

# The Law of Confidentiality

A Primer for Educators about Confidentiality





# FERPA Fundamentals

- The nation's educational privacy law is the Federal Education Rights and Privacy Act (FERPA). FERPA, along with state mandates and local procedures, outline the specific methods that confidential student data is to be stored, accessed, and destroyed when no longer needed.
- FERPA regulations apply to most education settings, not just K-12. Early childhood programs, private schools, charter schools, magnet schools, private schools, public and private universities, online schools, and adult education programs may also be required to abide with FERPA regulations. Any educational institution which receives federal funding is subject to FERPA requirements.
- FERPA has two broad goals: to allow parents access to their child's educational records, and to prevent other unauthorized access to their child's educational records.
- There are other state-specific regulations, as well as other federal confidentiality laws which impact educators' roles within the school. However, FERPA is the set of regulations we'll be discussing here.



# The Costs of FERPA Violations

- In 2011, a Colorado school was found to be noncompliant with FERPA by allowing nine school psychologists to share a workspace containing records of each others' confidential student files. Although these professionals were not sharing confidential information publically, or even with each other, the district was still found noncompliant because the individual practitioner's files were not secure from each other's files.
- In 2012, another Colorado school district was found noncompliant after parents requested to view their child's files, only to find them to be incomplete. After review, the court found the district to be in violation of FERPA. Not only were records incomplete, the school secretary kept the key to the file cabinet in an unlocked drawer and did not require staff to sign a log of when file access was granted to employees.
- FERPA violations will not produce any direct fines to the school district, although legal fees and court costs are likely will occur. However, districts who are found to be in willful violation of FERPA regulations will face the possibility of losing federal funding.
- In many cases, FERPA violations could have easily been avoided by educators through keeping a better system of controlled access to confidential student records.



# Protecting PII from Prying Eyes

- Most educators have access to confidential information, as this information is needed to fulfill their job duties. Educators also have both legal and ethical duties to protect that information from being shared with others who do not have a legitimate need to know such information.
- Both federal and state laws require schools to secure student records which contain Personally Identifiable Information (PII).
- All school employees are responsible to maintain the confidentiality and privacy of student records. School districts often have policies in place which state that unauthorized disclosure of student records can lead to immediate termination of employment.
- “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.” [20 U.S.C. 1232g(b)(1) and (b)(2)]



## What Records Contain PII?

- Personally identifiable information (PII) can generally be defined as any record which provides enough details about the person so that the person can be identified solely through the use of those records.
- Even records that don't use student names can be considered to contain other forms of PII. FERPA considers even randomly assigned student ID numbers to be PII, if those numbers can be traced back to a specific student.
- Students involved in special education programs have additional educational records which contain PII. Special education evaluation records, individualized education plans, student progress reports, and related service logs, all contain confidential information which is protected both by FERPA and The Individuals with Disabilities Education Act (IDEA).
- In addition, the Health Insurance Portability and Accountability Act (HIPAA) also has specific implications for student health and medical records, including those records generated or maintained from school nurses and school health clinics.



# Common Examples of PII

“...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.”

[20 U.S.C.1232g(b)(4)(A)]



## “Directory Information”

- Educators are often surprised to learn that some PII data is allowed to be shared without parental consent. This type of PII is considered to be “directory information”, which is considered to be public knowledge. The breadth of directory information that is permissible to share, without consent, is quite extensive.
- Directory information is not protected by FERPA and can be shared without permission by student or their parents. School districts must develop a policy as to what that district defines as “directory information”, and must post this policy publically.
- Students and parents may chose to opt-out of “directory information” sharing.
- The directory information exemption is what allows school to publish yearbooks, newspaper articles, sports programs, and other forms of media which publically identify students within their school system. This exemption would not allow a school to state specific educational information such as, “Mike Wilson has failed Junior English again this year and will be enrolled in a virtual school for credit recovery.” Such information would not be considered “directory information” and would violate FERPA regulations.



# What is Directory Information?

- 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.
- “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.”

[20 U.S.C. 1232g (a)(5)(A)]



# Transfer of Records

- What happens when a student transfers schools? If student records are confidential, how do schools legally share information with other schools?
- Schools are allowed to transmit student records to another school without parental consent. Schools are allowed, and in fact required, to send special education records to the child's new school without waiting on parental consent to do so. However, FERPA regulations require that school districts inform parents in advance that their child's records will be forwarded to the child's new school.
- In Kansas, when a child reaches the age of 18, the child reaches the age of majority and is legally responsible for his or her own educational decisions. (A small percentage of students will need adult guardians after the age of 18, but that process falls outside of the scope of this presentation.) When a student turns 18 years old, the student's parents no longer have access to the child's school records. However, the parents shall continue to receive certain types of educational notices about their child. Despite this, parents are no longer considered the educational decision maker for students who are over the age of majority. [See IDEA 300.625]



# Sending Records to Schools

- “Unless otherwise expressly authorized by state law, when a student transfers from a state school to a school district or from one school district to another, the most recent individualized education program, as well as any additional educationally relevant information concerning the child, shall be forwarded immediately to the receiving school district.”

[K.S.A 91-40-4c]

- “The school records of each pupil are the property of the pupil and shall not be withheld by any school district. Upon request of a pupil or the parent of a pupil, the school records of the pupil shall be given to such pupil or parent, or, upon transfer of the pupil to another school district or to a nonpublic school, shall be forwarded to such school district or nonpublic school. A pupil’s records forwarded to another school district due to transfer will include original copies of all the students records, including transcripts, grade cards, results of tests, assessments or evaluations, and all other personally identifiable records, files and data directly related to the pupil.”

[K.S.A. 72-5386(c)]



# Contemporary Concerns

- In 2014, President Obama signed into the law the “Uninterrupted Scholars Act” which modifies some previous language in FERPA to allow school districts to send confidential records of students in state custody (such as foster care or SRS/JJA).
  - Even so, this only allows transfer of these records directly to the state agency or their casework, not the local foster care agency contracted to provide those services.
  - Schools are not allowed to release special education records to foster parents, without the consent of the child’s biological parents or educational advocate.
- Also in 2014, Kansas passed the “Student Data Privacy Act” which modified some state regulations in regards to the storage of longitudinal assessment data. Due to this act, some districts have chosen not to contract with outside service providers (usually academic assessment companies) since the security of those third-party systems cannot be controlled.



## Resources to Consider

ECFR — Code of Federal Regulations. (n.d.). Retrieved January 20, 2016, from <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=34:1.1.1.1.33>

Kansas Statutes Annotated. (n.d.). Retrieved January 20, 2016, from <http://www.ksrevisor.org/ksa.html>

Llopis-Jepson, C. (2014, February 18). Student privacy act introduced in Senate. Retrieved January 20, 2016, from <http://cjonline.com/news/2014-02-18/sen-abram-proposes-student-privacy-act>

Personally Identifiable Information for Education Records. (n.d.). Retrieved January 20, 2016, from <http://ptac.ed.gov/glossary/personally-identifiable-information-education-records>

Privacy, Education Records, & Family Education Records and Privacy Act - Wrightslaw. (n.d.). Retrieved January 20, 2016, from <http://www.wrightslaw.com/info/ferpa.index.htm>