

FERPA Follies: Confidentiality and Student Records

Michigan Transition Services Association
2010 Annual Conference



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Student Records



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FERPA: Two Purposes

1. Parent access to education records
2. Limit on disclosure
 - Prior written consent, *or*
 - Consent exception



Family Educational Rights and Privacy Act

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FERPA: Four Parent Rights

- Right to inspect and review
- Right to challenge/seek to amend “inaccurate or misleading” content
- Right to be informed of rights and to file a complaint with USDOE
- Right to consent to or prohibit the release of personally identifiable information

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Enforcement

- US Department of Education’s Family Policy Compliance Office
- US Supreme Court ruled no private cause of action – *Gonzaga Univ v Doe* (2003)



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***Letter to Anonymous
(FPCO, 2009)***

- FPCO concluded district violated FERPA and directed district to provide written assurance that steps had been taken to protect against future improper disclosures
- Parents wanted additional remedies including public sanction, loss of stimulus monies, etc.
- FPCO: Parents' proposed remedies beyond FERPA's scope

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“Education Record”

- Records “directly” related to student; and
- Maintained by educational agency or party acting for agency



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Record

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



34 CFR 99.3

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Exception to “Education Record”

Records of school personnel which are:

- Kept in maker’s sole possession
- Used only as a personal memory aid
- Not accessible/revealed to anyone except temporary substitute for record maker



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FERPA Defines “Parent” As

- Natural parent
- Guardian
- Individual acting as a parent in the absence of a parent or guardian
- Noncustodial parent has FERPA rights *unless* court order addresses
- *See also* MCL 722.30

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“Eligible Student”

- 18 years of age or older
- Emancipated minor
- Student attending postsecondary institution



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Parent Access Procedures

- Right to “inspect and review”
- 45-day timeline
- May charge “reasonable fee” for copies, but *not* to search or retrieve



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Parent Amendment Procedures

- If parent believes record is inaccurate, misleading, or violates student’s privacy, parent may request amendment of record
- School decides whether to amend within a reasonable time after receiving request
- If school decides not to amend, parent has a right to a hearing

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Letter to Anonymous (FPCO, 2008)

- Parent alleged FERPA violation when school refused to delete reference to 5-day suspension in student’s record and didn’t offer a hearing
- FPCO: Amendment procedures are not to be used to change a grade, an opinion or substantial decision by the school

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Disclosure of Student Records



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General Rule

- School personnel may not disclose personally identifiable information from a student's education record to third parties unless the parent (or eligible student) provides prior written consent

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Personally Identifiable Information

- Student name
- Name of student's parents/family members
- Address of student/family
- Personal identification number
- Indirect identifiers
 - Date and place of birth
 - Mother's maiden name



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Personally Identifiable Information

“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 accuracy.”

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Personally Identifiable Information

“Information requested by a person who the [District] reasonably believes knows the identity of the student to whom the education record relates.”



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Letter re: Jackson Pub Sch Dist (FPCO, 2007)

- School official told another individual that the student’s mother was a “difficult parent”
- FPCO: Information obtained through personal knowledge, observation, or hearsay and not from an education record is not subject to FERPA

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Disclosure Procedures

- Prior written consent
 - Signed and dated
 - Purpose of disclosure
 - Party
- Maintain record of disclosures
- Agreement not to redisclose



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Consent Exceptions...

- School official with “legitimate educational interest” as determined by school
- Other schools where student seeks to enroll or is currently enrolled
- Authorized government officials
- Financial aid applications
- Organizations conducting certain educational studies
- Accrediting organizations

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More Consent Exceptions . . .

- Parent of dependent student under IRC
- Health or safety emergency
- Certain disciplinary or legal proceedings
- Court order or lawfully issued subpoena
- Directory information

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Court Order or Subpoena

- Before disclosure, must make “reasonable effort” to give parent notice
- Some exceptions if court orders subpoena not to be disclosed
- Michigan RJA



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Revised Judicature Act § 2165

“No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles”

MCL 600.2165 ²⁹

Revised Judicature Act § 2165

“... shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.”

MCL 600.2165 ³⁰

***Letter to Merrell
(FPCO, 2006)***

- Principal disclosed student’s gifted and talented program application to sheriff detective without parent consent
- FPCO: Principal violated FERPA
- District required to take steps to remind staff of FERPA requirements

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Authentication

- Amended FERPA regulations require use of reasonable methods to identify and authenticate the identity of any party to whom the institution discloses personally identifiable information from education records

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“Directory Information”

Information in a student’s education record that is generally not considered *“harmful or an invasion of privacy if disclosed.”*



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Directory Information Examples

- Name, address, telephone, e-mail address
- Date/place of birth
- Major field of study
- Participation in certain school activities
- Weight/height of athletic team members
- Dates of attendance
- Degrees and awards received
- Previous educational institution attended
- Photographs

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SSNs and IDs

- Recent amendments to FERPA regulations *expressly exclude* from the definition of directory information:
 - Student's SSN
 - Student ID #, but only if identifier can be used to gain access to education records *without* PIN/password

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Directory Information Criteria

- Provide annual notice
- Unless parent objects, may disclose without prior written consent
- May disclose, without notice, directory information of former students

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Military Recruiters

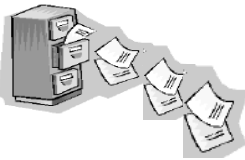
- Provide recruiters with
 - Student name, address, phone number
 - Access to campus
- Notify parents of nondisclosure rights
- Honor nondisclosure request



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Record Disclosure Checklist

- ✓Is it an “education record”?
- ✓Do you have prior written consent?
- ✓Does a consent exception apply?



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Other FERPA and Education Record Issues



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Discipline Records

- April 10, 2004 MDE memo
- NCLB requires procedure to “facilitate” transfer of discipline records to other schools
- SC § 1135 requires transfer of student’s file within 30 days
- MDE: “school record” includes “disciplinary record”
- FERPA permits nonconsensual record transfer to school where student seeks to enroll

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Letter to Scott (FPCO, 2007)

- If test protocol contains personally identifiable info about student, it’s an “education record” under FERPA subject to parent review
- If test protocol doesn’t contain info directly related to student, district may still have to respond to reasonable requests for explanation and interpretation

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Letter to Anonymous (FPCO, 2008)

- District redacted the test questions in booklet before giving parent access to test instrument that contained personally identifiable information of the student
- FPCO: Redaction effectively denied parent’s right to access

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Special Education Records

- Highly confidential
- Limited access
- Secure storage
 - Disclose on “need to know” basis
- Significant parental rights under IDEA
 - Correction/amendment
 - Destruction
 - Access



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Records of Transfer Students under IDEA

- New school district must take reasonable steps to promptly obtain child’s records from former district
- Previous school district must take reasonable steps to promptly respond to records request from new district
- RSC § 1135 requires transfer in 30 days

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Berkeley County School District (FPCO, 2004)

- Video containing the image of student(s) involved in a fight is an education record for each student involved in the fight
- Because only one student was depicted, parent could access tape
- But, if two students depicted, parent does *not* have right to access tape

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FPCO Guidance 2007

Surveillance tapes maintained by school's law enforcement unit (and not the school) are law enforcement records not subject to FERPA



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Plea for Clarity

- January 2007: NSBA made a written request to FPCO for clarification of its position on videotapes as education records
- To date, no response . . .
- New regs did not address



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FERPA, HIPAA and Health Records

- HIPAA generally does not apply to schools because either:
 - School is not a “covered entity” under HIPAA; or
 - Health records maintained are “ed records” or “treatment records” under FERPA and excluded under HIPAA
- www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf

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***Letter to Mussoline
(FPCO, 2009)***

- Parent received records pertaining to another student
- FPCO: Because complainant's FERPA rights weren't violated, parent didn't have standing
- But, FPCO recommended that District:
 - Review FERPA requirements with staff responsible for disclosing records
 - Revise procedures as necessary

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***Letter to Marshall
(FPCO, 4/14/09)***

- Former employee improperly disclosed special ed records of about 50 students
- District notified FPCO of the violation and steps taken since the breach
- FPCO: "No system for maintaining or transmitting education records...can be guaranteed safe...from unauthorized access and disclosure" but districts should "consider actions that mitigate the risk and are reasonably calculated to protect such information."

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Letter to Marshall (cont'd)

- If a district experiences a breach, FPCO suggests taking the following steps:
 - Report incident to law enforcement
 - Determine information compromised
 - Take steps to retrieve data and prevent further disclosures
 - Identify affected records and students
 - Determine how the incident occurred, whether policies were breached, and whether incident occurred due to lack of monitoring/oversight
 - Conduct a risk assessment

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