

STRAIGHT FROM THE TOP

Answers to FERPA Questions
as presented by LeRoy S. Rooker, Director
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On July 16, 2002 Mr. LeRoy Rooker, Director of Family Office of the U.S. Department of Education, gave a presentation to interested school district personnel and attorneys providing guidance on the Family Education Rights to Privacy Act. Excerpts from his presentation were chosen to help the practitioner deal with FERPA questions.

Impact of Falvo Decision

Q. In light of the ***Falvo*** [*Owasso Indep. Sch. Dist. v. Falvo*, 122 S. Ct. 934 (2002)] decision allowing students to grade papers in class, will the Family Compliance Office (FCO) revise the regulations defining education records?

A. *The FCO is planning on issuing new regulations, however, the Supreme Court in Falvo confirmed FCO's position that for a record to qualify as an "education record," it must be maintained by the school district.*

Comments on definition of "Educational Records"

Q. Where does the FCO stand on teacher grade books?

A. *Despite the Supreme Court's discussion in Falvo, the FCO considers grade books to be education records.*

Q. Are there any records that don't fall under the category of "educational records"?

A. *"Sole Possession" records of the maker are not educational records. For example, if records are kept as "memory jogger" type of records such as personal notes kept by a teacher/counselor as a reminder to themselves for dealing with a particular student.*

Q. Are documents created in the course of a student investigation "educational records"?

A. *Section 99.8 provides that a school may designate a school official (e.g. principal) to serve as the law enforcement unit for the school. This official may investigate incidents related to law enforcement and create and maintain records for a law enforcement purpose. This designation must be done officially, the records must be maintained in a separate location from education records, and the school district must have specified that it has taken this action in the annual FERPA notice of rights to parents. [The distinction offered by Mr. Rooker was that the records are not created or maintained as educational records but as law enforcement records.]*

Comments on Definition of "Parent"

*Custodial step parents will be treated as parents with rights outlined in FERPA but not the same for non-custodial step parents unless consent is obtained from a parent.

*Involved parents who are away for long periods of time (*i.e.*, long-haul truck drivers) need to leave written documentation for the school noting who is authorized to have parental access rights

while absent.

*Mr. Rooker counseled to “document, document, document” if the school district is unsure of the adult’s authority to have access to student records. In today’s world, students often live with other family members or other families without legal custody even being changed. Be able to show that reasonable inquiry is made before allowing access to student records by someone other than the authorized parent.

*Any parent regardless of custody status or level of involvement with the student still retains access to records absent a court order specifically revoking or limiting those educational rights.

Comments on the School District’s Annual Notification

*Remember, the annual notification to parents must be “reasonably likely to inform”.

*The method or form is not dictated by statute or regulation. It is not required that the parent must sign for notice of FERPA rights. Notice as part of the student handbook/materials is acceptable. Many school district across the nation use the local newspaper to provide this annual notification. School districts may consider using their web site as a means of providing the annual notification.

Comments on “Personally Identifiable Information”

*Use caution in identifying students as passing the TAAS. While it can possibly be categorized as an “honor or an award” and included within the category of directory information that is releasable. The FCO will be reviewing this issue but if the designation of the honor of passing in effect identifies students who have not passed, there could be a violation of FERPA.

*Unless a confidentiality agreement is reached with an outside institution as provided in the statute, a district cannot share personally identifiable information with institutions who are awarding grants of money to schools.

Comments on Directory Information

*It is permissible for a school district to declare that email addresses are private. A state cannot require disclosure of information that is protected by FERPA.

*Schools can require parents to consent to “all or nothing” release. Parents can be prohibited from picking and choosing what piece of directory information they want released and what piece they do not want released. The administrative burden on a school district could be substantial if this was allowed.

*Schools can pick and choose from the list of what items FERPA identifies as directory information so long as state law does not require disclosure of all FERPA designated directory information.

*Race, gender, national origin, disability, etc. cannot be divulged as directory information.

*School districts can designate class rosters or student class schedules as directory information so long as these items were included in the annual notice of parents and the parents are given the opportunity to opt out.

Comments on definition of “Record”

*Emails are records.

*Records can include documentation that exists only in the hard drive of a computer and the school district may have to spend time and resources to retrieve data if requested. Mr. Rooker acknowledges that public information laws may allow the district to charge for certain records and labor it requires to provide the records.

*Recommended that school district adopt and/or update their retention policies to decrease the burden on districts.

Comments on FERPA Concerns in Disciplinary Hearings

Q. What should a school do with a parent complaining about disciplinary action taken against their child and they insist on this discussion to occur in open session?

A. *The District can explain that even though the parent can discuss their student in open session that the school district cannot without express consent from the parent. The school district cannot infer that the parent has consented to a discussion about their child.*

*Remember that Section 99.12 provides that a school cannot give information to a parent about disciplinary action regarding a child other than his/her own except to note that “appropriate action has been taken” unless the parent of the child receiving disciplinary action consents to the disclosure.

Q. Has the Office of Civil Rights (OCR) and FPCO issued any guidelines on interaction between Title IX and FERPA?

A. *There have been joint meetings between OCR and the FPCO to discuss the interplay between Title IX and FERPA. Title IX does not require specific notification of specific disciplinary action to the complainant. However, concern still remains about Title IX requirements to conduct an investigation when school officials are prohibited from discussing particular student information that would be required for a proper investigation. Mr. Rooker notes that if Title IX requires the release of private student information then Title IX would trump FERPA.*

Comments on Parent Complaints

* Parent complaints which are maintained by the District are educational records and are protected by FERPA.

Q. Would a teacher who is the subject of a parent complaint have the right to see that complaint if they were facing disciplinary proceedings as a result of that complaint?

A. *This could be very fact specific and would need to be decided on a case by case basis. Due process rights could be involved if the disciplinary action would affect a teacher's compensation.*

Q. If a teacher is disciplined as a result of a parent complaint and the teacher's conduct is required to be reported to the State Board for Educator's Certification, can the school release the parent/student complaint without permission?

A. *No. Usually the school district should be able to get the complainant's written permission. Suggest using consent forms as part of the investigation to let the parents know the information may be needed to send to SBEC. Another option for a school district who has*

designated a law enforcement unit officer to investigate and make a record. The record would not be an educational record but would be a law enforcement record that could be released without consent.

Comments on Hall Monitoring or Bus Videos

*Remember videos are generally considered an educational record and the school district cannot release to the parents the video tape that would reveal the identity of other students.

*Can a school district have the designated law enforcement unit maintain these videos and not have the videos maintained as an educational record. Remember that if the law enforcement unit turns over a copy of the video to administer discipline to the student, then that copy becomes an educational record.

*Names of students on a bus when there is a wreck or the bus roster may not be released absent a subpoena. It is generally permissible to classify bus rosters as directory information except for those bus routes that would tend to identify a student as a special education student.

Comments on Records for Safety Reasons

Q. Is there a way under the current law for schools to share education records with law enforcement for non-emergency safety concerns?

A. *No. Congress would need to amend FERPA and the Bush administration supports such an amendment.*

Q. What would constitute an emergency justifying release of FERPA protected information?

A. *As an example, the parents of a child who is the subject of a death threat letter by another student should be told of the threat. Timing is a factor because it probably is not the same emergency if the threatening child is in custody and it is three weeks later. The District should document their analysis of why an emergency exists.*

Comments on Parents' Access to Counselor Records

* Parents have rights of access to all counseling records of their children under FERPA despite any counselor duty of confidentiality, absent the sole possession exception.

Comments on Maintenance of Records

Q. What education records does FERPA require schools to maintain?

A. FERPA does not require maintenance of any specific education record unless someone with access rights requests a record that is currently maintained. The school district cannot destroy a record after it has been requested.

* Keep all requests related to special education student records.

Q. How long do FERPA rights exist for education records of a student?

A. If the student dies and the rights were with the student at the time of death, the rights expire. If the student dies and the rights were with the parents at the time of death, then the rights continue until the parents' death.

Comments on Subpoenas for Education Records

Q. What if the school district gets a subpoena for education records?

A. Contact your attorney to ensure that the subpoena is lawfully issued. Contact the parents of the child involved and give the parent/student sufficient time to get the subpoena

quashed. No set time for what is “reasonable” is in the law but use good judgment. If the subpoena states that the parents are not to be notified, then comply with the subpoena without notice to the parents.

Comments on FERPA Enforcement

* FCPO investigates complaints made within 180 days from the date the complainant knew of or should have known of the alleged violation.

*FCPO generally investigates to determine if “sufficient evidence” exists to conclude that a violation has occurred. If “sufficient evidence” exists, then FPCO works with the school district to bring about voluntary compliance, i.e. changing policies. Courts have upheld other means of seeking compliance such as injunctions. There is no private cause of action under FERPA, but state law privacy actions still exist.

Conclusion

Mr. Rooker emphasized that the recent *Falvo* decision only illustrates that FERPA, although on the books for a long time, is still very relevant to the privacy issues of students and how school districts must continue to strive and stay in compliance with the law. Mr. Rooker encourages school district officials and attorneys to contact the FPCO for guidance.