have a “legitimate educational interest” if the official needs to review an education record in order to fulfill his or her professional or delegated responsibility.

Having law enforcement unit officials who are “school officials” with “legitimate educational interests” will permit a school to disclose PII from students’ education records, without appropriate consent, to its law enforcement unit officials so that they may perform their professional duties and assist with school safety matters. For example, if a student is expelled from school and barred from campus the principal could disclose the student’s disciplinary report to law enforcement unit officials so that they would know that the student should not be on campus. The PII from the student’s education records that is provided to the school’s law enforcement unit officials remains subject to FERPA and may only be further disclosed by that unit (e.g., to the local police department) with consent or as otherwise permitted under FERPA⁵⁰, such as making a disclosure to comply with a lawfully issued subpoena⁵¹ or the


⁴⁷ 34 CFR § 99.8(b)(1)

⁴⁸ 34 CFR § 99.3, “Education Records”

⁴⁹ 34 CFR § 99.7(a)(3)(iii)

⁵⁰ 34 CFR § 99.33. To be permissible under FERPA, any such redisclosures must be on behalf of the educational agency or institution, and must meet the requirements of one or more of the exceptions to consent at 34 CFR 99.31.

⁵¹ 34 CFR § 99.31(a)(9)



disclosure is in connection with a health or safety emergency,⁵² and provided FERPA's recordkeeping requirements have been met.⁵³

Utilizing Local Police Officers and SROs as School Law Enforcement Unit Officials

Q.21. Does a school or district have to use only employees to staff its law enforcement unit?

No. The manner in which a school or district staffs its law enforcement unit is not addressed by FERPA. Accordingly, FERPA does not require a school or district to use only employees to staff its law enforcement unit and may contract out those services.

Q.22. Are SROs or other outside local law enforcement officials who serve as a school's law enforcement unit automatically considered school officials?

Not automatically. Subject to the conditions indicated in Q.15 relative to outsourcing institutional services or functions, these officials may be considered "school officials" with "legitimate educational interests" and may have access to students' education records.

Q.23. Can a school provide local or other law enforcement officials with "directory information" on students?

Yes. If the school or district has a directory information policy under FERPA that permits this disclosure to local or other law enforcement officials, then the directory information of those students whose parents (or those eligible students who) have not opted out of such a disclosure may be disclosed without appropriate consent.⁵⁴ See the related discussion in Q.7.

Q.24. Does FERPA distinguish between SROs and other local police officers who work in a school?

No. As noted previously, an SRO typically serves as an on-site law enforcement officer and as a liaison with the local police or sheriff's department. An SRO may be designated by a school or district as a "law enforcement unit" official under FERPA.⁵⁵ However, in order for a school or district to disclose education records (or any PII contained in those records) to an SRO, without appropriate consent, the disclosure must satisfy an exception to FERPA's general written consent requirement such as the "school official" exception under which the SRO must be considered a "school official" with a "legitimate educational interest" under FERPA. See Qs 15 and 22.


As explained in Q.15, the school or district must have direct control over an SRO's maintenance and use of education records in providing SRO services in order for the SRO to be considered a school official. Additionally, as explained in Q.13, schools and districts must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. Further, under the school official exception (as well as any FERPA exception to consent), SROs may only use the PII from

⁵² 34 CFR §§ 99.31(a)(10) and 99.36

⁵³ 34 CFR § 99.32

⁵⁴ 34 CFR §§ 99.31(a)(11) and 99.37

⁵⁵ 34 CFR § 99.8(a)(1)



education records for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of the students.⁵⁶ In addition, SROs are subject to FERPA's re-disclosure limitations.⁵⁷ This means that an SRO who is serving as a "school official" under FERPA may not disclose PII from education records to others, including other employees of his or her local police department who are not acting as school officials, without consent unless: (1) the re-disclosure is on behalf of the educational agency or institution; (2) the re-disclosure fits within one of the exceptions to FERPA's consent requirement (see Qs 15 and 17); and (3) the recordkeeping requirements in 34 CFR § 99.32 have been met.

Other Exceptions to FERPA's General Consent Rule Relevant to School Safety

Health or Safety Emergencies

Q.25. When is it permissible for schools or districts to disclose, without appropriate consent, student education records (or PII contained in those records) under FERPA's health or safety emergency exception?

In some situations, school administrators may determine that it is necessary to disclose a student's education records (or PII contained in those records) to appropriate parties in order to address a specific and articulable threat of a health or safety emergency. FERPA's health or safety emergency provision permits such disclosures when the disclosure is necessary to protect the health or safety of the student or other individuals.⁵⁸ This exception to FERPA's general consent requirement is limited to the period of the emergency and does not allow for a blanket release of PII from a student's education records. Rather, these disclosures must be related to a significant and articulable emergency, such as an impending natural disaster, a terrorist attack, a campus threat, or the outbreak of an epidemic disease. Please refer to the following previously issued Department guidance entitled, "Addressing Emergencies on Campus," issued in June 2011, for additional information: <https://studentprivacy.ed.gov/resources/addressing-emergencies-campus>.

Q.26. Who are considered "appropriate parties" that may receive information under the health or safety emergency exception?

An appropriate party under the health or safety emergency exception to FERPA's general consent requirements is a party whose knowledge of such information is necessary to protect the health or safety of the student or other persons. Typically, local or State law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom schools and districts may disclose information under this FERPA exception.⁵⁹

⁵⁶ 34 CFR §§ 99.31(a)(1)(i)(B)(3) and 99.33(a)(2).

⁵⁷ 34 CFR § 99.33(a)

⁵⁸ 34 CFR §§ 99.31(a)(10) and 99.36

⁵⁹ Please refer to the following previously issued Department guidance entitled, "Addressing Emergencies on Campus," issued in June 2011, for additional information: <https://studentprivacy.ed.gov/resources/addressing-emergencies-campus>

Q.27. How does a school or district know when a health or safety emergency exists so that a disclosure may be made under this exception to consent?

A school or district must make this determination on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of a student or others. If the school or district determines that there is an articulable and significant threat to the health or safety of a student or other individuals and that one or more third parties (e.g., law enforcement officials, public health officials, trained medical personnel, parents, etc.) need education records (or PII contained in those records) in order to protect the health or safety of the student or other individuals, it may disclose that information to the appropriate parties without consent.⁶⁰

Q.28. What does “articulable and significant threat” mean?

This is a flexible standard under which the Department generally defers to school officials so that they might respond appropriately. In applying this standard, a school official should be able to explain the basis for his or her reasonable belief, based on all the available information, as to why a given student poses an “articulable and significant threat.” The phrase “articulable and significant threat” means that a school official is able to explain, based on all the information available at the time, what the threat is and why it is significant when he or she makes and records the disclosure.⁶¹

Q.29. May a school make disclosures under FERPA’s health or safety emergency exception for emergency preparedness exercises?

No. Disclosures made under the health or safety emergency exception must be “in connection with an emergency,” which means it must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus threat, or the outbreak of an epidemic disease.

Q.30. Does a school have to record disclosures made under FERPA’s health or safety emergency exception?

Yes. When a school or district makes a disclosure under the health or safety exception, it must record in the student’s education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed.⁶² (The recordkeeping requirements for disclosures under the health or safety emergency exception are different than the recordkeeping requirements for other disclosures discussed in Q.11.)


Q.31. Are there other situations in which school officials may non-consensually disclose PII from education records of students who have been disciplined for conduct that posed a significant risk to the safety of the school community to officials at another school?

Yes. Under FERPA, a school or district may disclose appropriate information concerning disciplinary action taken against a student who has been disciplined for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of

⁶⁰ 34 CFR § 99.36(c).

⁶¹ 34 CFR § 99.36

⁶² 34 CFR § 99.32(a)(5)



the school community, to school officials at *another school*. The school must determine that the other school has a legitimate educational interest in the behavior of the student.⁶³

For instance, a school official knows that a student, who had recently been disciplined for bringing a weapon to school, was overheard threatening to hurt students or teachers at a school-sponsored activity at another school. In this instance, FERPA would allow that school official to notify school officials at the other school who have been determined to have legitimate educational interests in the behavior of the student.⁶⁴ Please note that this exception does not permit the non-consensual disclosure of information concerning disciplinary action taken against a student for behavior that did not pose a significant risk to the safety or well-being of that student, other students, or other members of the school community (see Q.28).

Judicial Orders or Lawfully Issued Subpoenas

Q.32. May schools comply with a subpoena or court order for education records without the consent of the parent or eligible student?

Yes, although a reasonable effort to notify the parent or eligible student is generally required. FERPA permits disclosure of education records without consent in compliance with a lawfully issued subpoena or judicial order.⁶⁵ However, a school or district must generally make a reasonable effort to notify the parent or eligible student of the subpoena or judicial order before complying with it in order to allow the parent or eligible student the opportunity to seek protective action, unless certain exceptions apply. Exceptions to the requirement of making a reasonable effort to provide prior notification apply to: (1) a federal grand jury subpoena or other subpoena issued for a law enforcement purpose if the court or other issuing agency, for good cause shown, has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; and (2) an *ex parte* order obtained by the United States Attorney General (or designee not lower than Assistant Attorney General) concerning investigations or prosecutions of an act of terrorism or other specified offenses.⁶⁶ For example, if a school received a law enforcement subpoena that requested PII about a student suspected of selling drugs, it would not have to make an effort to notify the parent or eligible student if the court or other issuing agency, for good cause shown, had ordered that the existence or the contents of the subpoena or information furnished in response to the subpoena not be disclosed.

Transfer to New Schools

Q.33. Does FERPA permit schools to disclose any and all education records on a student to another school where the student seeks or intends to enroll?


Yes. FERPA permits a school or district to disclose education records (or PII contained in those records) without appropriate consent to another school or school system in which a student

⁶³ 34 CFR § 99.36(b)(3)

⁶⁴ 34 CFR § 99.36(b)(3).

⁶⁵ 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9)(i) and (ii)

⁶⁶ 20 U.S.C. §§ 1232g(b)(1)(J) and (j); 34 CFR § 99.31(a)(9)(ii)



seeks or intends to enroll, subject to certain conditions.⁶⁷ This exception to FERPA's general consent requirement also permits a school to disclose education records when a student is being placed in a juvenile justice facility that is considered a school.

Q.34. Are schools required to transfer certain student disciplinary records to other schools where the student seeks or intends to enroll?

It depends on State procedures. A State receiving funds under the Elementary and Secondary Education Act of 1965, as amended (ESEA),⁶⁸ was required, not later than January 8, 2004, to provide an assurance to the Secretary that they had "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." Schools and districts, therefore, should include a notice in their annual notification of rights under FERPA that they forward such student disciplinary records with respect to a suspension or expulsion by local educational agencies to other elementary or secondary schools that have requested the records and in which the student seeks or intends to enroll.⁶⁹ Unless the school or district includes this notice in its annual notification of FERPA rights or the parent or eligible student initiates the transfer of records, the school or district otherwise would be required to make a reasonable effort to notify the parent or eligible student of the disclosure at the last known address of the parent or eligible student.⁷⁰ (See the model notification of rights: <https://studentprivacy.ed.gov/resources/ferpa-model-notification-rights-elementary-secondary-schools>)

Juvenile Justice System

Q.35. Does FERPA permit the disclosure of PII from education records to officials of a State's juvenile justice system?

Yes, under certain conditions. FERPA permits schools to non-consensually disclose education records and the PII contained therein to State and local officials or other authorities if the disclosure is specifically: (1) allowed to be reported or disclosed by a State law adopted prior to November 19, 1974, if the allowed reporting concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or (2) allowed to be reported or disclosed by a State law adopted after November 19, 1974, if the disclosure concerns the juvenile justice system and its ability to serve, prior to adjudication, the student whose records are disclosed and the officials and authorities to whom the records are disclosed certify in writing to the school or district that the information will not be provided to any other party, without written consent, except as provided for under State law.⁷¹

⁶⁷ 34 CFR § 99.31(a)(2)), 34 CFR § 99.34

⁶⁸ 20 U.S.C. § 7917(b)

⁶⁹ 34 CFR §§ 99.7, 99.31(a)(2), and 99.34(a)(1)(ii)

⁷⁰ 34 CFR § 99.34(a)(1)

⁷¹ 34 CFR §§ 99.31(a)(5) and 99.38



Release of Information Not Considered Education Records

Personal Knowledge and Observation

Q.36. Does FERPA permit school officials to release information that they personally observed or of which they have personal knowledge?

Because FERPA applies to the disclosure of education records and of PII from education records that are maintained by the school, FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official's personal knowledge or observation, rather than from the student's education records.

Q.37. Are there any limitations to sharing information based on personal knowledge or observations?

The general rule regarding personal knowledge and observations does not apply where a school official learns of information about a student through his or her official role in making a determination about the student and the determination is maintained in an education record. For example, under FERPA, neither a principal nor any other school official who took official action to suspend a student may disclose information learned in that process, absent appropriate consent or an exception to consent under 34 CFR § 99.31 that permits the disclosure. However, the principal or other school official could disclose information about the student's behavior that they personally observed.



Resources

- U.S. Department of Education, Student Privacy Policy Office (formerly called the Family Policy Compliance Office): <https://studentprivacy.ed.gov>
- U.S. Department of Education, Privacy Technical Assistance Center: <https://studentprivacy.ed.gov>
- Family Educational Rights and Privacy Act Regulations: <https://studentprivacy.ed.gov/ferpa-regulations>
- Federal regulations resources web page at the U.S. Department of Education: <https://www.ed.gov/policy/gen/reg/edpicks.jhtml>
- U.S. Department of Education (2013): Guide for Developing High-Quality School Emergency Operations Plans, available at: http://rems.ed.gov/docs/REMS_K-12_Guide_508.pdf
- U.S. Department of Education, Family Policy Compliance Office (2011): Addressing Emergencies on Campus, available at: <https://studentprivacy.ed.gov/resources/addressing-emergencies-campus>
- U.S. Department of Education, Privacy Technical Assistance Center (2014): FERPA Exceptions Summary, available at <https://studentprivacy.ed.gov/resources/ferpa-exceptions-summary-large-format-11-x-17>
- U.S. Department of Education, Privacy Technical Assistance Center, FAQs on Photos and Videos under FERPA, available at: <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>
- U.S. Department of Education, Family Policy Compliance Office (2017): Model Notification of Rights under FERPA for Elementary and Secondary Schools, available at: <https://studentprivacy.ed.gov/node/490>
- Final Report of the Federal Commission on School Safety (2018), Chapter 13, "Training School Personnel to Help Ensure Student Safety," available at: <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>
- United States Secret Service and U.S. Department of Education, (2004): Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates, available at: <http://www.ed.gov/admins/lead/safety/edpicks.jhtml>

Appendix B

FERPA Regulations

Family Educational Rights and Privacy Act Regulations

34 CFR Part 99

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(Authority: 20 U.S.C. 1232g, unless otherwise noted).

PART 99 – FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

The authority citation for this part continues to read as follows:

(Authority: 20 U.S.C. 1232g, unless otherwise noted).

Subpart A-General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if-

(1)The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive nonmonetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section-

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or (2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

Note to § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to-

(a) Attendance in person or by paper correspondence, videoconference,

satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

“Biometric record,” as used in the definition of “personally identifiable information,” means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

"Dates of attendance"

(a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g (a)(5)(A))

"Directory information" means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name;

address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's –

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this section.

(c) Directory information includes a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

“Disciplinary action or proceeding” means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

"Disclosure" means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g (a)(3))

"Education Records"

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution;

(5) Records created or received by an educational agency or institution after an

individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C.1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally Identifiable Information"

The term includes, but is not limited to--

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) 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

(g) 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.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C.1232g)

"Student," except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of students?

(a)(1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from

giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have the rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C.1232g(d))

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to-

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the

extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31 (a) (1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1875-0246)

(Authority: 20 U.S.C. 1232g (e) and (f))

§ 99.8 What provisions apply to records of a law enforcement unit?

(a) (1) "Law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to-

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a "law enforcement unit" if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b) (1) Records of law enforcement unit means those records, files, documents, and other materials that are-

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of law enforcement unit does not mean –

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by any educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

Subpart B-What are the Rights of Inspection and Review of Education Records?

§ 99.10 *What rights exist for a parent or eligible student to inspect and review*

education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall-

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an educational agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A) and (B))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

- (i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

- (ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

- (i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

- (ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

- (ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

Subpart C-What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

- (a) If a parent or eligible student believes

the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

- (b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

- (c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

- (a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

- (b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

- (i) Amend the record accordingly; and

- (ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual including an official of the educational agency or institution, who does not have direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D-May an Educational Agency or Institution disclose Personally Identifiable Information from Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) "Signed and dated written consent" under this part may include a record and signature in electronic form that-

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable

information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party--

(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest

requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of-

(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.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically-

(A) Allowed to be reported or disclosed pursuant to a State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to a State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(1) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of,

educational agencies or institutions to:

- (A) Develop, validate, or administer predictive tests;
- (B) Administer student aid programs; or
- (C) Improve instruction.

(ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if--

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution enters into a written agreement with the organization that--

(1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and

(4) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(iv) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(v) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with-

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii) (A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an

educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information," under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if-

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law

Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that--

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of

education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j))

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding

authorized under § 99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local

educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a)(1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1875-0246)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if--

(i) The disclosures meet the requirements of § 99.31; and

(ii) (A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(e) If this Office determines that a third party outside the educational agency or institution improperly rediscloses personally identifiable information from education records in violation of this section, or fails to provide the notification required under paragraph (b)(2) of this section, the educational agency or institution may not allow that

third party access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C.1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a) (2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which 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;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) Authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by the Act or this part and must be established under other Federal, State, or local authority.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the officials or agencies headed by officials referred to in paragraph (a) of this section, except that those officials and agencies may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of

§ 99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C.1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in the Act or this part shall prevent an educational agency or institution from-

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student 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;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution 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 any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student designated as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled.

(d) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g (a)(5) (A) and (B))

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g((b)(1)(J))

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or nonforcible sex offenses?

As used in this part:

"Alleged perpetrator of a crime of violence" is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson
Assault offenses
Burglary
Criminal homicide-manslaughter by negligence
Criminal homicide-murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses

"Alleged perpetrator of a nonforcible sex offense" means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

"Final results" means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

"Sanction imposed" means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

"Violation committed" means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C.1232g (b)(6))

Subpart E-What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "Office" means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "applicable program" is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234))

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local

laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g (f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out its enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(f) and (g))

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a

violation is based on a policy or practice of the educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under § 99.64(b). The notice to the educational agency or institution--

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution. A notice of findings issued under paragraph (b) of this section to an educational agency or institution that has not complied with a provision of the Act or this part--

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part E of the General Education Provisions Act--

(1) Withhold further payments under any applicable program;

(2) Issue a complaint to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(NOTE: 34 CFR part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

Appendix A to Part 99 - Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

(NOTE: By definition there can be no "attempted" assaults, only "completed" assaults.)

(ii) Aggravated Assault

An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) Simple Assault

An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) Intimidation

To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other

conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

(NOTE: This offense includes stalking.)

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide-Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide-Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

(NOTE: Kidnapping/Abduction includes hostage taking.)

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or

threat of force or violence or by putting the victim in fear.

(NOTE: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.)

Sex Offences, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) Forcible Rape (Except "Statutory Rape")

The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) Forcible Sodomy

Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(b) Sexual Assault With An Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc..)

(d) Forcible Fondling.

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(NOTE: Forcible Fondling includes "Indecent Liberties" and "Child Molesting.")

Nonforcible Sex Offenses (Except "Prostitution Offenses")

Unlawful, nonforcible sexual intercourse.

(a) Incest

Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) Statutory Rape

Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[This is not an official version of the regulations. These regulations are codified in 34 CFR Part 99.]

[Updated January 2009.]

Appendix C

Virginia Model Memorandum of Understanding (MOU)

**VIRGINIA MODEL
MEMORANDUM OF UNDERSTANDING**

between
THE _____ SCHOOL BOARD/SCHOOL DIVISION
and
THE _____ POLICE DEPARTMENT/SHERIFF'S OFFICE [DATE]

PURPOSE

The [School Board/School Division (SD)] and [Police Department/Sheriff's Office (PD/SO)] hereby enter into this Memorandum of Understanding (MOU) setting forth the respective roles and responsibilities of both parties regarding the use of school resource officers (SROs). The purpose of this MOU is to establish a mutually beneficial partnership (School–Law Enforcement Partnership (SLEP)) that both schools and law enforcement can work within to achieve shared goals. The purpose of the SLEP is to foster relations of mutual respect and understanding in order to build a positive and safe school environment and to facilitate effective, timely communication and coordination of efforts for both the SD and the PD/SO.

This MOU is intended only to outline expectations between the SD and the PD/SO. It is not intended to create contractual or equitable obligations on the part of the SD or the PD/SO toward particular students, parents, SD or PD/SO employees, or any other third parties.

The parties agree the vast majority of student misconduct can be best addressed through classroom and in-school strategies. The parties acknowledge that students are generally less mature and responsible than adults; they often lack the maturity, experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; and they are more susceptible to outside pressures than adults.

For further details regarding the SLEP, please see the School and Law Enforcement Partnership Guide.

GOALS

The primary goals of the SLEP and this model MOU are to (i) promote positive and supportive school climates and (ii) create and maintain safe and secure school environments.

To promote positive and supportive school climates, the SD and PD/SO will collaborate to increase law-related education, expand school safety and crime prevention efforts, reduce conflict, and support effective interventions for students.

To create and maintain safe and secure school environments, the SD and PD/SO will collaborate to reduce and prevent crime, violence, victimization, and fear in and around schools, and minimize student involvement with the juvenile and criminal justice systems.

EVALUATION OF THE SCHOOL–LAW ENFORCEMENT PARTNERSHIP

The SD and the PD/SO should jointly develop measurable objectives of the SLEP using school discipline, crime, and violence data, school climate survey data, and any other data deemed to be relevant. The SD and the PD/SO will review progress toward achieving such objectives at least annually and the results of the progress review will be made available to the public.

ROLES AND RESPONSIBILITIES

I. Police Department/Sheriff's Office Responsibilities

The PD/SO will designate a direct point of contact between the PD/SO and the SD. The PD/SO point of contact will address any operational and administrative issues and will serve as a consultant for school safety and security issues including assessments and critical incident response planning. The PD/SO point of contact will maintain a working knowledge of school rules, regulations, and laws regarding student safety and conduct. The PD/SO point of contact will establish and maintain effective relationships with school personnel at the division and school levels.

The PD/SO will be responsible for the selection, assignment, scheduling, training, supervision, and evaluation of school resource officers (SROs). In their performance of law enforcement functions, the SRO will remain at all times under the control, through the chain of command, of the PD/SO. The PD/SO will ensure the SRO meets the training standards for SROs established by the Virginia Department of Criminal Justice Services (DCJS) pursuant to *Virginia Code* §§ 9.1-101(54) and 9.1-114.1.

The PD/SO will take into consideration the views of the SD and the identified needs and conditions of the schools when (i) developing and implementing law enforcement policies and practices that may affect schools and (ii) selecting, assigning, scheduling, training, supervising, and evaluating SROs.

II. School Division Responsibilities

The SD will designate a primary division-level point of contact between the SD and the PD/SO. The SD point of contact will implement the SLEP and maintain ongoing communications with PD/SO officials.

School administrators will be responsible for facilitating effective communication between the SRO and school personnel and for supporting the goals of the SLEP.

Each school with an assigned SRO should provide work area(s) for the SRO that allow access to technologies, private interviewing of several persons, and locking storage space for securing physical evidence.

The SD will handle discipline within the school disciplinary process without involving SROs. The SD policies, administrative guidance, training, and ongoing oversight should clearly communicate that school personnel are responsible for school discipline and that law enforcement is not to be involved with disciplinary action, except as may be requested by the SD (e.g., if factual information gathered or observations by the SRO are relevant to a disciplinary matter). The SD is responsible for communicating the goals and role of the SRO to all school administration, personnel, and students.

The SD should ensure that school administrators meet the training requirements set forth in *Virginia Code* § 22.1-279.8(E).

III. SRO Roles and Responsibilities

SROs should be considered active members of their assigned schools. The SRO facilitates the effective delivery of law enforcement services and assists with matters related to safety, security, and the exchange of information between the SD and the PD/SO.

Unless there is a clear and imminent threat to safety, requests from school personnel for SRO or other law enforcement assistance are to be made to a school administrator and such administrator should, if appropriate, request assistance from the SRO.

To the extent possible, SROs' duty schedules should be organized to provide coverage throughout the school day. SROs provide a visible deterrent to crime and shall be visible patrolling the exterior and interior grounds. SROs should wear the regulation uniform of the employing PD/SO and operate a marked PD/SO vehicle while on duty unless otherwise authorized by the SRO's supervisor.

Additionally, SROs should assist school administrators in developing school crisis, emergency management, and medical emergency response plans. SROs should work with school administrators in problem-solving to prevent crime and promote safety in the school environment. SROs are expected to collaborate with school administrators and other school personnel to support positive school climates that focus on resolving conflicts and minimizing student involvement with the juvenile and criminal justice systems.

SROs serve multiple roles in schools. The roles are interrelated but all are carried out with the aim to contribute to school safety and security and to promote positive and supportive school climates. The key roles of an SRO are:

Law enforcement officer

As a sworn law enforcement officer, the primary role of an SRO in a school is as a law enforcement officer. SROs assume primary responsibility for responding to requests for law enforcement assistance from school administrators and coordinating the response of other law enforcement resources to the school. SROs should work with school administrators in problem-solving to prevent crime and promote safety in the school environment. In all cases, the SRO's role as a law enforcement officer should take precedence over any other roles performed by the SRO.

Law-related educator

As resources permit, SROs should strive to assist with presentations to school personnel on law-related topics such as law enforcement practices, changes in relevant laws, crime trends, crime prevention, school safety strategies, and crisis response procedures. SROs may also deliver law-related education to students using lessons/curricula approved in advance by the SD.

Role model and informal mentor

Students often seek approval, direction, and guidance from adults in the school setting about various problems. Through formal and informal interaction with students, SROs serve as role models and informal mentors. SROs are expected to communicate clearly to students about acceptable and unacceptable behavior, set a positive example in handling stressful situations and resolving conflicts, show respect and consideration of others, and express high expectations for student behavior. Students who may need additional assistance shall be referred to a school-based resource.

IV. School Administrator Roles and Responsibilities

Consistent with the Virginia Standards for Accrediting Public Schools in Virginia, 8 VAC 20-131-210(A), “the principal is recognized as the instructional leader and manager of the school and is responsible for [f]ostering the success of all students by developing, advocating, and sustaining an academically rigorous, positive, and safe school climate for all stakeholders[.]” Additionally, pursuant to 8 VAC 20-131-260(D), the school administration should ensure that the school has written procedures “to follow in emergencies such as fire, injury, illness, allergic reactions, and violent or threatening behavior” and “for responding to violent, disruptive, or illegal activities by students on school property or during a school sponsored activity[.]”

School administrators should review the MOU annually with SROs and establish school-specific operational and communications procedures to support the goals of the SLEP.

OPERATIONAL PROCEDURES

I. Differentiating Disciplinary Misconduct from Criminal Offenses

School administrators and personnel are responsible for school discipline. Although SROs are expected to be familiar with the school division code of student conduct, the rules of individual schools, and their application in day-to-day practice, SROs should not be involved with the enforcement of school rules or disciplinary infractions that are not violations of law.

Consequences of student misconduct should be effective, developmentally appropriate, and fair. Interventions and school sanctions should help students learn from their mistakes and address root causes of misconduct. School administrators should consider alternatives to suspensions and expulsions and law enforcement officials should consider alternatives to involvement with the juvenile and criminal justice systems for student violations of law.

II. Information Sharing

The release and sharing of student records is governed by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. Part 99, and §§ 22.1-287 and 22.1-287.1 of the *Code of Virginia*.

When appropriate, and to the extent allowable by law, the SD should notify SROs of any special needs of a student involved in a school-based infraction that is not routine discipline in order to assist the SRO in recognizing and accommodating behaviors that may be manifestations of the student’s disability.

Consent access. An SRO or other law enforcement officer may have access to a student’s education records with written consent of the student’s parent or legal guardian or of the student if the student is 18 years or age or older.

SRO access. For purposes of access to student records, SROs may be considered “school officials with a legitimate educational interest” in reviewing information from student education records covered by FERPA, and may be provided student information as needed to carry out their duties related to the school environment, provided such SROs perform a function or service for which the school would otherwise use employees (e.g., maintaining the physical safety and security of the school) and comply with the use and re-disclosure requirements set forth in 34 C.F.R. § 99.33. SROs may have

access to (i) information on students in their assigned schools that include directory information and additional items needed to carry out their duties, such as class schedules, as approved by the school administrator, and (ii) directory information for all students in the school division (however, unless they are school officials with a legitimate educational interest, they will not have access to student addresses, telephone numbers or email addresses unless another exception applies, given § 21.1-287.1 of the *Code of Virginia*). While, as noted above, SROs are always under the control of the PD/SO in carrying out their law enforcement duties, the PD/SO agree that SROs will respect the confidentiality of student education records as other school officials would, and are under the control of the SD when it comes to the handling of student education records. PD/SOs understand that unless a FERPA exception applies that would permit disclosure to law enforcement by any school official (e.g., in the context of a health or safety emergency or in response to a subpoena), SROs will not share protected student record information with the PD/SO.

Health or Safety Emergency Exception. Pursuant to 34 C.F.R. § 99.36, in the event of an articulable and significant threat to the health or safety of a student or other individuals, school officials may disclose any information from student records to appropriate parties, including law enforcement officials, whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

SRO disclosure of law enforcement records. SROs may disclose law enforcement records created and maintained by the SRO for the purpose of maintaining the physical security and safety of the school or the enforcement of laws. Because law enforcement records are not student records, they are not subject to the disclosure requirements of FERPA.

III. Investigation and Questioning

SROs have the authority to question students who may have information about criminal activity. As sworn law enforcement officers, SROs have authority to stop, question, interview, and take law enforcement action without prior authorization of the school administrator or contacting parents or legal guardians. However, the investigation and questioning of students during school hours or at school events should be limited to situations where the investigation is related to suspected criminal activity related to the operation of or occurring at the school. The investigation and questioning of students for offenses not related to the operation of or occurring at the school should take place at school only when delay might result in danger to any person, destruction of evidence, or flight from the jurisdiction by the person suspected of a crime.

The interviewing of students, whether as suspects, victims, or witnesses, should be conducted privately in an office setting. SROs shall take steps to ensure minimal intrusion into the educational experience of students being questioned in the school setting.

SROs are responsible for leading the investigation and questioning of students related to suspected violations of criminal law. SROs shall not be included in the investigation and questioning of students about student code of conduct violations that do not involve any criminal activity or risk of harm to self or others. School administrators are responsible for the investigation and questioning of students about violations of the code of conduct.

IV. Searches

All searches shall be conducted in accordance with federal and state laws and applicable SD and PD/SO policies and guidelines, including the principles embodied in this MOU.

School administrator searches. School personnel may conduct searches of a student's property and person under their jurisdiction in accordance with guidelines developed as contemplated by *Code of Virginia* § 22.1-279.7, and the advice of the school's legal counsel.

SRO searches. Any search initiated by an SRO or other law enforcement officer should be conducted in accordance with constitutional search and seizure requirements. All searches should occur outside the presence of students and school personnel, with the exception of school administrators, unless there is a clear and imminent threat to safety.

SROs should not become involved in administrative searches and at no time should SROs request that an administrative search be conducted for law enforcement purposes or have school personnel conduct a search as the SRO's agent.

V. Arrests

Whenever practical, the arrest of a student or school personnel should be accomplished outside of school hours in order to not disrupt the educational process or school setting. Arrests that must occur during school hours or on school grounds should be coordinated through the school administrator to minimize potential disruption. When circumstances do not allow for prior coordination through the school administrator, arrests should be reported to the school administrator as soon as possible. In addition to any required notification of parents and legal guardians by the SRO taking a student or employee into custody, school administrators or their designees should consider notifying parents and legal guardians upon a school-based arrest of the student.

VI. Physical Restraint by School Personnel

Physical restraint refers to restricting a student's ability to freely move his or her torso, arms, legs, or head. The term physical restraint does not include a physical escort, such as temporary touching of the arm or other body part for the purpose of inducing a student who is acting out to walk to a safe location.

Physical restraint by school personnel is used in accordance with Virginia Board of Education policies and guidelines on seclusion and restraint and related local school board policies. Every effort should be made by school personnel to prevent the need for the use of restraint. Physical restraint should not be used except by school personnel trained in the use of physical restraint as required by the school division.

School personnel should act to de-escalate situations that are causing, or have the potential to cause, disruptions to the school environment and/or are violations of the student code of conduct. If physical intervention is necessary, the action shall be reported promptly to the school administrator and the rationale for the action shall be fully documented.

VII. Physical Intervention by School Resource Officers

An SRO should not be involved in the physical restraint of a student unless there is a clear and imminent threat to safety. As sworn law enforcement officers, SROs may intervene to de-escalate situations.

Physical intervention by SROs is undertaken in accordance with policies and operational procedures of the PD/SO and state law regarding physical intervention and use of force by a law enforcement officer. If an SRO is involved in the use of restraint or physical intervention, the action should be reported to the school administrator and the SRO's supervisor and the rationale for the action should be fully documented.

SROs should be aware of the Virginia Board of Education's policies and guidelines on seclusion and restraint and related local school board policies and may attend training offered by the local school system on their use of seclusion and restraint by school personnel. However, SROs should continue to operate by the policies and operational procedures of the PD/SO and state law regarding physical intervention and use of force by a law enforcement officer.

Additionally, if the SRO physically intervenes with a student, the SD and PD/SO should coordinate to ensure that reasonable effort is made to inform the parents or legal guardians of such student on the same day as the occurrence of the physical intervention.

KEY STATUTORY RESPONSIBILITIES

I. Crime Reporting

Pursuant to *Virginia Code* § 22.1-279.3:1(B), law enforcement agencies are required, among other things, to notify the division superintendent and the principal or the principal's designee when a student in the principal's school commits (i) any offense that would be a felony if committed by an adult or (ii) any offense listed in *Virginia Code* § 22.1-279.3:1(A) that would be a misdemeanor if committed by an adult if such offense was committed on a school bus, on school property, or at a school-sponsored activity and whether the student is released to the custody of his parent or legal guardian or released on bond.

Pursuant to §§ 16.1-260(G) and 19.2-83.1(B), law enforcement agencies and/or intake officers are required to notify the division superintendent if a student is arrested for certain offenses or subject to a petition alleging that the student committed certain offenses. Division superintendents who receive such reports are required to report the information to the principal of the school in which the student is enrolled.

As a general practice, SROs should notify the principal as soon as practical of any significant law enforcement events occurring at or in association with the school (e.g., at a school bus stop or off-campus activity, during or outside school hours).

Pursuant to *Virginia Code* § 22.1-279.3:1(D), certain types of criminal activity committed on a school bus, on school property, or at a school-sponsored activity that come to the attention of the principal or school personnel should be reported immediately to the PD/SO as specified in SD policy. No SRO or school administrator will be required to file delinquency charges in response to any such activity. After such notification is made to PD/SO, the SD will ascertain the disposition of the incident made by the PD/SO in order to complete the optional [Model School/Law Enforcement Incident Report](#) form. Schools and SROs should be encouraged to deal with school-based offenses through graduated sanctions or educational programming before a delinquency charge is filed with the juvenile court.

II. Threat Assessment

Threat assessments will be conducted in accordance with local school board policies adopted as required by *Virginia Code* § 22.1-79.4 and, in general, consistent with model procedures and guidelines published by the DCJS Virginia Center for School and Campus Safety and other appropriate practices.

SROs may serve as members of threat assessment teams (including as school officials with a legitimate education interest, as defined by FERPA and as discussed above) and assist in the monitoring of subject students as well as determining the need, if any, for law enforcement action.

III. School Safety Audits

School safety audits will be conducted annually as required by *Virginia Code* § 22.1-279.8 to assess school safety conditions in schools. SROs, in collaboration with school administrators, will conduct school inspection walk-throughs using a standardized checklist developed by the Center for School and Campus Safety. SROs should collaborate in other school safety audit mandates set forth in *Virginia Code* § 22.1-279.8, including school crisis, emergency management, and medical emergency response planning and preparation.

REVIEW OF MOU

Effective July 1, 2020, per an amendment to *Virginia Code* § 22.1-280.2:3 “school boards and local law enforcement agencies shall review and amend or affirm memorandums of understanding at least once every two years, or at any time upon the request of either party”. Further, “each school board shall ensure the current division memorandum of understanding is conspicuously published on the division website and provide notice and opportunity for public input and discussion during each memorandum of understanding review period.”

Quarterly meetings should be conducted throughout the year between the SD point of contract and PD/SO point of contact to support successful implementation of the partnership. This MOU remains in force until such time as either party withdraws from the agreement by delivering a written notification of such withdrawal to the other party at least 45 days prior to the date of withdrawal.

Signed:

Chief of Police/Sheriff

Superintendent of Schools

Date

Date

Appendix A

Graduated Intervention and Responses

In developing the School–Law Enforcement Partnership MOU, the School Division and Law Enforcement Agency are encouraged to develop alternative responses and educational programming for school-based misconduct in order to divert youth from unnecessary involvement with the juvenile justice systems.

Examples of graduated response programs used by school divisions and law enforcement agencies in other states can be found in these agreements and MOUs.

Clayton County, Georgia

Inter-Agency Governance Agreement on the Handling of School Offenses Between the Clayton County Public School System and Clayton County Juvenile Court (2013)

[www.jdaihelpdesk.org/casemodpolicies/Handling%20of%20School%20Offenses%20MOU%20\(Clayton%20County,%20GA\).pdf](http://www.jdaihelpdesk.org/casemodpolicies/Handling%20of%20School%20Offenses%20MOU%20(Clayton%20County,%20GA).pdf)

Hartford, Connecticut

Memorandum of Agreement By and Between Hartford Public Schools and Hartford Police Department (2012)

<https://www.cga.ct.gov/2014/JUDdata/Tmy/2014SB-00054-R000224-Hartford%20Police%20Dept.%20-%20James%20C.%20Rovella-TMY.PDF>

San Francisco, California

Memorandum of Understanding Between the San Francisco Police Department and the San Francisco Unified School District (2014)

www.dignityinschools.org/sites/default/files/SFPD-SRO-MOU.pdf