

The Family Educational Rights and Privacy Act of 1974 (FERPA)

The Texas A&M University System Office of
General Counsel



Topics

- 1) When does FERPA apply?
 - Key definitions
 - Triggering events

- 2) What are the basic FERPA requirements?
 - Right to Inspect and Request Corrections
 - Notice and Consent

- 3) When is prior consent required?
 - Directory Information
 - Non-directory information
 - Note: Applicant information



1. When Does FERPA Apply?



Key Definitions

What are “Education Records”? Education Records are “those records that are...Directly related to a student; and...Maintained by an educational agency or institution or by a party acting for the agency or institution.” *See* 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

Who is a “Student”? A person who is or has been in attendance at the institution and about whom the institution maintains education records. *See* 20 U.S.C. § 1232g(a)(6); 34 C.F.R. § 99.3.



Key Definitions

What records are defined as not included in “Education Records”? *See* 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3.

- Records kept in the sole possession of maker (personal memory aid).
- UPD records (maintained by UPD and created for purpose of law enforcement).
- Business records relating to an individual’s capacity as an employee (a person not attending the institution. Therefore, the exception does NOT include employment records for individual employed as a result of status as a student).
- Treatment records on a student 18 or over attending an institution (made by a professional acting in that capacity, only in connection with treatment, disclosed only to individuals providing treatment).
- Records created by institution after individual is no longer a student and not directly related to attendance as a student.
- Grades on peer-graded papers before collected/recorded by a teacher.



Key Definitions

What education records are defined as “Directory Information”?
Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. *See* 20 U.S.C. § 1232g(a)(5)(A), (b)(1); 34 C.F.R. §§ 99.3, 99.31, 99.37.

Includes: 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.



Key Definitions

“Directory information” does not include a student's--

(1) Social security number; or

(2) Student identification (ID) number, except student ID numbers that cannot be used to gain access to education records except in conjunction with one or more factors to authenticate the user’s identity, such as a PIN, password or other factor known only by the authorized user.

This includes student ID numbers:

--used for purposes of accessing or communicating in electronic systems; or

--displayed on a student ID badge. *See* 34 C.F.R. § 99.3



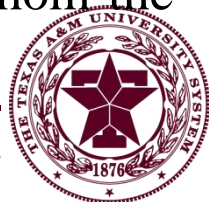
Key Definitions

What is “Disclosure”? 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. 34 C.F.R. § 99.3



What is “Personally Identifiable Information”?

- (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. 34 C.F.R. § 99.3.



Triggering Events

FERPA applies generally to a postsecondary institution of education to which funds have been made available by the Department of Education, including funds provided to the institution or to a student attending the institution. *See* 20 U.S.C. § 1232g; 34 C.F.R. § 99.1.



Triggering Events

FERPA's specific requirements apply when an individual becomes a "student" of the institution, meaning the individual is accepted and begins to attend the institution, including additional components of the institution (such as graduate programs or programs of another department of the institution). 34 C.F.R. §§ 99.3, 99.5(c).



Triggering Events

A student attending a postsecondary institution has FERPA rights, not his or her parents, although disclosures may be made to the student's parents without the student's consent if the student is a dependent for tax purposes.

See 20 U.S.C. § 1232g(e); 34 C.F.R. §§ 99.3, 99.5, 99.31.



2. What are the basic FERPA requirements?



Basic FERPA Requirements

1. An institution is required to provide annual notice to students currently in attendance of their rights under FERPA, including a student's right to:

--Inspect and review the student's education records, including the right to seek an amendment of records containing information the student believes is inaccurate, misleading or violates the student's privacy rights and the process for inspection/review and the process for inspection/review and seeking an amendment;

--consent to disclosures of personally identifiable information in the student's education records as authorized under FERPA/FERPA regulations; and

--complain to DOE regarding alleged violations of FERPA.

The notice must specify the institution's criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

See 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7.



Basic FERPA Requirements

2. A student has a right to inspect and review the student's education records.

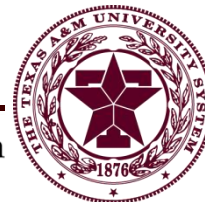
--The institution shall comply with a student's request for access within a reasonable time, not more than 45 days of receipt.

--The institution "shall respond to reasonable requests for explanations and interpretations of the records."

--The institution must provide copies or make other arrangements for inspection if "circumstances effectively prevent" the inspection and review.

--Treatment records—A student may have reviewed by a physician/professional of the student's choice.

See 20 U.S.C. § 1232g(a)(1); 34 C.F.R. § 99.10.



Basic FERPA Requirements

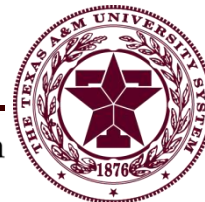
3. A student may request for an institution to amend an education record if the student believes the record contains information that is inaccurate, misleading or violates the student's right of privacy.

--The institution shall decide whether to amend as requested within a reasonable time after receipt of the request.

--The institution “shall respond to reasonable requests for explanations and interpretations of the records.”

--The institution shall inform the student if it decides not to amend to record and it must inform the student of his or her right to a hearing.

See 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.20.



Basic FERPA Requirements

3A. An institution shall give a student, on request, an opportunity for a hearing to challenge the content of the student's education record on the ground that information contained in the record is inaccurate, misleading or violates the student's right of privacy.

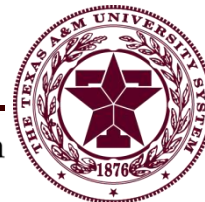
--The institution shall hold the hearing within a reasonable time after receipt of the request and shall provide notice to the student reasonably in advance of the hearing (date, time, place).

--The hearing officer must not have a direct interest in the outcome.

--The institution shall provide the student a "full and fair opportunity to present evident relevant to the issues raised in the request.

--The institution must make its decision in writing within a reasonable time of the hearing and must be based solely on the evidence presented at the hearing.

See 20 U.S.C. § 1232g(a)(2); 34 C.F.R. §§ 99.21, 99.22.



Basic FERPA Requirements

3B. Following the hearing, the institution shall decide whether the information is inaccurate, misleading or in violation of the student's privacy rights and shall:

-amend the record and inform the student OR

-if the institution decides the record is not inaccurate, misleading or in violation of the student's privacy rights, it shall inform the 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 institution's decision, or both.

The student's statement must be maintained with the record and disclosed with that portion of the record.

See 20 U.S.C. § 1232g(a)(2); 34 C.F.R. §§ 99.21, 99.22.



Basic FERPA Requirements

4. An institution is generally prohibited from disclosing personally identifiable information from a student's education records without the prior written consent of the student. See 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.30.

5. A student may file a written complaint with DOE's Family Policy Compliance Office regarding alleged violations of FERPA. 34 C.F.R. § 99.63.



3. When is a student's prior written consent required?



Prior Consent Requirements

Disclosures of Directory Information: **Prior to disclosure**, the institution must provide public notice to students of:

- Types of personally identifiable information the institution has designated as directory information.
- A student's right to elect not to allow the institution to designate any or all of these types of information about the student as directory information.
- The reasonable period of time within which students must notify the institution that he or she does not want any or all of these types of information about the student designated as directory information .

See 20 U.S.C § 1232g(a)(5)(B); 34 C.F.R. § 99.37.



Prior Consent Requirements

Disclosures of Directory Information:

-Prior notice is NOT required for former students but a former student may elect to “opt out.”

-If an institution uses a student’s social security number or other non-directory information alone or in combination with other data elements to identify or help identify the student or the student’s records, the institution may not disclose directory information without following the written consent requirement.

See 20 U.S.C § 1232g(a)(5)(B); 34 C.F.R. § 99.37.



Prior Consent Requirements

Disclosures of Non-Directory Information: A student's signed and dated written consent is required prior to the institution's disclosure of personally identifiable information from the student's education records. The consent (which may be electronic) must specify the records allowed to be disclosed, the purpose of the disclosure, and the party/class of parties to whom disclosure must be made.

See 20 U.S.C § 1232g(b)(2); 34 C.F.R. § 99.30.



Prior Consent Requirements

Disclosures of Non-Directory Information: When is prior consent NOT required?

- Disclosure to school officials determined to have a legitimate educational interest (including certain contractors).
- Disclosure to officials of other schools in which the student seeks to enroll if the student is notified of the disclosure.
- Disclosure necessary to determine financial aid eligibility, amount, conditions or to enforce terms.
- To comply with judicial order or lawfully issued subpoena (prior notice to student required unless terms of law enforcement subpoena or Federal grand jury subpoena prohibit disclosure of existence, contents, or response to subpoena).

See 20 U.S.C. § 1232g(b)(1); 34 C.F.R. §§ 99.31.



Prior Consent Requirements

Disclosures of Non-Directory Information: When is prior consent NOT required?

-Disclosure in connection with a health or safety emergency.

The institution must decide, based on the totality of the circumstances pertaining to a threat to the health or safety to the students or others, that the disclosure to appropriate parties is necessary to protect the health or safety of the student or others. This is described in DOE's regulation as "an articulable and significant threat to the health or safety of a student or other individuals..."

If, based on existing information, there is a rational basis for the institution's decision, DOE will not substitute its judgment for that of the institution.

See 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31; 99.36.



Prior Consent Requirements

Disclosures of Non-Directory Information: When is prior consent NOT required?

-Disclosure to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense, regardless of outcome (final results of institution's disciplinary proceeding, meaning student's name, violation committed, sanction imposed).

-Disclosure in connection with a disciplinary proceeding. 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.

See 20 U.S.C. § 1232g(b)(6); 34 C.F.R. §§ 99.31; 99.39.



Note: Applicant Information

Recent Texas Office of the Attorney General (OAG) letter rulings

-The OAG has determined in an open records letter ruling that information identifying applicants to a university that is not otherwise protected by FERPA is CONFIDENTIAL.

-The A&M System recently received an open records letter ruling from the OAG finding this same result.

-**Recommendation:** Until the Office of General Counsel notifies otherwise, an applicant's identifying information not protected by FERPA is CONFIDENTIAL and should not be released to other individuals. This ruling is limited to individuals who have applied to the university but have not attended.



Contact Information

R. Brooks Moore
Managing Counsel, Governance
(979) 458-6144 (direct)
rbm@tamus.edu

