

IN THE SUPREME COURT OF OHIO

STATE EX REL. : Case No. 2014-0749  
SCHOOL CHOICE OHIO, INC., :  
 :  
Relator, :  
 :  
vs. : Original Action in Mandamus  
 :  
CINCINNATI PUBLIC SCHOOL :  
DISTRICT, et al., :  
 :  
Respondents. :

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MERIT BRIEF OF RESPONDENT, SPRINGFIELD CITY SCHOOL DISTRICT

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## INTRODUCTION

Relator State ex rel. School Choice Ohio, Inc. (“SCO”) uses Ohio’s Public Records Act, R.C. 149.43, as a vehicle to pursue an original action in mandamus before this Court. This case has nothing to do with Ohio’s Public Records Act. It is, instead, an attempt by SCO to assert rights it does not possess under federal and state statutes intended to protect the privacy of students’ records in an effort to obtain these records.

SCO has no clear legal right and Respondent Springfield City School District (“Springfield”) has no clear legal duty to produce Springfield’s students’ personally identifiable information for the 2013-2014 School Year. This information falls squarely within the exception to the definition of “public records” provided in Ohio’s Public Records Act for records the disclosure of which is prohibited by federal or state law. The privacy of these records is protected both by the Family Education Rights and Privacy Act, 20 U.S.C. 1232g (“FERPA”), and Ohio’s analogous statute, R.C. 3319.321. SCO’s first cause of action seeking a writ of mandamus pursuant to Ohio’s Public Records Act must be rejected.

Lacking a claim to Springfield’s education records under Ohio’s Public Records Act, SCO argues it is entitled to the education records pursuant to the very privacy statutes that accept those education records from disclosure. Contrary to SCO’s allegations in its second and third causes of action, neither FERPA nor R.C. 3319.321 provides a basis for the Court to issue a writ of mandamus ordering the release of students’ personally identifiable information. These are privacy and not disclosure statutes and must be construed accordingly.

SCO has no standing to assert claims under either FERPA or R.C. 3319.321 as SCO is not within the “zone of interest” of these statutes, which were intended to protect the rights of parents and eligible students to access their records. Additionally, the Court has held no private

right of action exists for parents or students who are within FERPA's "zone of interest" to bring a claim for a violation of FERPA much less for SCO to do so. R.C. 3319.321 similarly provides no right of action or remedy on which SCO may base a claim for mandamus.

Even if SCO had standing and a right to file a private action under FERPA or R.C. 3319.321, its claims would fail under the language of the statutes themselves. SCO did not designate any of the information sought by it as "directory information" so as to fall within the exception to the requirement of parental consent. SCO argues the Court should order Springfield to change its policies so as to designate "directory information." In the alternative, SCO argues the Court should order Springfield to release the requested information under previously obtained parental consent in which parents gave the Superintendent discretion to release information to partner organizations providing benefits to Springfield's students. These arguments contradict the clear language of FERPA, which leaves determinations as to the disclosure of students' information pursuant to exceptions to FERPA's prohibition against nonconsensual release entirely within the discretion of Springfield. They also fly in the face of the parental consent, which provides for limited circumstances in which the information can be released to limited partners of Springfield subject to the Superintendent's discretion. Springfield's Board of Education determined not to designate or release any personally identifiable information as "directory information," and the Superintendent determined release to SCO to the limited parental consent was not in the interest of Springfield's students. Based on the discretion possessed by the Board and the Superintendent, SCO cannot establish a clear legal right to the information or that Springfield has a clear legal duty to produce the information under FERPA or R.C.3319.321.

## STATEMENT OF THE CASE AND FACTS

This case is an original action in mandamus in which Relator School Choice Ohio, Inc. (“SCO”) seeks a writ mandating the release of students’ personally identifiable information contained in the education records maintained by Respondent Springfield City School District (“Springfield”) contrary to the prohibition provided by both state and federal law. The Court referred the case to mediation. Following unsuccessful mediation, the case was returned to the regular docket.<sup>1</sup>

Throughout its brief, SCO misrepresents the time period for which it requested Springfield’s education records as the current 2014-15 School Year. However, SCO’s Amended Complaint, as well as the public records requests attached to the Affidavit verifying SCO’s original Complaint<sup>2</sup>, reference the 2013-14 School Year. As the original Complaint was filed on May 12, 2014, it could not have requested education records for the 2014-15 School Year, particularly as they did not yet exist. Springfield will limit its facts and arguments to SCO’s requests for the 2013-14 School Year, which are the subject of its Amended Complaint.

Springfield is comprised of ten elementary schools, three middle schools, one high school, one pre-school, and one alternative school. Springfield had 7,660 students enrolled for

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<sup>1</sup> SCO also asserted claims against Cincinnati Public School District, which have been dismissed.

<sup>2</sup> SCO has failed to meet the requirements of R.C. 2731.04 for filing an original action in mandamus before this Court. R.C. 2731.04 provides: “Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.” S.Ct.Prac.R. 12.02(B)(1) similarly requires complaints in original actions before this Court, “shall be supported by an affidavit.” This action should be dismissed based upon SCO’s failure to file the required Affidavit verifying its Amended Complaint.

The Affidavit of Sarah Pechan filed on May 12, 2014, verified the original Complaint filed on that same date; however, the original Complaint was superseded and replaced by the Amended Complaint upon its filing on October 22, 2014. *Hidey v. Ohio State Highway Patrol*, 116 Ohio App.3d 744, 748, 689 N.E.2d 89 (10<sup>th</sup> Dist. 1996). The Amended Complaint was not verified by affidavit as required by statute or this Court’s Rules of Practice.

the 2013-2014 School Year. (Springfield’s Submission of Evidence, (“Evidence”), Vol. 3, Miller Aff., ¶2.) Springfield is a recipient of federal funding. (Evidence, Vol. 3, Miller Aff., ¶3.) In order to receive this funding, Springfield must meet the conditions for the protection of the privacy of students’ education records set by Congress in the Family Educational Rights and Privacy Act (“FERPA”). *State ex rel. ESPN, Inc. v. Ohio State University*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶19.

**A. Springfield’s Student Record Policy (“Policy JO”) for the 2013-2014 School Year.**

On June 12,2013, Springfield’s Board of Education adopted its student records policy for the 2013-14 School Year titled “ORC Student Records” and labeled “JO” (hereinafter “Policy JO”). (Evidence, Vol. 1, Estrop Aff., ¶9.) Policy JO identified the rights of parents and eligible students<sup>3</sup> under FERPA and the Ohio Revised Code, including their rights to access records, to correct records, and to file a complaint with the U.S. Department of Education in the event of an alleged violation of FERPA.

Policy JO also included Springfield’s “directory information” policy. With respect to former students, the Board designated nine categories of information as “directory information.” Policy JO informed parents this information could be “released unless the parents have affirmatively withdrawn their consent to release in writing.” With respect to current students, the Board did not designate any information as “directory information.”

For current students and for former students who were enrolled in the District within the 12 months preceding a directory information request and withdrew prior to

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<sup>3</sup> A student becomes “an eligible student” once the student “has attained eighteen years of age, ...” 20 U.S.C. 1232g(d). Once 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.” 34 C.F.R. §99.5. References in this brief to “parental consent” refer to consent of parents and eligible students.

graduation, no personally identifiable information contained in the student's education record shall be designated as "directory information."

Policy JO was provided to all parents at the beginning of the 2013-2014 School Year.

(Evidence, Vol. 1, Estrop Aff., ¶9, Ex. E (Bates 001-004).)

Springfield also provided parents with the FERPA Notice of Rights, which notified them of their rights of access to their students' records, and the FERPA Notice for Directory Information, which notified them of Springfield's policy as to "directory information" as adopted by the Board of Education in Policy JO. (Evidence, Vol. 1, Estrop Aff., ¶10, Ex. F (Bates 050-051).) Additionally, parents and students were provided with a form titled, "Consent for Disclosure of Student Information for Superintendent Approved Purposes," (hereinafter "Consent Form"). This optional Consent Form provided:

It may become necessary from time to time ... to disclose a student's personally identifiable information to the public for purposes such as school newsletters, yearbook publication, athletic rosters, honor roll or other achievement recognition, music and theatre presentations, and school-related events. In addition, the District often partners with community leaders, community organizations, and school-related organizations in order to provide educational, health, service, or other non-profit programs which may provide a benefit to the students of the District. It may become necessary to disclose a student's personally identifiable information to such partnering community leaders or organizations. Due to a change in Board policy effective July 1, 2013, the District is required to obtain your permission to allow your child's information to be disclosed for these purposes."

I authorize the Springfield City School to disclose the following information about my child to third parties for purposes approved by the Superintendent or his designee:

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(Evidence, Vol. 1, Estrop Aff., ¶11d, Ex. G (Bates 060).) The Consent Form then specified the categories of information that could be disclosed in the Superintendent’s discretion.

The cover page to the Consent Form provided the following:

#4 I have read the terms of the Consent for Disclosure of Student Information for Superintendent Approved Purposes and give my permission for disclosure of my student’s information as designated in this document.

I agree \_\_\_\_ [initial here] I do not agree \_\_\_\_ [initial here]

(Id., Ex. G (Bates 052).) It further provided a place for the parents to sign and date their initialed agreement:

I have read and give my consent to those items initialed above.

\_\_\_\_\_ Date \_\_\_\_\_  
Parent/Guardian signature

(Id.)<sup>4</sup>

Pursuant to Policy JO and the Consent Form, Springfield implemented guidelines for handling requests for personally identifiable information by entities other than parents accessing their own students’ records (“Guidelines”) whereby requests from non-profit organizations were to be directed to the Superintendent for consideration pursuant to his discretion. If the request was approved by the Superintendent, information for students for whom Springfield had received

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<sup>4</sup> Nothing in the Consent Form requires release of students’ information to SCO or any other requester. Parents gave the Superintendent discretion to grant or deny requests within the limited circumstances set forth in the Consent Form. FERPA provides with respect to parental consent that it specify “records to be released, the reasons for such release, and to whom, ....” 20 U.S.C. 1232g(b)(2)(A). The Consent Form meets these requirements. If there is any ambiguity as to the meaning of FERPA’s consent requirement or the language of the Consent Form, such ambiguity should be resolved in favor of privacy and nondisclosure as, unlike Ohio’s Public Records Act, FERPA is a privacy statute. Further, any claim the Consent Form does not meet FERPA’s requirements is in the nature of a claim for declaratory judgment under FERPA and not a claim for mandamus under Ohio’s Public Records Act.

a signed Consent Form was released. (Evidence, Vol. 1, Estrop Aff., ¶12.) Springfield generated an email that was sent to the principal or building designee each morning, which tracked receipt of signed Consent Forms. As a result of this system, the principal or building designee was continually updated with respect to the students for whom parental consent had been provided. Springfield received Consent Forms in which parents had denied their consent. If no signed Consent Form had been returned or the returned Consent Form was left blank, Springfield considered that a denial of parental consent to release personally identifiable information. (Evidence, Vol. 1, Estrop Aff., ¶12; Vol. 2, Ex. Z.)

As a result of Policy JO and the Consent Form, parents had greater control of their students' personally identifiable information. Previously, the Board designated "directory information," which could be released by Springfield in its discretion unless a parent took the initiative to opt-out in writing. (Evidence, Vol. 1, Estrop Aff., ¶5; Vol. 2, Ex. X.) This did not occur. (Evidence, Vol. 1, Estrop Aff., ¶12.) Under Policy JO in effect for the 2013-14 School Year, Springfield was required to obtain affirmative parental consent prior to any discretionary release of students' personally identifiable information.

SCO misconstrues the evidence throughout its discussion of Policy JO. First, SCO repeatedly mistakes the year in which Policy JO went into effect as the 2014-15 School Year. (SCO's Brief, pp. 2, 6, 13, 15, and 16.) Second, SCO argues Springfield distributed the Consent Form in lieu of the Notice of Directory Information. (SCO's Brief, p. 15.) The evidence proves Springfield provided the annual FERPA Notice of Directory Information in which it set forth its policy with respect to "directory information," as well as the optional Consent Form, to parents at the beginning of the 2013-14 School Year. (Evidence, Vol. 1, Estrop Aff., ¶10, Ex. F, and ¶11, Ex. G.) Third, SCO argues, "Springfield tried to make it invisible to students and their

families by including the Consent for Disclosure as part of the packet of the policies and consents it distributes at the start of each school year.” (SCO’s Brief, p. 16.) Springfield is required by law to provide a great deal of information to students and their families at the beginning of the school year. In particular, Springfield is required by FERPA to provide an annual notification of rights, including its policy with respect to the designation of “directory information.” 20 U.S.C. 1232g(a)(5)(B); 34 C.F.R. 99.7. The Consent Form and its requirement of both the parents initials and signature cannot be considered “invisible,” particularly in comparison with the prior “directory information” policy, which presumed consent absent the parent taking the initiative to opt-out in writing.

Finally, SCO argues, “Springfield did not inform parents why it was including the Consent for Disclosure.” (SCO’s Brief, p. 16.) The evidence proves the FERPA Notice for Directory Information informed parents there would be no information designated as “directory information.” The Consent Form specifically stated, “Due to a change in Board policy effective July 1, 2013, the District is required to obtain your permission to allow your child’s information to be disclosed for these purposes.” (Evidence, Vol. 1, Estrop Aff., Ex. G (Bates 060).) In both Policy JO and the Consent Form, Springfield provided parents with greater confidentiality with respect to their students’ educational records than they had previously possessed.

**B. SCO’s Public Records Requests for “Directory Information” for the 2013-14 School Year.**

On October 22, 2013, SCO sent its first public records request for students’ personally identifiable information for the 2013-2014 School Year to Springfield’s Treasurer. The request specifically sought students and parents’ names, addresses, email addresses, telephone numbers, grade levels, and school buildings for the 2013-14 School Year. (Evidence, Vol. 1, Estrop Aff., Ex. H (Bates 140-42).) This request was part of a bulk email request sent by SCO to Treasurers

of public school districts in Ohio. SCO specifically excluded from this bulk email any requests to public charter schools. (Evidence, Vol. 7, Affidavit of Sam Gedert, E-Roots Consulting LLC, (Bates 909-10).)

The request was forwarded to Superintendent Estrop who instructed Miller to respond by forwarding to SCO the School Board's Policy JO adopted the previous June. (Evidence, Vol. 1, Estrop Aff., ¶13, Ex. H (Bates 139-146).) Policy JO clearly provided Springfield had not designated any personally identifiable information as "directory information" for current students for whom SCO was seeking "directory information." SCO argues Springfield did not disclose its Consent Form, (SCO's Brief, p. 17); however, SCO fails to identify any legal requirement that it do so. Additionally, nothing in the Consent Form established a right to the release of information in favor of SCO or any other requesting entity.

SCO ignored Policy JO and sent a second request for "directory information per your district policy for all students in your district," reducing the information sought to students' names, addresses, telephone numbers, dates of birth, and graduation dates. (Evidence, Vol. 1, Estrop Aff., ¶14, Ex. I (Bates 146-153).) Springfield denied SCO's second request, stating, in pertinent part:

The Family Educational Rights and Privacy Act ("FERPA") generally prohibits the disclosure of student personally identifiable information which has not been designated by the educational institution as "directory information", subject to certain exceptions. 20 U.S.C. 1232g(b)(1). Educational institutions are given the discretion to identify categories of directory information and are required to notify parents and eligible students of the categories so designated to allow them an opportunity to opt out of non-consensual disclosures. Pursuant to Board policy JO, a copy of which is attached, the Springfield City School District has not designated any category of personally identifiable information of current students as "directory information." Your request does not meet the requirements of any other exception under FERPA; consequently, no personally

identifiable information of current students may be disclosed in response to your request.

(Evidence, Vol. 1, Estrop Aff., ¶14, Ex. I (Bates 000152-53).)

On February 24, 2014, SCO sent its third public records request for “directory information” for the 2013-2014 School Year, wrongly claiming the FERPA “Notice of Directory Information” issued by Springfield designated “directory information” for all students when such designation was clearly limited to “former students.” (Evidence, Vol. 1, Estrop Aff., ¶15, Ex. J.)

On April 4, 2014, Springfield denied SCO’s request for “directory information” once again as no personally identifiable information of current students had been designated as “directory information” under Policy JO or the Notices required by FERPA for the 2013-2014 School Year. However, Springfield produced the other records requested by SCO. (Evidence, Vol. 1, Estrop Aff., ¶16, Ex. K (Bates 317-320).)

**C. Requests for Personally Identifiable Information By Other than Parents and Eligible Students Under Policy JO for the 2013-14 School Year.**

The following chart reflects the requests for students’ personally identifiable information received by Springfield for the 2013-14 School Year, including the reason the information was requested, the relationship between Springfield and the requester, and the intended benefit to Springfield’s students. Any information relating to School Years before or after the 2013-14 School Year at issue in this case is included only as further explanation of the relationship between Springfield and the requester.

<b>Requester</b>	<b>Date of Request</b>	<b>Reason Information Sought and Response</b>
Clark State Community College (Evidence, Vol. 1, Estrop Aff., ¶17a, Ex. L (Bates 172-173, 259-261;	August 7, 2013; and August 8, 2014	Clark State requested contact information for 8 <sup>th</sup> Graders to provide information regarding the Champion City Scholar Program, which has for more than five years partnered with Springfield to award 40 full scholarships to Springfield’s students

221, 257-58, 278-79, 212-14, 321).)		each year. The request was forwarded to Dr. Estrop who instructed the information be provided for students for whom parents had returned signed Consent Forms.
Springfield Christian Youth Ministries (“SCYM”) (Evidence, Vol. 1, Estrop Aff., ¶17b, Ex. M (Bates 116-117, 118-19, 228-229, 298-302, 215-216).)	May 30, 2013; August 27, 2013; and June 30, 2014	SCYM requested contact information for K-5 students to provide information for summer reading camps. The information was provided pursuant to the policy for “directory information” in effect for 2012-13 School Year. After the policy regarding “directory information” was changed and Policy JO went into effect, SCYM requested contact information to provide information regarding afterschool programs. Pursuant to Dr. Estrop’s discretion, the information was released for students whose parents had returned signed Consent Forms. Subsequently, SCYM submitted a request for grades, which request was accompanied by releases signed by parents.
Global Impact Stem Academy (“GISA”) (Evidence, Vol. 1, Estrop Aff., ¶17c, Ex. N (Bates 199, 217, 316; 198, 171, 211).)	April 17, 2013; January 21, 2014; and September 25, 2014	GISA originally requested information for 7 <sup>th</sup> and 8 <sup>th</sup> grade students which was released pursuant to the prior “directory information” policy in effect for the 2012-13 School Year. GISA is an agriculture bio-science STEM school that opened in Springfield, Ohio for the 2013-14 School Year. It serves students in grades nine through twelve. GISA was formed pursuant to R.C. 3326 with Springfield serving as the “sponsoring district.” GISA subsequently requested information for 7 <sup>th</sup> – 9 <sup>th</sup> grade students after the new Policy JO went into effect. Pursuant to Dr. Estrop’s discretion, the information was released for students whose parents had returned signed Consent Forms.
Clark County Combined Health District (Evidence, Vol. 1, Estrop Aff., ¶17d, Ex. O (Bates 222-224).)	April 21, 2014	Superintendent Estrop approved release of information for a joint project with Clark County Combined Health District in which Springfield had participated for at least four years to study the impact of BMI on academic performance for students whose parents had returned signed Consent Forms.
Perrin Woods Promise Team (Evidence, Vol. 1, Estrop Aff., ¶17e, Ex. P (Bates 225-226).)	July 7, 2014	Located at Springfield’s Perrin Woods Elementary School, the Promise Team is an afterschool program that partners with the community to provide assistance and services, including tutoring, to students and parents with the goal of students graduating. Information was released for the 2013-14 School Year for students for whom

		parents had signed Consent Forms, but not for the 2014-15 School Year as signed Consent Forms had not yet been received.
Rotary Club (Evidence, Vol. 1, Estrop Aff., ¶17f, Ex. Q (Bates 247-48, 252-56).)	September 16, 2014	The Rotary Club provided its 92 <sup>nd</sup> Annual Children with Disabilities Christmas Party. Information was produced for students for whom parents had returned signed Consent Forms.
Jostens (Evidence, Vol. 1, Estrop Aff., ¶17g, Ex. U (Bates 1993-1995; 273-74; 2008).)	August 30, 2013	Per contract, Jostens requested the roster of sophomores and seniors for 2013-14 School Year and 2014-15 School Year to send out information about class rings and graduation items. The service performed by Jostens occurs primarily on school grounds. Information was produced for 2014-15 School Year for students for whom parents had returned signed Consent Forms.
U.S.M.C. (Evidence, Vol. 1, Estrop Aff., ¶18a, Ex. R (Bates 177).)	October 10, 2013	The Junior and Senior List was released as required by The No Child Left Behind Act of 2001, P.L. 107-110 (Jan. 8, 2002) and the National Defense Authorization Act for Fiscal Year 2002. (Legislative History of Major FERPA Provisions, <a href="http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html">http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html</a> ; Appendix 7, p. 5.)
Navy (Evidence, Vol. 1, Estrop Aff., ¶18b, Ex. S (Bates 262-67, 285-290).)	September 2, 2014	The Junior and Senior list was released as required by The No Child Left Behind Act of 2001, P.L. 107-110 (Jan. 8, 2002) and the National Defense Authorization Act for Fiscal Year 2002. (Legislative History of Major FERPA Provisions, <a href="http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html">http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html</a> ; Appendix 7, p. 5.)
Subpoenas (Evidence, Vol. 1, Estrop Aff., ¶18c, Ex. T (Bates 230-31, 232-40).)	Various	Information was released pursuant to the exception under FERPA, 20 U.S.C. 1232g(b)(2)(B).
Miami Valley Educational Computer Association (Evidence, Vol. 1, Estrop Aff., ¶19, Ex. V (Bates 158-70).)	February 21, 2014	After an extended series of emails as to the need for a student list by the ODE and after advising Springfield had not designated any information for current students as “directory information” for the 2013-14 School Year, Dr. Estrop approved the release of the requested information for students whose parents had returned signed Consent Forms.

The uncontroverted evidence proves the entities to which Springfield released information pursuant to the Superintendent’s discretion for students whose parents had signed the Consent Form for the 2013-14 School Year shared at least the following characteristics: 1)

partnerships with Springfield; 2) transparency with respect to intended uses of information sought; 3) obvious benefits offered to Springfield’s students; and 4) the ability to track the effectiveness of the benefits offered. To the contrary, SCO had no partnership with Springfield. SCO repeatedly refused to inform Springfield of the specifics of its intended use of the information beyond its intent to market other school options to Springfield’s students. (Evidence, Vol. 1, Estrop Aff., ¶¶4-4-8, Exs. B-D.) Springfield had no means to determine the accuracy of the information marketed by SCO or means of following up on the benefits of that marketing. SCO “does not track” the results of its efforts. (Evidence, Vol. 5, SCO’s Response to Springfield’s Interr. No. 26.) The record reveals only that SCO judges the success of its marketing efforts based solely on the number of students it pulls from public school districts and the total dollars obtained from the State for vouchers, (Am. Compl., ¶¶14-21), regardless of the benefit to students.

SCO’s argument it was treated less favorably than GISA, Clark State Community College, SCYM, the Clark County Health District, Perrin Woods Promise Team, the U.S. Navy, and the Rotary Club because they were “viewed as more favorable to its pecuniary interests” must similarly fail. (SCO’s Brief, p. 19.) Although there is nothing that would make such a motive improper, the evidence contradicts this argument. First, information is indeed disclosed to the military, but not pursuant to the Consent Form or Dr. Estrop’s discretion, but pursuant to the requirements of other federal legislation. (Appendix 7, Legislative History of Major FERPA Provisions at p. 5.) Second, information is disclosed to GISA, a STEM school for which Springfield is the sponsoring district, pursuant to R.C. 3326. Nonetheless, Springfield provided information only for students for whom parents had provided consent in the Consent Form, which reflects the conservative manner in which Springfield disclosed students’ information.

Third, with respect to Clark State, SCYM, Perrin Woods, CCHD, and the Rotary Club, Springfield has long-term partnerships with these entities, which provide clear and direct services and benefits to Springfield's students. None of the evidence reveals a "self-interest," (SCO's Brief, p. 20), beyond Springfield's interest in benefitting its students.

**D. SCO's Use of the Information Requested from Springfield Remains Hidden from Springfield and the Results of that Use Shrouded from Public Scrutiny.**

As set forth above, unlike requesters to which Springfield released information for the 2013-14 School Year, Springfield had no partnership with SCO whereby SCO shared information with Springfield so that Springfield was assured of the accuracy of SCO's representations regarding school choice options, including those available at Springfield. SCO had refused to explain how it used the students' information beyond its generalization that "its mission is to educate parents on their educational options and advocates for the expansion of quality options for every child on a state-wide basis. School Choice Ohio carries out its mission by focusing efforts on informing Ohio families about the State's school options, including publicly funded scholarships which have benefitted over 26,000 students in the most recent academic year." (Evidence, Vol. 5, SCO's Response to Springfield's Interr. No. 7.) SCO argues it "reaches out ... to Ohio families" by phone, email, social media, and community events, but refuses to provide Springfield or the Court with evidence as to how it does so. (Id, SCO's Response to Springfield's Interr. Nos. 8-15.) SCO fails to identify any efforts to reach parents and students through social or broadcast media or in any manner other than through information obtained via public records requests.

SCO also refuses to provide information regarding the benefits to students of its use of Springfield's students' information to market school choice. SCO admits "it does not track" the results of its contacts with Springfield's students or any benefit derived by the students from

those contacts. (Evidence, Vol. 5, SCO's Response to Springfield's Interr. No. 26.) SCO can offer only "representative examples of 'success stories' associated with students transferring from assigned schools" via its website. (Id., SCO's Response to Springfield's Interr. No. 26.) SCO is simply a marketer of school choice to students in Ohio which takes no responsibility for the outcome of its marketing efforts unless that outcome is a "success story." (Evidence, Vol. 5, Portions of SCO's website as of December 31, 2014 (Bates 2324-2326; See also, <http://www.scoohio.org/>.)

The record reflects SCO's campaign to market private schools via the promotion of EdChoice vouchers. (Id., RA No. 1; Evidence, Vol. 5, Affidavit of Old Trail Printing.)<sup>5</sup> Unlike Springfield, private schools have a distinct advantage in marketing their services as they do not receive a "report card" from the State of Ohio each year by which their performance can be judged or compared with Springfield's.

Although SCO attempts to separate itself from public charter schools by limiting its arguments to its efforts to notify students of the availability of EdChoice Scholarships to attend private schools, it is evident from SCO's website that SCO also markets public charter schools. (Evidence, Vol. 5, SCO's website.) This is particularly pertinent to Springfield as the largest number of high school students leaving Springfield transfer to public charter schools, including: LifeSkills, ECOT, and OVA. (Evidence, Vol. 1, Estrop Aff., ¶3, Ex. A (Bates 086).) All three of these schools receive State funding that follows the student when they transfer out of the

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<sup>5</sup> In violation of FERPA, SCO redisclosed students' personally identifiable information obtained through public records requests to its vendors Old Trail Printing and E-Roots. SCO argues "such vendors are not third parties *per se* because each is bound to maintain information disclosed by SCO as confidential." (Evidence, Vol. 5, SCO's Response, to Springfield's RA, No. 1.) However, the evidence reveals no nondisclosure agreements with these vendors in the years prior to this action, including with Old Trail Printing, which has handled tens of thousands of education records containing students' personally identifiable information.

District. All three of these community schools are managed by for-profit entities. See <http://www.lifeskillshs.com/>, <https://www.ecotohio.org/>, <http://www.k12.com/ohva#.VKFJVP8w5A>. SCO seeks and receives substantial donations from the owner of at least one of these for-profit management companies.<sup>6</sup> It is certainly in the interest of these for-profit companies to support SCO's efforts to obtain students' personally identifiable information, which allows SCO to market the charter schools they manage. Whether or not Springfield's students benefit from SCO's efforts to market school choice, these for-profit companies certainly do.

### ARGUMENT<sup>7</sup>

SCO seeks a writ of mandamus under Ohio's Public Records Act. "To be entitled to a writ of mandamus, a relator must demonstrate that (1) the relator has a clear legal right to the relief requested, (2) the respondent is under a clear legal duty to perform the requested act, and (3) the relator has no plain and adequate remedy in the ordinary course of law." *State ex rel.*

*Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Employment Relations*

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<sup>6</sup> In 2012 and 2013 alone, SCO received almost \$200,000 in donations from David Brennan. (Evidence, Vol. 5, SCO's responses to DPR, SCO000016 and SCO000052.) Brennan is the founder and owner of White Hat Management, the for-profit management company of LifeSkills. <http://www.pbs.org/wgbh/pages/frontline/shows/vouchers/interviews/brennan.html>.

<sup>7</sup> For clarity, this brief addresses SCO's five propositions of law in a different sequence than SCO's brief, combines some of the propositions into a single response, and introduces additional propositions of law. Springfield's Proposition of Law No. 1 (Springfield School District is not *sui juris*), No. 3 (SCO lacks standing), No. 4 (SCO has no private right of action), and No. 6 (the Court cannot create public policy contrary to the express policy identified by Congress) reflect additional propositions of law. Springfield's Proposition of Law No. 2 (personally identifiable information contained in education records is not a "public record") responds to SCO's Proposition of Law No.1. Springfield's Proposition of Law No. 5 (record requesters have no clear legal right to personally identifiable information in education records under either FERPA or R.C. 3319.321) responds to SCO's Propositions of Law Nos. 2, 3, and 4. Springfield's Proposition of Law No. 7 (attorney fees are not available under FERPA or R.C. 3319.321) responds to SCO's Proposition of Law No. 5.

*Board*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶9. Although the Court construes the Public Records Act “liberally in favor of broad access ... the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence.” *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶14. SCO is not entitled to a writ as Springfield appropriately responded to SCO’s public records requests and properly denied the portions thereof seeking the disclosure of students’ personally identifiable information prohibited under FERPA and R.C. 3319.321.

**Springfield’s Proposition of Law No. 1:**

*An original action in mandamus asserted against a school district must be dismissed with prejudice as a school district lacks capacity to be sued.*

R.C. 2731, under which SCO has filed this original action in mandamus, provides:

“Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. SCO’s petition for a writ of mandamus should be dismissed with prejudice as SCO has improperly asserted this claim against the Springfield City School District.<sup>8</sup>

The Springfield City School District “is an entity not capable of being sued—or sui juris.... Ohio statutory law dictates: ‘The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing or being sue[d] ....’ Ohio Rev.Code § 3313.17. As a result, ‘[a] school district is not sui juris, rather it is the board of education which must be sued.’ Consequently, Plaintiffs’ claims ... are not cognizable and subject to dismissal with prejudice.” (Internal citations omitted.) *Peterson v. Ne. Local Sch. Dist.*, No.

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<sup>8</sup> Without waiving its argument that Springfield City School District is not *sui juris*, this brief will refer to Springfield.

3:13CV00187, 2014 WL 2095380, at \*3 (S.D. W.D. Ohio May 20, 2014), report and recommendation adopted, No. 3:13-CV-187, 2014 WL 4628544 (S.D. Ohio Sept. 15, 2014). In *Getachew v. Columbus City Schools*, No. 2:11-CV-861, 2012 WL 748783 \*2 (S.D. Ohio, E.D., March 8, 2012), the court found the defendant entitled to summary judgment on all of the plaintiff's claims because the defendant, Columbus City Schools, was not *sui juris*. The federal court noted, "Ohio courts have held that a school district is not *sui juris*; rather, it is the board of education which must be sued." *Id.* See also *Catchings v. Cleveland Public Schools*, No. 43730, 1982 WL 5261, at \*3, n. 2 (Ohio App. 8. Apr. 1, 1982) ("The Cleveland Public Schools is not a legal entity which is capable of being sued. Rather, in legal actions involving schools, it is the board of education which must be sued."); *Matter of Ayersville School District*, No. 4-30-1, 1980 WL 352009, at \*1 (Ohio App. 3. June 19, 1980) ("We also note that the respondent is a school district which is merely a geographical area and not a body corporate, capable of suing and being sued, as is a board of education.") Whether or not Springfield is a "school district unit" under R.C. 149.43, it is not an entity capable of being sued under R.C. 2731.

Similarly, SCO's second and third claims against Springfield asserted pursuant to FERPA and R.C. 3319.321 should be dismissed as they have been asserted against the improper party. R.C. 3319.321(2)(a) specifically applies to a "school district board of education." FERPA is specifically limited to "educational agencies and institutions." It is Springfield's Board that adopted Policy JO effective for the 2013-2014 School Year, which SCO seeks to amend through an order of this Court; therefore, SCO has sued the incorrect entity and this action should be dismissed with prejudice.

**Springfield's Proposition of Law No. 2:**

*A student's personally identifiable information in education records is not a "public record" under Ohio's Public Records Act, R.C. 149.43, as disclosure is prohibited by FERPA and R.C. 3319.321.*

In its Proposition of Law No. 1, SCO asserts a right to the disclosure by Springfield of personally identifiable information contained in Springfield's students' education records under R.C. 149.43, Ohio's Public Records Act. (SCO's Brief, p. 21.) However, "R.C. 149.43 mandates full access to all public records upon request unless the requested records fall within one of the specified exemptions." (Emphasis supplied.) *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶29. Both FERPA and R.C. 3319.321, Ohio's analogous law<sup>9</sup>, are applicable to Springfield and both prohibit the release of students' personally identifiable information.

In *ESPN*, the Court held FERPA's prohibition on the release of students' personally identifiable information without consent falls squarely within this exception to Ohio's Public Records Act. 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶25. The Court held to do otherwise, "would be compelling educational agencies and institutions throughout Ohio to adopt a 'policy or practice' permitting the release of education records." *Id.* at ¶26.

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<sup>9</sup> "R.C. 3319.321 was enacted on May 15, 1976. The stated purpose of this bill is 'to restrict the release of information about public school pupils.' ... R.C. 3319.321 was apparently passed in order to bring the state's public schools into compliance with federal law." (Emphasis supplied.) Franklin B. Walter, 1987 Ohio Atty.Gen.Ops. No. 87-037 (1987). "Under R.C. 3319.321 and the nearly identical provisions of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. §1232g, an educational institution is expected to safeguard student education records." *Ash v. Dublin City Schools*, Franklin Cty., No. 07CVH-08-10416, 2008 WL 5731755 (July 3, 2008). R.C. 3319.321 makes the narrow class of "public school student records" confidential. 1988 Ohio Atty.Gen.Ops. No.88-103 at \*5. "Because the information in question is confidential under state law, it is not subject to disclosure pursuant to R.C. 149.43." The Honorable Timothy A. Oliver, 1992 Ohio Atty.Gen.Ops. No. 2-296\*1 (1992).

Springfield denied SCO's public records requests for "directory information" as it had not designated any "directory information" for release pursuant to FERPA. In this action, SCO asks the Court to order Springfield either to revise its policy to designate and release the information sought by SCO as "directory information" or to release the information pursuant to the Consent Form. Either alternative would not only deprive Springfield of the discretion to which it is entitled to establish its own policies, but would compel Springfield to adopt a "policy" permitting the release of education records contrary to the Court's holding in *ESPN*. Further, granting SCO's request would convert FERPA and R.C. 3319.321 from privacy statutes to disclosure statutes by creating rights of access in favor of requesters such as SCO, which do not exist in the statutes.

According to the Court's decision in *ESPN*, FERPA is "applicable" to "education records." Unlike the documents in *ESPN*, there is no question the students' personally identifiable information sought by SCO qualifies as "education records." 2012-Ohio-2690 at ¶30. Also, unlike the documents in *ESPN*, there is no means by which the personally identifiable information in the education records can be redacted before release. 2012-Ohio-2690 at ¶34. As Springfield has established the information requested by SCO is personally identifiable information in the education records maintained by Springfield, the prohibitions of FERPA and R.C. 3319.321 are applicable to prohibit the release of the information.

SCO provides no legal support for its proposition that the categories of information which FERPA allows an educational agency or institution to designate as "directory information" must be so designated and released upon receipt of a public records request. Acceptance of this proposition would render the prohibition of FERPA against a policy of permitting the release of education records null. The decisions cited by SCO in its proposition of

law are inapplicable. They do not address either FERPA or education records. Instead, they concern situations in which courts have considered whether other asserted exceptions to Ohio's Public Records Act exist or apply. (SCO's Brief, pp. 21-23.) In this case, the Court has previously concluded FERPA provides an exception to Ohio's Public Records Act and that exception applies to students' education records when those records cannot be redacted to remove personally identifiable information.

Further, unlike the records requested in the cases cited by SCO, the students' education records sought by SCO do not pertain to the operation of a public office and their release would not serve the public's interest in an "open government." The documents requested by SCO pertaining to the Springfield's operation, including, for example, its receipt and response to public records requests for the 2013-14 School Year, were provided to SCO pursuant to its public records request of February 24, 2014. (Evidence, Vol. 1, Estrop Aff., ¶16, Ex. K (Bates 317-20).) Only the students' personally identifiable information was not released.

As an exception to Ohio's Public Records Act applies, Springfield is entitled to judgment denying SCO's claim for a writ of mandamus. As SCO is not entitled to the education records it has requested, it is not entitled to statutory damages under the Ohio Public Records Act. R.C. 149.43(C). SCO's remaining claims demand a writ of mandamus against Springfield for alleged failures to designate the information sought as "directory information" or to release the information either pursuant to the exception for "directory information" or pursuant to the Consent Form. These are claims of rights under FERPA and R.C. 3319.321. Although mandamus may be the appropriate remedy to compel compliance with R.C. 149.43, (SCO's Brief, p. 21), it is not the appropriate remedy to compel compliance with either FERPA or R.C.3319.321.

**Springfield’s Proposition of Law No. 3:**

*Requesters of personally identifiable information in education records lack standing to assert mandamus claims under either FERPA or R.C. 3319.321.*

SCO asserts rights to disclosure under FERPA and R.C. 3319.321, the statutes prohibiting disclosure under Ohio’s Public Records Act, which rights it alleges are “wholly independent” of its rights under Ohio’s Public Records Act. (SCO’s Brief, p. 33.) With respect to FERPA, SCO alleged “Springfield City Schools has a clear legal duty to amend its FERPA policy ... to ensure that it complies with its obligations under FERPA.” (Am. Compl., ¶98.) With respect to R.C. 3319.321, SCO alleged “Springfield City Schools has violated School Choice Ohio’s clear legal rights under Revised Code 3319.321(B)(2)(a) by imposing restrictions on the disclosure of ‘directory information’ to School Choice Ohio that it does not impose on others.” (Am. Compl., ¶80.) SCO lacks standing to assert claims in mandamus under FERPA or R.C. 3319.321.

“Standing determines whether a litigant is entitled to have a court determine the merits of the issues presented. Whether a party has established standing to bring an action before the court is a question of law, ....” (Emphasis supplied.) (Internal citations omitted.) *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶20. “No matter how enticing the merits of a case, the merits do not justify allowing a party who lacks standing to bring it.” *State ex rel. Flanagan v. Lucas*, 139 Ohio St.3d 559, 2014-Ohio-2588, ¶30.

“[S]tanding turns on the nature and source of the claim asserted by the plaintiffs.” *Moore*, 133 Ohio St.3d at ¶23. Standing requires the plaintiff to establish “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” (Internal citations omitted.) *Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 459, 351 N.E.2d 127

(1976). See *State of Ohio v. Civil Service Commission*, 1<sup>st</sup> Dist. No. C-950285, 1995 WL 763649 \*2 (Dec. 29, 1995) (“A party has standing to raise an issue when he or she can demonstrate ... the interest asserted is within the scope of the interest protected by the provision.”); *Taser Int’l, Inc. v. Chief Medical Examiner of Summit County*, 9<sup>th</sup> Dist. No. 24233, 2009-Ohio-1519, 2009 WL 826416, ¶18 (“When an action is brought in relation to a specific statute or constitutional provision, the plaintiff must demonstrate that the interest he or she seeks to protect falls within the ‘zone of interests’ that are protected or regulated.”). SCO is not within the “zone of interests” of FERPA or R.C. 3319.321 as these are statutes intended to protect the rights of parents and students in the confidentiality of their educational records. They are not disclosure statutes. While Ohio’s Public Records Act is to be construed liberally in favor of disclosure, *Dues*, 2004-Ohio-1497 at ¶24, FERPA and R.C. 3319.321 should be construed liberally in favor of privacy. Neither statute reflects an intent to favor disclosure, much less disclosure that conflicts with the discretion of the educational agency or institution.

“In construing this statute, ‘our obligation is to ascertain and give effect to the intent of the legislature as expressed in the statute.’ (Citations omitted.) ‘[W]e determine the legislative intent by reading words and phrases in context and construing them in accordance with rules of grammar and common usage.’” *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga County Board of Commissioners*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶43. By its express language, FERPA protects the rights of parents and students in four major ways: 1) FERPA ensures the rights of parents to access, to inspect, and to review their child’s education records, 20 U.S.C. 1232g(a)(1)(A); 2) FERPA ensures the rights of parents to challenge the content of their child’s education records and to have any inaccuracies corrected, 20 U.S.C. 1232g(a)(2); 3) FERPA prohibits educational agencies or institutions from maintaining policies

permitting the release of students' personally identifiable information without the parents' written consent, with certain delineated exceptions, 20 U.S.C. 1232g(b)(1); and 4) FERPA provides parents with the right to file a complaint with the Department of Education. 20 U.S.C. 1232g(g).

Students and their parents are "the parties whom FERPA was intended to protect." *U.S. v. The Miami University*, 91 F.Supp.2d 1132, 1140 (S.D. Ohio, E.D. 2000). "Moreover, millions of people in our society have been or will become students at an educational agency or institution, and those people are the object of FERPA's privacy guarantees." *U.S. v. Miami University*, 294 F.3d 797, 818 (6<sup>th</sup> Cir. 2002). "FERPA [is] not an opens [sic] record law or a data sharing law. Rather, it is a privacy law." "FERPA Presentation for Elementary/Secondary School Officials," Dale King, Director, U.S. Dept. of Ed., Family Policy Compliance Office, October 24, 2012, [www2.ed.gov/policy/gen/guid/ptac/pdf/transcript.pdf](http://www2.ed.gov/policy/gen/guid/ptac/pdf/transcript.pdf). (Appendix 5, p. 2.)

R.C. 3319.321 is nearly identical to FERPA in its protection of the privacy of students' personally identifiable information. In *State ex rel. Brown v. Lemmerman*, 124 Ohio St.3d 296, 2010-Ohio-137, 921 N.E.2d 1049, ¶14, the Court found a noncustodial parent had the clear legal right to the public school records of his children under R.C.3319.321(B)(5)(a). In doing so, the Court held, "This statute does not confer any rights on nonparents to public school records of children." (Emphasis supplied.) *Id.* at ¶12. This holding complies with FERPA regulations, which specify with respect to nonconsensual disclosures, including disclosures of "directory information," that it does "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" 34 C.F.R. §99.31. Paragraph (a)(12) provides for

disclosure only “to the parent of a student who is not an eligible student or to the student.”

Requesters such as SCO have no right of access under FERPA or R.C.3319.321.

SCO cites FERPA’s legislative history, which provides, “[FERPA] was not intended, in establishing a minimum Federal standard for record confidentiality and access, to preempt the States’ authority in the field.’ 120 Congr.Rec. at 39863 (Joint Statement of Sens. Buckley and Pell).” However, SCO improperly interprets this statement to provide, “The Court therefore has the ability to resolve the circular reference’ between FERPA and Ohio’s Public Records Act in favor of disclosure.” (SCO’s Brief, p. 29.) As set forth above, the right to access records is granted solely to parents and eligible students, not to requesters such as SCO. In establishing a minimum standard for confidentiality and access, Sens. Buckley and Pell did not intend to preempt the States from providing greater access to parents and eligible students. This legislative history, therefore, cannot be read to interpret FERPA to provide any access to SCO, much less a minimum standard for access beyond which the states may proceed, in favor of disclosure to SCO.

**Springfield’s Proposition of Law No. 4:**

*There exists no private right of action under either FERPA or R.C. 3319.321.*

“Congress did not establish individually enforceable rights through FERPA.” *U.S. v. Miami University*, 294 F.3d at 818fn20, *citing Gonzaga University*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). In *Gonzaga*, the Supreme Court rejected the claim of a student against a university to enforce provisions of FERPA. *Gonzaga University v. John Doe*, 536 U.S. 275, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). The Court held “such an action foreclosed because the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. §1983 (1994 ed., Supp. V).” *Id.* “Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private

suit, whether under §1983 or under an implied right of action.” *Id.* at 286. SCO, therefore, has no private right of action to challenge Springfield’s denial of access under FERPA.

According to its legislative history, FERPA only provides for “centralized review” by the Secretary of the Department of Education of complaints by students and parents suspecting a violation of FERPA “due to concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.’ 120 Cong. Rec. 39863 (1974) (joint statement).” *Id.* at 290. “It is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of ‘multiple interpretations’ the Act explicitly sought to avoid.” *Id.* at 290. Congress had no intention of allowing claims of parents or eligible students, much less SCO, to be asserted in thousands of state and federal courts.

R.C. 3319.321 similarly provides no private right of action or remedy to SCO. This is clear when R.C. 3319.321 is contrasted with R.C. 1347, “Ohio’s Privacy Act,” which includes R.C. 1347.08, granting “access rights to individuals on whom information is collected” and R.C. 1347.09, providing “a mechanism to correct disputed information.” R.C. 1347.10 specifically provides for a private right of action and damages by “[a] person who is harmed by the use of personal information that relates to him and that is maintained in a personal information system and may recover damages in a civil action from any person who directly and proximately caused the harm ....” R.C. 1347.10(A). R.C. 3319.321 contains no such language providing parents and students, the individuals for whose protection the statute exists, with a private right of action. The statute certainly provides no such private right of action or remedy for a requester such as SCO.

**Springfield’s Proposition of Law No. 5:**

*Neither FERPA nor R.C.3319.321 gives the clear legal right to disclosure of students’ personally identifiable information contained in education records. The designation of these records as “directory information” and release of these records pursuant to this designation is within the discretion of the educational agency or institution, regardless of whether similar information has been released to other entities pursuant to parental consent and the Superintendent’s discretion.*

SCO’s Propositions of Law Nos. 2, 3, and 4, can be read together to argue SCO has some rights under FERPA and R.C. 3319.321 to the disclosure of students’ personally identifiable information. Even if SCO had standing and a private right of action under these statutes, it could not prevail on its mandamus claims under these statutes based on the discretion these statutes provide educational agencies and institutions.

**A. SCO has no clear legal right to the release of students’ personally identifiable information under FERPA.**

In its third claim against Springfield, SCO alleges Springfield “has a clear legal duty to amend its FERPA policy ... to ensure that it complies with its obligations under FERPA.” (Am. Compl., ¶98.) SCO demands this Court issue a writ ordering Springfield to amend its Policy JO to designate the information sought as “directory information.” (Id., ¶99.) As SCO has no rights under FERPA, it can have no clear legal right to the disclosure of students’ personally identifiable information regardless of the fact Springfield could have designated and released the information under the “directory information” exception or the fact Springfield released similar information to other entities pursuant to the discretion given the Superintendent in the Consent Form.

The only entities to whom FERPA provides a right of access to students’ personally identifiable information are parents and eligible students. FERPA prohibits the release of students’ personally identifiable information without consent to entities other than parents or eligible students, specifically providing, “No funds shall be made available under any applicable

program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization.” 20 U.S.C. 1232g(b)(1). The statute provides limited exceptions to the requirement of parental consent, but makes these exceptions permissive and entirely within the discretion of the educational agency or institution.

SCO requested information pursuant to the exception to consent for “directory information.” Springfield denied SCO’s request based upon its discretionary decision not to designate any categories of “directory information” for release without consent. SCO argues FERPA requires Springfield to designate and release all categories of information permitted under FERPA. This argument is contrary to the clear and unambiguous language of the Regulations interpreting FERPA, which provide, “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.” 34 C.F.R. 99.31(d). Paragraphs (a) and (b) identify the exceptions to consent and the only parties identified in paragraph (a)(12) are parents and eligible students. In light of this language, SCO has no basis to argue the designation or release of “directory information” is mandatory. SCO’s argument must similarly fail in light of the decisions of the FPCO, the agency administering FERPA, and the decisions of courts considering FERPA.

FERPA specifically allows educational agencies and institutions to designate as “directory information” the following: “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports,

weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” 20 U.S.C. 1232g(a)(5)(A). FERPA and its Regulations further include within the definition of “directory information” the “information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. §99.3.

Prior to making “directory information” public, FERPA requires the educational agency or institution “shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.” 20 U.S.C. 1232g(a)(5)(B). As set forth above, Springfield neither designated any “directory information” nor gave the required public notice necessary for the release of designated “directory information.” According to the clear and unambiguous language of FERPA and its implementing Regulations, such a decision was entirely within Springfield’s discretion.

Even if it had designated “directory information,” for current students, the release of that “directory information” would remain within Springfield’s discretion. FERPA provides only that educational agencies and institutions “may” disclose designated “directory information.” 34 C.F.R. 99.37(a). This Court has held, “The usage of the term ‘may’ is generally construed to render optional, permissive, or discretionary the provision in which it is embodied.” *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶21. In at least 25 references in its brief, SCO notes Springfield “may,” “can,” “could,” and has the “ability” to

designate and release information, as well as that FERPA only “allows” or “permits” Springfield to do so. (SCO’s Brief, pp. 2, 11, 22-26, 29, 31-32.) Through its own arguments, SCO repeatedly admits the designation and release of “directory information” is permissive as opposed to mandatory.

SCO argues Springfield “hoped” Policy JO and the Consent Form “would give it more control over student information that [sic] it otherwise had under state and federal law ....” (SCO’s Brief, p. 15.) This argument must be rejected in light of the unlimited discretion to designate and release students’ information as “directory information” Springfield possessed prior to the adoption of Policy JO. Under its former policy, Springfield could designate and release “directory information” without any affirmative consent. Under Policy JO, Springfield is limited with respect to the purposes for which it may release information and the partners to which it may release information. It is also limited to releasing information only for students for whom parents have returned the signed Consent Forms.

The FPCO, the office in the Department of Education that administers and provides technical assistance on FERPA, 34 C.F.R. §99.60, has consistently noted the express language of the statute and regulations provides the designation and release of “directory information” is discretionary. The Supreme Court has “set forth the analytical framework regarding statutory interpretation where federal agencies are involved. The Court stated that if the intent of Congress is clear from the plain language of the statute, the court, as well as the agency involved, must give effect to such unambiguously expressed intent. If, however, the court determines that a provision in the statute is ambiguous and the intent of Congress is unclear, the court must defer to an agency’s reasonable interpretation of the provision.” *U.S. v. The Miami University*, 91 F.Supp.2d 1132, 1152 (S.D. E. D. 2000). “When interpreting statutes, courts must give due

deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which Congress has delegated the responsibility of implementing the congressional command.” *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 176, 1997-Ohio-386, 680 N.E.2d 956, (Stratton, J., dissenting), *citing Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165. In the event the express intent of FERPA was unclear, the Court would be required to defer to the FPCO’s interpretation.

The FPCO advises, “[U]nder FERPA, all of the disclosures a school can make without consent are permitted disclosures, not required disclosures – except, of course, for disclosures to the parent or the eligible student, which are required.” “FERPA Presentation for Elementary/Secondary School Officials,” Dale King, Director, U.S. Dept. of Ed., Family Policy Compliance Office, October 24, 2012, [www2.ed.gov/policy/gen/guid/ptac/pdf/transcript.pdf](http://www2.ed.gov/policy/gen/guid/ptac/pdf/transcript.pdf) , p. 10. (Appendix 5, p. 10.) “FERPA does not [even] require that a school disclose education records to a new school to which the student is transferring – it permits disclosure. (FERPA only requires disclosure to parents and eligible students.)” *Id.* at p. 14.

SCO’s arguments FERPA must be interpreted to require Springfield either to change its policy to designate and release “directory information” or to release the information pursuant to the Consent Form contrary to the Superintendent’s discretion contradicts the interpretation of FERPA by the FPCO. “The purpose of FERPA is to protect the privacy interests of eligible students in education records. These privacy interests should not be viewed as barriers to be minimized or overcome, but as important public safeguards to be protected and strengthened. Exceptions to the rule of prior written consent under FERPA should be construed narrowly to

achieve its statutory purpose-protecting the privacy interests of students.” FPCO Letter of Technical Assistance to American Federation of Teachers (8/21/00). (Appendix 6b.)

“FERPA has been construed by the courts as permitting an educational agency or institution to choose not to designate as directory information items, such as students’ names and addresses, that are listed in 20 U.S.C.A. §1232g(a)(5)(A) (1990).” The Honorable Timothy A. Oliver, 1992 Ohio Op.Atty.Gen. 2-296\*3 (1992). “The federal provisions do not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student in the specified circumstances, or to designate any information as directory information, but merely permit the educational agency or institution to do so, if it chooses, without forfeiting federal funds.” (Internal citations omitted.) *Id.*

Contrary to SCO’s argument, the fact that an educational agency or institution has discretion to designate information as “directory information” does not change the fact the disclosure of such information falls within the exception to Ohio’s Public Records Act’s for information protected under FERPA. This conclusion is consistent with the result of cases in other states, a consistency this Court has recognized as desirable when interpreting federal statutes. *ESPN*, 2012-Ohio-2690 at ¶24. Kentucky’s Open Records Act contains an exception for “information the disclosure of which is prohibited by federal law or regulation.” In spite of the discretion involved in the decision not to designate “directory information,” the fact a school district had “not implemented the statutory mechanism for designating any information directly relating to its students as directory information” was sufficient to invoke the exception to disclosure. Office of the Attorney General, Ky.Op.Atty.Gen. 03-ORD-146 (2003), 2003 WL 21501808. The Arkansas Freedom of Information Act “shields from disclosure all public records that are education records” as defined by FERPA. That information could have been

designated “directory information” does not change the fact those “education records” are protected under FERPA and thereby excluded from disclosure under Arkansas FOIA. The Honorable Nate Bell, Ark.Op.Atty.Gen. No. 2012-083 (2012). Any decision making the designation of “directory information” mandatory would contradict the permissive language of the statute and convert FERPA from a privacy statute into another disclosure statute contrary to Congress’ intent. Such a decision would also exert improper control over the discretion of local and state educational agencies and institutions with respect to students’ information.

“Mandamus does not lie to control the discretion of a board of education, but mandamus is a proper remedy to compel a board of education to exercise its discretion.” *State ex rel. Masters v. Beamer*, 109 Ohio St. 133, 141 N.E.851 (1923), syllabus. Springfield has exercised its discretion by implementing Policy JO, which sets forth Springfield’s policy with respect to student records in compliance with FERPA and R.C. 3319.321, and by following that policy. Mandamus does not lie to control the terms of Policy JO, which is in compliance with FERPA and R.C. 3319.321 simply because the results of Policy JO will not provide SCO with the information necessary for it to pursue its marketing efforts in the cheapest and easiest manner.

Springfield’s decision not to designate or release any personally identifiable information as “directory information” is due substantial deference by the Court as is the Superintendent’s discretion regarding the exercise of parental consent provided in the Consent Form. School districts vary widely and the boards and superintendents must have discretion to manage their districts accordingly.

“The Ohio Constitution grants the legislature full power and authority to regulate the school system in the state of Ohio. Ohio lawmakers have provided that [e]ach \* \* \* board of education shall have the management and control of all the public schools of whatever name or character that it operates in its respective district, and that [t]he board of education of a school district \* \* \* *shall make any rules that are necessary for its government* and the government of its employees, pupils

of its schools, *and all other persons entering upon its school grounds or premises.* (Emphasis added.) A fair determination of the issues of this case recognizes that (a) the [Ohio] legislature has vested \* \* \* boards of education with almost unlimited reasonable authority to manage and control schools within their districts, (b) members of boards of education [enjoy] a presumption that [they act] in a valid manner and in good faith, (c) [u]nless an abuse of discretion is shown \* \* \* boards of education are the sole judges of policy regarding management and control of the schools, and (d) [c]ourts do not act as a ‘super board of education’ and second-guess the wisdom of the \* \* \* boards of education in managing public schools. Decisions of the United States Supreme Court show substantial deference to the decisions of school authorities.” (Internal citations omitted.)

*Nichols v. W. Local Bd. of Edn.*, 127 Ohio Misc. 2d 30, 34, 2003-Ohio-7359, 805 N.E.2d 206, 209 (C.P.), ¶¶10-11.

Mandamus cannot be used to compel the discretion of the Springfield City School Board. “It is, of course, a fundamental principle, of universal acceptance, that although a court may be required by mandamus to decide a controversy, it may not be compelled to render a particular decision or to rule in favor of a petitioning party, and that a state or local administrative board may not thus be controlled in the exercise of its discretion. Neither may such a board be compelled to exercise the controlled judicial function of interpreting a statute in favor of a relator.” *State ex rel. Mack v. Bd. of Ed. of Covington*, 1 Ohio App. 2d 143, 146-47, 204 N.E.2d 86, 89 (Ohio App. 2<sup>nd</sup> Dist. 1963).

In *Mack*, the court held, in spite of a statute’s provision of discretion to the school board to admit an unimmunized student with a parent’s written objection to immunization, the board retained the discretion not to do so, to have a more stringent standard for immunization. The court held, “the board still retains full authority to compel immunization to prevent the spread of communicable diseases. And this they do by making and enforcing such rules and regulations to secure the vaccination and immunization of pupils. It is not required, for example, to permit an unimmunized pupil to continue in school.” *Id.* at 148. “[R]elator was not entitled to a writ of

mandamus to compel the respondent board to construe the statute in his favor.” *Id.* at 149.

Similarly, in the case at bar, SCO may not compel Springfield to release the personally identifiable information even if it may have the discretion to do so.

“As for the right and corresponding duty involved, ‘[w]hen an asserted legal right is based on a statutory provision, the relator must demonstrate that the statute, as applied and interpreted, gives rise to the requisite clear legal right.’ *State ex rel. Deters v. Wilkinson*, 72 Ohio St.3d 54, 56, 1995–Ohio–79, 647 N.E.2d 480.” *Hingel v. Bd. of Edn. of Austintown Local Sch. Dist.*, 7<sup>th</sup> Dist., No. 08 MA 258, 2009WL4547721, 2009-Ohio-6396, (Nov. 23, 2009), ¶ 22. As set forth above, neither FERPA nor R.C. 3319.321 gives SCO any rights to disclosure, much less a clear legal right.

In this case, it is Springfield’s interpretation and application of FERPA and R.C. 3319.321, which is being challenged. “In the context of public school systems, courts are historically deferent to a school board’s decision making process, presuming that decisions are made in good faith and declining to substitute judgment absent a gross abuse of discretion, clear demonstration of bad faith, or fraud.” *Hingel*, 2009-Ohio-6396 at ¶ 23. The Supreme Court has recognized the “tradition of deference to state and local school officials” in its decisions. *Gonzaga*, 536 U.S. at 286fn5.). “The legal rule is generally accepted that ‘in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor of the administrative action. [citations omitted]’.” (Internal citations omitted.) *Ash*, 2008 WL 5731755. The evidence shows Springfield lawfully adopted and followed its policy, acting neither arbitrarily nor in bad faith; therefore, SCO has no clear legal right to the disclosure

of students' personally identifiable information contained in Springfield's education records, which is contrary to that policy.

SCO alleges "the district adopted its new policy as a pretextual basis for it to deny School Choice Ohio the public record information it needs to educate the families of district students as part of a concerted effort to stem the tide of district students taking advantage of EdChoice scholarships and other non-district educational opportunities provided under Ohio law." (Am.Compl., ¶43.) There is, however, no evidence either the Board's approval of Policy JO for the 2013-2014 School Year or Dr. Estrop's discretion regarding release pursuant to the Consent Form was exercised in anything other than a good faith manner in the best interest of all of the children in Springfield. "A plethora of authority holds that public officials such as school superintendents and members of boards of education, are presumed to have acted in a valid manner and in good faith. The exercise of honest judgment by the Superintendent and Board cannot constitute an abuse of discretion, even if that judgment is erroneous. The interest of the community as a whole and not that of the smaller number in affected areas dictates the action taken by a board and superintendent entrusted with the education of all children in the school district." (Internal citations omitted.) *Clay v. Harrison Hills City School Dist. Bd. of Edn.*, 102 Ohio Misc.2d 13, 24, 723 N.E.2d 1149 (1999).

"Great caution should be exercised when a court of law enjoins the functions of other branches of government." *Dandino v. Hoover*, 70 Ohio St. 3d 506, 510, 1994-Ohio-525, 639 N.E.2d 767, 770. "Neither the management of the public schools vested in superintendents and boards of education nor their management decisions will be interfered with by the courts in the absence of a showing of fraud or abuse of discretion." *Clay*, 102 Ohio Misc.2d at 23.

**B. SCO has no right to the release of students' personally identifiable information under R.C. 3319.321(B)(2)(a).**

R.C. 3319.321, which limits public access to students' records, is a privacy statute in that it makes a narrow class of government-held information, public school student records, confidential. 1988 Ohio Atty. Gen. Ops. No. 88-103 \*5 (1988). "R.C. 3319.321 was enacted on May 15, 1976. The stated purpose of this bill is 'to restrict the release of information about public school pupils.' ... R.C. 3319.321 was apparently passed in order to bring the state's public schools into compliance with federal law." Franklin B. Walter, 1987 Ohio Atty.Gen.Ops. No. 87-037 (1987). "Under R.C. 3319.321 and the nearly identical provisions of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. §1232g, an educational institution is expected to safeguard student education records." *Ash*, 2008 WL 5731755 (Ohio Com.Pl.). R.C. 3319.321 makes the narrow class of "public school student records" confidential. 1988 Ohio Atty.Gen.Ops. No.88-103 at \*5. "Because the information in question is confidential under state law, it is not subject to disclosure pursuant to R.C. 149.43." The Honorable Timothy A. Oliver, 1992 Ohio Atty.Gen.Ops. 2-296\*1 (1992).

SCO argues Springfield has an obligation under R.C. 3319.321 to release the information "wholly independent of its obligations under Ohio's Public Records Act." (SCO's Brief, p. 33.) However, like FERPA, R.C.3319.321 protects parents and students by prohibiting the release of personally identifiable information without parental consent. R.C. 3319.321(B). As set forth above, it does not give SCO any standing or private right of action to pursue a claim under the statute against Springfield.

Even if SCO had standing and a private right of action, SCO's claim under R.C. 3319.321(B)(2)(a) must fail based on the clear language of the statute itself. R.C. 3319.321(B)(2)(a) does not provide an "independently-sufficient reason," (SCO's Brief, p. 34),

on which to base a claim against Springfield. SCO identifies no caselaw addressing R.C. 3319.321, much less caselaw finding R.C. 3319.321 to provide an independent basis for SCO's claims to mandamus relief.

SCO alleges Springfield has violated R.C. 3319.321(B)(2)(a) "by imposing restrictions on the disclosure of 'directory information' to School Choice Ohio that it does not impose on others." (Am. Compl., ¶80.) This allegation ignores the language of the statute itself which makes this provision applicable only to information designated as "directory information" under FERPA, as well as the undisputed evidence Springfield did not designate any "directory information" for current students. R.C. 3319.321(B)(2)(a), the "non-discrimination requirements" on which SCO relies, specifically provides it pertains to "directory information that it has designated as subject to release in accordance with the "Family Educational Rights and Privacy Act of 1974, 88 Stat. 571, 20 U.S. C. 1232g, as amended, ...." R.C. 3319.321 (B)(2)(a). In specifically citing to FERPA with respect to the designation of "directory information," Ohio has similarly made this designation permissive and entirely within the discretion of the educational agencies and institutions. The "non-discrimination requirements" apply only to information designated as "directory information" under FERPA. As Springfield did not designate "directory information" or provide the notice and opportunity to opt-out as required to make "directory information" public, it could not have violated the "non-discrimination provision." Like FERPA, there is no support in R.C. 3319.321 for SCO's claim the Court can order Springfield to designate information as "directory information" or that the Court can order Springfield to obtain consent to release the information sought by SCO contrary to its discretion.

SCO's argument R.C. 3319.321 can be interpreted to provide some right to requesters beyond that provided by FERPA by virtue of the "non-discrimination requirements" is contradicted not only by the clear and unambiguous language of R.C. 3319.32 citing FERPA, but by the additional limits the statute places on the release of information. First, R.C. 3319.321 narrows FERPA's definition of the personally identifiable information that may be designated as "directory information" to "student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards received." R.C. §3319.321(B)(1). Second, R.C. 3319.321 provides greater protection of students' personally identifiable information by prohibiting the release of "directory information" to requesters seeking to use the information for profit. R.C. 3319.321(A). This prohibition currently has no counterpart in FERPA. *Ash*, 2008 WL 5731755. These greater protections of students' privacy reflect neither an intent to lessen the confidentiality of students' personally identifiable information nor an intent to provide requesters with "rights" of access to information. Finally, the release of information to other entities pursuant to the Consent Form and in the discretion of the Superintendent does not convert that information into a "public record" disclosure of which would be required under Ohio's Public Records Act. *State ex rel. Physicians Comm. For Responsible Medicine v. Board of Trustees of Ohio State University*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶35.

SCO's argument R.C. 3319.321 provides it with greater access to students' information than FERPA would violate the law with respect to the interplay between federal and state legislation. The "Joint Statement in Explanation of Buckley/Pell Amendment" is the major source of legislative history for the FERPA amendments enacted four months after FERPA and

made retroactive to FERPA's effective date of November 19, 1974. "The Joint Statement explained that in establishing a minimum Federal standard for record confidentiality and access, FERPA was not intended to preempt the States' authority in the field. Accordingly, States may further limit the number or type of State or local officials who will continue to have access or provide parents and students with greater access to records than under FERPA." "Legislative History of Major FERPA Provisions," <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html>. (Appendix 7, p. 7.) While Ohio may further expand access to parents and students, it may not expand access for requesters such as SCO, which is precisely how SCO requests this Court interpret the "non-discrimination requirements."

**Springfield's Proposition of Law No. 6:**

*It is not the role of the Court to create public policy favoring school choice over students' privacy contrary to the express public policy contained in legislation passed by Congress and Ohio's General Assembly.*

SCO alleges "[p]ublic policy, as embodied in the school choice programs implemented by the General Assembly, the Ohio Public Records Act and the non-discrimination requirements under Revised Code 3319.321(B)(2)(a)," requires Springfield to disclose the information sought by SCO. (Am. Compl., ¶99.) In requesting this Court to create a public policy in favor of the disclosure of students' educational records, SCO ignores: 1) the clear and unambiguous language of FERPA and its Regulations, the purpose of which is "the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended," 34 C.F.R. §99.2; 2) the clear and unambiguous language of the Ohio Public Records Act excepting records the disclosure of which is prohibited by state or federal law; 3) the clear and unambiguous language of R.C. 3319.321(B)(2)(A) adopting FERPA; and 4) the absence of any language in the Educational Choice Scholarship Program legislation, R.C. Chapter 3310, expressing such a public policy.

First, the public policy in favor of students' privacy intended to be protected by FERPA has been clearly and unambiguously legislated by Congress. Ohio's adoption of R.C. 3319.321 to bring it in line with the federal legislation reflects the General Assembly's adoption of this public policy. An argument the court should favor another public policy was rejected by the court in *U.S. v. The Miami University*, which held it "has no bearing on the Court's interpretation of FERPA. The United States Congress, when it enacted FERPA, presumably weighed the various policy interests involved. Therefore, while ... [newspaper] has provided the Court with several policy interests that weigh against keeping disciplinary records private, those arguments are directed to the wrong branch of government. The Court's duty is to discern Congress' intent regarding FERPA by applying sound principles of statutory interpretation. It would be a gross violation of the constitutional principle of separation of powers for the Court to act as a super-legislature and decide what it thinks the law should be based on contemporary policy interests." *U.S. v. The Miami University*, 91 F.Supp.2d 1132, 1148 (S.D. Ohio, E.D. 2000). This Court has recognized, "the General Assembly is the ultimate arbiter of public policy." *WBNS*, 2004-Ohio-1497 at ¶37.

The Court may not create a public policy contrary to that asserted by the federal and state legislatures. SCO alleges Springfield's failure to comply "with its obligations" under FERPA and R.C. 3319.321 will cause "all citizens of Ohio, and particularly children eligible for Ohio's school choice scholarships" to "suffer irreparable harm." (Am. Compl., ¶82 and 101.) SCO does not elaborate on how it will damage "all citizens of Ohio." Ignoring the fact SCO has no standing or private right of action to assert a claim for Springfield's alleged failure to comply with its obligations under FERPA and R.C. 3319.321, such a public policy argument in favor of disclosure of students' information was rejected by the court in *Miami University*. In that case,

the court concluded, “[T]he public, while certainly benefitting from laws that promote openness in public records, also benefits from the privacy accorded students through FERPA. Congress, through FERPA, has balanced the interests of privacy versus public disclosure and the Court is in no position to second guess it.” 91 F.Supp.2d at 1159. “Congress holds student privacy interests in such high regard” that it “places the privacy interests of students and parents above the federal government’s interest in obtaining necessary data and records.” *U.S. v. Miami University*, 294 F.3d 797 (6<sup>th</sup> Cir. 2002). This Court has expressly cited with approval the Sixth Circuit’s decision in *Miami University*. *ESPN*, 2012-Ohio-2690 at ¶26.

Second, the Educational Choice Scholarship Program legislation contains no indication the public policy behind such legislation trumps the public policy in favor of students’ privacy. In that legislation, the General Assembly neither created a state agency to market school choice to students nor included an exception to R.C. 3319.321 for entities choosing to engage in such activities. Simply because some students might be eligible for EdChoice Scholarships by virtue of building/district performance or family income does not mean these students should be deprived of the right to privacy of their information. To the contrary, EdChoice legislation specifically provides for students’ personally identifiable information to retain its confidentiality as follows:

The department and each chartered nonpublic school that receives a data verification code under this section shall not release that code to any person except as provided by law.

Any document relative to this program that the department holds in its files that contains both a student’s name or other personally identifiable information and the student’s data verification code *shall not be a public record* under section 149.43 of the Revised Code.

(Emphasis supplied.) R.C. 3310.11(D).

**Springfield's Proposition of Law No. 7:**

*SCO Can Meet Its Mission Without a Writ Ordering the Release of Students' Personally Identifiable Information in contravention of the privacy statutes.*

The FPCO has repeatedly recognized an alternative to the release of students' personally identifiable information that would not implicate student privacy, the dissemination of the material by the educational agency or institution. In response to a request for information by a union, the Graduate Teaching Fellows Federation, the FPCO found, "the University could provide information to the students on behalf of the GTFF and the graduate fellows could then submit the following information to the GTFF." FPCO Letter of Technical Assistance to American Federation of Teachers, (8/21/00). (Appendix 6.b.) Similarly, in order to resolve a conflict in which the California Public Employment Relations Board sought names of students employed as teaching assistants on the campus of the University of California, the FPCO suggested as a possible solution, "The University could volunteer to mail or deliver the literature that PERB presumably would like to have provided to the students via their mailing addresses. This would avoid any disclosures of education records to a third party." FPCO Letter of technical assistance to the Regents of the University of California re: disclosures to employment relations board (9/17/99). (Appendix 6.a.) Again, in another finding, the FPCO noted "nothing in FERPA would prohibit the District from obtaining the recruitment information from the third party and providing it to the students and parents." FPCO Letter to Austin Independent School District (TX) re: Disclosure of Special Education Records Under Open Records Law (3/2/05). (Appendix 6.c.)

SCO could give Springfield the information it wishes to provide students regarding their educational opportunities and avoid any privacy issues. This would, however, require SCO to share with Springfield the information regarding school choice options it is marketing, including

private schools and charter schools, prior to marketing these options to Springfield's students, which SCO has been reluctant to do.

**Springfield's Proposition of Law No. 8:**

*Attorney's fees are not appropriately awarded absent statutory authorization. Neither FERPA nor R.C. 3319.321 authorize an award of attorney's fees in a mandamus action.*

In its Proposition of Law No. 5, SCO asserts the right to recover statutory damages and attorney's fees under R.C. 149.43(C). (SCO's Brief, p. 35.) SCO neither seeks attorney's fees under FERPA or R.C.3319.321 nor would SCO be entitled to an award of fees in light of the absence of any language in these statutes providing for such an award.

SCO is not entitled to an award of attorney's fees under Ohio's Public Records Act in the absence of any violation thereof. As set forth above, Springfield complied with SCO's public records requests by providing documents requested, which did not fall within the exception for records protected by FERPA and R.C. 3319.321. Even if SCO could establish Springfield's denial of SCO's request was in error, SCO would not be entitled to an award of attorney's fees.

First, an award of attorney's fees is entirely within the discretion of the Court in the absence of either one of two specific situations identified in the Act neither of which exists in this case. R.C. 149.43(C)(2)(b). An award of fees is mandatory only if the person responsible for responding to the request failed to respond affirmatively or negatively to the request or promised to respond, but failed to fulfill that promise. R.C. 149.43(C)(2)(b)(i) and (ii). SCO did not allege, and there is no evidence to establish, Springfield failed to respond to SCO's requests or failed to fulfill a promise to respond so as to support a mandatory award of attorney's fees. Further, SCO did not seek relief based on Springfield's failure to respond to SCO's requests, but based on Springfield's negative response. SCO is not, therefore, entitled to a mandatory award of attorney's fees available in the event of such failure. *ESPN*, 2012-Ohio-2690 at ¶12-15.

Second, even if an award of attorney's fees was mandatory, no award would be appropriate based on the reasonableness of the discretion exercised by the Board of Education in adopting Policy JO and the Superintendent in denying the requests for students' personally identifiable information, neither of whom was named in this action. R.C. 149.43(C)(2)(c). Ohio's Public Records Act provides for the denial of an award of attorney's fees if the person responding to the request reasonably believed either: 1) the denial of the request did not constitute a failure to comply with his obligations under the Act, or 2) the denial "would serve the public policy that underlies the authority that is asserted as permitting" the denial. The evidence supports both findings thereby negating any entitlement of SCO to an award of attorney's fees even in the event it should prevail on its claim under R.C. 149.43.

Even if the reasons for withholding records were ultimately determined to be meritless, attorney's fees should not be awarded if the decision to deny access "evidenced a good-faith concern to protect" the individuals whose information is requested. *WBNS*, 2004-Ohio-1497 at ¶48. Based on the permissive language of FERPA, the Board of Education reasonably believed it had discretion to adopt Policy JO and to choose not to designate or release any "directory information" for current students. Similarly, based on the discretion to which he is entitled as Superintendent, as well as the discretion provided in the Consent Form, the Superintendent reasonably believed he was complying with the intent of FERPA in denying SCO's request. Based on the language of the Consent Form giving the Superintendent discretion, as well as the substantial deference courts have shown the use of discretion by boards and superintendents in the management of school districts, both Springfield and its Superintendent reasonably believed they were acting within the intent of FERPA and R.C. 3319.321 under the exception these statutes provide to its obligations of disclosure under Ohio's Public Records Act.

SCO argues the disclosure of the information sought “would strongly benefit the public consistent with the policies embodied by Ohio’s school choice programs.” (SCO’s Brief, p. 36.) However, it is not the policy behind school choice that Springfield and the Superintendent were tasked with protecting, but the policy behind FERPA and its protection of students’ privacy. Their actions were reasonably intended to benefit all of Springfield’s students and not just those to whom SCO seeks to market school choice.

### **CONCLUSION**

The Court should deny SCO’s request for a writ of mandamus ordering Springfield to produce students’ education records as the records fall within the exception to “public records” required to be disclosed under the Ohio Public Records Act. The Court should deny SCO a writ of mandamus ordering Springfield to comply with its obligations under FERPA or R.C. 3319.321 as SCO has neither standing nor a private right of action under these statutes. Further, these statutes prohibit, as opposed to mandate, disclosure of the records sought by SCO. Even where they allow disclosure, that disclosure is not mandatory, but falls entirely within the discretion of Springfield. To order disclosure would divest Springfield of its discretion and contradict the intent of these statutes to prohibit policies or practices of permitting the release of education records.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served via regular U.S.

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# Appendix 1

Baldwin's Ohio Revised Code Annotated  
Title I. State Government  
Chapter 149. Documents, Reports, and Records (Refs & Annos)  
Records Commissions

R.C. § 149.43

149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

Effective: September 29, 2013 to March 19, 2015  
Currentness

<Note: See also version(s) of this section with later effective date(s).>

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;



(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting

attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4705.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news,

reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate

district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

#### **CREDIT(S)**

(2013 H 59, eff. 9-29-13; 2012 S 314, eff. 9-28-12; 2012 H 487, eff. 9-10-12; 2011 H 64, eff. 10-17-11; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 10-16-09; 2008 S 248, eff. 4-7-09; 2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979 S 62; 130 v H 187)

#### **Relevant Notes of Decisions (166)**

View all 1543

Notes of Decisions listed below contain your search terms.

#### **— Public, records**

Information submitted to a county sheriff pursuant to RC Ch 2950 by an individual who has been convicted of or pleaded guilty to a sexually oriented offense is a public record that must be made available for inspection to any person under RC

# Appendix 2

United States Code Annotated

Title 20. Education

Chapter 31. General Provisions Concerning Education (Refs & Annos)

Subchapter III. General Requirements and Conditions Concerning Operation and Administration of Education Programs: General Authority of Secretary (Refs & Annos)

Part 4. Records; Privacy; Limitation on Withholding Federal Funds

20 U.S.C.A. § 1232g

§ 1232g. Family educational and privacy rights

Effective: January 14, 2013

Currentness

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations--

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include--

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted--

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if--

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed 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.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena;

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will be reported in an aggregate form that does not identify any individual, on the conditions that--

(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements; and

(L) an agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 450b of Title 25), who has the right to access a student's case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding--

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from--

- (1) including appropriate information in the education record of any student concerning disciplinary action taken against such 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; or
- (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any 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, regardless of whether that information is contained in the student's education records, if--

- (A) the student is under the age of 21; and
- (B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) of this section or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--

- (A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general

An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.

**CREDIT(S)**

(Pub.L. 90-247, Title IV, § 444, formerly § 438, as added Pub.L. 93-380, Title V, § 513(a), Aug. 21, 1974, 88 Stat. 571; amended Pub.L. 93-568, § 2(a), Dec. 31, 1974, 88 Stat. 1858; Pub.L. 96-46, § 4(c), Aug. 6, 1979, 93 Stat. 342; Pub.L. 101-542, Title II, § 203, Nov. 8, 1990, 104 Stat. 2385; Pub.L. 102-325, Title XV, § 1555(a), July 23, 1992, 106 Stat. 840; renumbered § 444 and amended Pub.L. 103-382, Title II, §§ 212(b)(1), 249, 261(h), Oct. 20, 1994, 108 Stat. 3913, 3924, 3928; Pub.L. 105-244, Title IX, §§ 951, 952, Oct. 7, 1998, 112 Stat. 1835, 1836; Pub.L. 106-386, Div. B, Title VI, § 1601(d), Oct. 28, 2000, 114 Stat. 1538; Pub.L. 107-56, Title V, § 507, Oct. 26, 2001, 115 Stat. 367; Pub.L. 107-110, Title X, § 1062(3), Jan. 8, 2002, 115 Stat. 2088; Pub.L. 111-296, Title I, § 103(d), Dec. 13, 2010, 124 Stat. 3192; Pub.L. 112-278, § 2, Jan. 14, 2013, 126 Stat. 2480.)

Notes of Decisions (114)

**Footnotes**

1 So in original. The period probably should be a comma.

20 U.S.C.A. § 1232g, 20 USCA § 1232g

Current through P.L. 113-209 approved 12-16-2014

# Appendix 3

Baldwin's Ohio Revised Code Annotated

Title XXXIII. Education--Libraries

Chapter 3319. Schools--Superintendent; Teachers; Employees (Refs & Annos)

Records and Reports

**R.C. § 3319.321**

**3319.321 Limits on public access to records concerning pupils**

Effective: September 29, 2007

Currentness

(A) No person shall release, or permit access to, the directory information concerning any students attending a public school to any person or group for use in a profit-making plan or activity. Notwithstanding division (B)(4) of section 149.43 of the Revised Code, a person may require disclosure of the requestor's identity or the intended use of the directory information concerning any students attending a public school to ascertain whether the directory information is for use in a profit-making plan or activity.

(B) No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school, for purposes other than those identified in division (C), (E), (G), or (H) of this section, without the written consent of the parent, guardian, or custodian of each such student who is less than eighteen years of age, or without the written consent of each such student who is eighteen years of age or older.

(1) For purposes of this section, "directory information" includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards received.

(2)(a) Except as provided in division (B)(2)(b) of this section, no school district board of education shall impose any restriction on the presentation of directory information that it has designated as subject to release in accordance with the "Family Educational Rights and Privacy Act of 1974," 88 Stat. 571, 20 U.S.C. 1232q, as amended, to representatives of the armed forces, business, industry, charitable institutions, other employers, and institutions of higher education unless such restriction is uniformly imposed on each of these types of representatives, except that if a student eighteen years of age or older or a student's parent, guardian, or custodian has informed the board that any or all such information should not be released without such person's prior written consent, the board shall not release that information without such person's prior written consent.

(b) The names and addresses of students in grades ten through twelve shall be released to a recruiting officer for any branch of the United States armed forces who requests such information, except that such data shall not be released if the student or student's parent, guardian, or custodian submits to the board a written request not to release such data. Any data received by a recruiting officer shall be used solely for the purpose of providing information to students regarding military service and shall not be released to any person other than individuals within the recruiting services of the armed forces.

(3) Except for directory information and except as provided in division (E), (G), or (H) of this section, information covered by this section that is released shall only be transferred to a third or subsequent party on the condition that such party will not permit any other party to have access to such information without written consent of the parent, guardian, or custodian, or of the student who is eighteen years of age or older.

(4) Except as otherwise provided in this section, any parent of a student may give the written parental consent required under this section. Where parents are separated or divorced, the written parental consent required under this section may be obtained from either parent, subject to any agreement between such parents or court order governing the rights of such parents. In the case of a student whose legal guardian is in an institution, a person independent of the institution who has no other conflicting interests in the case shall be appointed by the board of education of the school district in which the institution is located to give the written parental consent required under this section.

(5)(a) A parent of a student who is not the student's residential parent, upon request, shall be permitted access to any records or information concerning the student under the same terms and conditions under which access to the records or information is available to the residential parent of that student, provided that the access of the parent who is not the residential parent is subject to any agreement between the parents, to division (F) of this section, and, to the extent described in division (B)(5)(b) of this section, is subject to any court order issued pursuant to section 3109.051 of the Revised Code and any other court order governing the rights of the parents.

(b) If the residential parent of a student has presented the keeper of a record or information that is related to the student with a copy of an order issued under division (H)(1) of section 3109.051 of the Revised Code that limits the terms and conditions under which the parent who is not the residential parent of the student is to have access to records and information pertaining to the student or with a copy of any other court order governing the rights of the parents that so limits those terms and conditions, and if the order pertains to the record or information in question, the keeper of the record or information shall provide access to the parent who is not the residential parent only to the extent authorized in the order. If the residential parent has presented the keeper of the record or information with such an order, the keeper of the record shall permit the parent who is not the residential parent to have access to the record or information only in accordance with the most recent such order that has been presented to the keeper by the residential parent or the parent who is not the residential parent.

(C) Nothing in this section shall limit the administrative use of public school records by a person acting exclusively in the person's capacity as an employee of a board of education or of the state or any of its political subdivisions, any court, or the federal government, and nothing in this section shall prevent the transfer of a student's record to an educational institution for a legitimate educational purpose. However, except as provided in this section, public school records shall not be released or made available for any other purpose. Fingerprints, photographs, or records obtained pursuant to section 3313.96 or 3319.322 of the Revised Code, or pursuant to division (E) of this section, or any medical, psychological, guidance, counseling, or other information that is derived from the use of the fingerprints, photographs, or records, shall not be admissible as evidence against the minor who is the subject of the fingerprints, photographs, or records in any proceeding in any court. The provisions of this division regarding the administrative use of records by an employee of the state or any of its political subdivisions or of a court or the federal government shall be applicable only when the use of the information is required by a state statute adopted before November 19, 1974, or by federal law.

(D) A board of education may require, subject to division (E) of this section, a person seeking to obtain copies of public school records to pay the cost of reproduction and, in the case of data released under division (B)(2)(b) of this section, to pay for any mailing costs, which payment shall not exceed the actual cost to the school.

(E) A principal or chief administrative officer of a public school, or any employee of a public school who is authorized to handle school records, shall provide access to a student's records to a law enforcement officer who indicates that the officer is conducting an investigation and that the student is or may be a missing child, as defined in section 2901.30 of the Revised Code. Free copies of information in the student's record shall be provided, upon request, to the law enforcement officer, if

prior approval is given by the student's parent, guardian, or legal custodian. Information obtained by the officer shall be used solely in the investigation of the case. The information may be used by law enforcement agency personnel in any manner that is appropriate in solving the case, including, but not limited to, providing the information to other law enforcement officers and agencies and to the bureau of criminal identification and investigation for purposes of computer integration pursuant to section 2901.30 of the Revised Code.

(F) No person shall release to a parent of a student who is not the student's residential parent or to any other person, or permit a parent of a student who is not the student's residential parent or permit any other person to have access to, any information about the location of any elementary or secondary school to which a student has transferred or information that would enable the parent who is not the student's residential parent or the other person to determine the location of that elementary or secondary school, if the elementary or secondary school to which the student has transferred and that requested the records of the student under section 3313.672 of the Revised Code informs the elementary or secondary school from which the student's records are obtained that the student is under the care of a shelter for victims of domestic violence, as defined in section 3113.33 of the Revised Code.

(G) A principal or chief administrative officer of a public school, or any employee of a public school who is authorized to handle school records, shall comply with any order issued pursuant to division (D)(1) of section 2151.14 of the Revised Code, any request for records that is properly made pursuant to division (D)(3)(a) of section 2151.14 or division (A) of section 2151.141 of the Revised Code, and any determination that is made by a court pursuant to division (D)(3)(b) of section 2151.14 or division (B)(1) of section 2151.141 of the Revised Code.

(H) Notwithstanding any provision of this section, a principal of a public school, to the extent permitted by the "Family Educational Rights and Privacy Act of 1974," shall make the report required in section 3319.45 of the Revised Code that a pupil committed any violation listed in division (A) of section 3313.662 of the Revised Code on property owned or controlled by, or at an activity held under the auspices of, the board of education, regardless of whether the pupil was sixteen years of age or older. The principal is not required to obtain the consent of the pupil who is the subject of the report or the consent of the pupil's parent, guardian, or custodian before making a report pursuant to section 3319.45 of the Revised Code.

**CREDIT(S)**

(2006 H 9, eff. 9-29-07; 1995 S 26, eff. 9-14-95; 1992 H 154, eff. 7-31-92; 1990 S 3, S 258, H 341; 1987 S 75; 1984 S 321; 1976 S 367)

**NOTES OF DECISIONS**

**Law enforcement requests for information**

RC 3319.321 prohibits the release, without proper consent on behalf of the student, by public school officials of information concerning illegal drug or alcohol use by students to law enforcement agencies when such information is "personally identifiable information other than directory information concerning any student attending a public school." OAG 90-099.

**Parental rights of access**

RC 1347.08 does not affect the right of parents to have access to their child's school records under RC 3319.321. OAG 87-037.

Under RC 3319.321, a noncustodial parent of a handicapped student has the same right of access to the student's records as a custodial parent except where access is limited by an agreement between the parents or a court order affecting the rights of the parents. Parents of handicapped students have the same right of access to their child's school records as parents of nonhandicapped students. OAG 87-037.

R.C. § 3319.321, OH ST § 3319.321

Current through Files 1 to 146 and Statewide Issue 1 of the 130th GA (2013-2014).

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# Appendix 4

Code of Federal Regulations  
Title 34, Education  
Subtitle A, Office of the Secretary, Department of Education  
Part 99, Family Educational Rights and Privacy (FERP & Annos)  
Subpart A, General

34 C.F.R. § 99.2

§ 99.2 What is the purpose of these regulations?

Effective: January 8, 2009

Currentness

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.

**Credits**

[61 FR 59295, Nov. 21, 1996; 73 FR 74851, Dec. 9, 2008]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Current through Jan. 15, 2015; 80 FR 2284.

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Code of Federal Regulations

Title 34, Education

Subtitle A, Office of the Secretary, Department of Education

Part 99, Family Educational Rights and Privacy (Refs & Annos)

Subpart A, General

34 C.F.R. § 99.3

§ 99.3 What definitions apply to these regulations?

Effective: January 3, 2012

Currentness

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)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct--with respect to Federal- or State-supported education programs--any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

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 definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes--

(1) A student ID number, user ID, or other unique personal identifier used by a 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; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, 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 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))

Early childhood education program means--

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 et seq.), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that--

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is--

(i) A State prekindergarten program;

(ii) A program authorized under section 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

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 program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

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; and

(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, handwriting, 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))

#### **Credits**

[60 FR 3468, Jan. 17, 1995; 60 FR 8563, Feb. 15, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000; 73 FR 74851, Dec. 9, 2008; 76 FR 75641, Dec. 2, 2011]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Notes of Decisions (47)

Current through Jan. 15, 2015; 80 FR 2284.

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Code of Federal Regulations  
Title 34. Education  
Subtitle A. Office of the Secretary, Department of Education  
Part 99. Family Educational Rights and Privacy (Refs & Annos)  
Subpart A. General

34 C.F.R. § 99.5

§ 99.5 What are the rights of students?

Effective: January 8, 2009

Currentness

(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 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))

**Credits**

[58 FR 3188, Jan. 7, 1993; 58 FR 36871, July 9, 1993; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Notes of Decisions (8)

Current through Jan. 15, 2015; 80 FR 2284.

Code of Federal Regulations

Title 34 . Education

Subtitle A . Office of the Secretary, Department of Education

Part 99 . Family Educational Rights and Privacy (Refs & Annos)

Subpart A . General

34 C.F.R. § 99.7

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

Currentness

(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 1880-0508)

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

**Credits**

[53 FR 19368, May 27, 1988; 61 FR 59295, Nov. 21, 1996]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Current through Jan. 15, 2015; 80 FR 2284.

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Code of Federal Regulations

Part 99. Education

Subtitle A. Office of the Secretary, Department of Education

Part 99. Family Educational Rights and Privacy (Refs & Annos)

Subpart D. May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

34 C.F.R. § 99.31

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

Effective: January 3, 2012

Currentness

(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 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 State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) 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) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) 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 or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section 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 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 destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(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)).

#### **Credits**

[53 FR 19368, May 27, 1988; 58 FR 3189, Jan. 7, 1993; 58 FR 36871, July 9, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008; 74 FR 401, Jan. 6, 2009; 76 FR 75641, Dec. 2, 2011]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

**AUTHORITY:** 20 U.S.C. 1232g, unless otherwise noted.

Notes of Decisions (51)

**Current through Jan. 15, 2015; 80 FR 2284.**

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Code of Federal Regulations

Title 34 . Education

Subtitle A . Office of the Secretary, Department of Education

Part 99 . Family Educational Rights and Privacy (Refs & Annos)

Subpart D . May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

34 C.F.R. § 99.37

§ 99.37 What conditions apply to disclosing directory information?

Effective: January 3, 2012

Currentness

(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 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--

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) 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))

**Credits**

[73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Notes of Decisions (7)

Current through Jan. 15, 2015; 80 FR 2284.

Code of Federal Regulations  
Title 34. Education  
Subtitle A. Office of the Secretary, Department of Education  
Part 99. Family Educational Rights and Privacy (Refs & Annos)  
Subpart E. What Are the Enforcement Procedures?

34 C.F.R. § 99.60

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

Currentness

(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)

**Credits**

[58 FR 3189, Jan. 7, 1993; 58 FR 36871, July 9, 1993]

SOURCE: 53 FR 11943, April 11, 1988; 58 FR 3188, Jan. 7, 1993, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

Notes of Decisions (17)

Current through Jan. 15, 2015; 80 FR 2284.

# Appendix 5

## **Presentation**

### **Elementary/Secondary School Officials**

#### **Slide 1**

- Good afternoon. My name is Dale King. I am the Director of the Family Policy Compliance Office (or FPCO). FPCO is responsible for administering the Family Educational Rights and Privacy Act (FERPA).
- I want to thank you for taking the time to participate in today's webinar. The purpose of this webinar is to provide local school officials with an overview of their responsibilities and obligations under FERPA.
- You need be aware of State laws and local policies that might address some of the issues we will be talking about today. I am only addressing how FERPA applies to various situations.
- We are conducting this webinar as a part of the Department of Education (Department) requirement to notify annually school officials their obligations under the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA). While we only have time today to cover the basic of FERPA, we do provide helpful information on PPRA in our annual notification that is posted on FPCO's website and which is emailed to all SEAs and to the larger LEAs in the country. Because we do not have an email address for all the LEAs, we have asked that SEAs ensure that this information is forwarded to the local superintendents in their State. We also distribute this information via our office listserv. If your LEA is not signed-up for FPCO's listserv, I will provide you with how to do so at the end of this presentation.
- Today's presentation will cover the basic requirements under FERPA and cover some of the changes included in the December 2, 2011 regulations. At the end of the basic overview of FERPA, time permitting, I will present various scenarios that are of interest to LEAs. This webinar is scheduled for one hour.

- Before I begin, I want to point out that this presentation will be a listen session only. There will not be a question and answer period or opportunity for you to submit questions or comments during the webinar. However, if you have questions that arise during the webinar, you may submit them afterwards to our email address at [FERPA@ed.gov](mailto:FERPA@ed.gov).
- Also, if you have any technical difficulties during the webinar please email Bernie Cieplak or Regina Miles. Their email addresses are included in the email you received regarding this webinar.

**Slide 2:**

- Congress passed the Family Educational Rights and Privacy Act (FERPA) in 1974 around the same time that other privacy statutes were passed. Congress has amended FERPA approximately 10 times since its original enactment. Typically, when Congress amends the statute, the Department issues new regulations reflecting those changes, as well as changes based on administrative experience. What we are going to discuss today are the regulations by which FPCO administers this important law.

**Slide 3:**

- FERPA is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.
- When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student, and he or she is known as an "eligible student" under FERPA.
- We will talk specifically about these rights as we get into this presentation.
- FERPA not an opens record law or a data sharing law. Rather, it is a privacy law.

**Slide 4:**

- FERPA applies to “educational agencies and institutions” that receive funds under any program administered by the Department of Education.
- Generally, most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.
- However, that if a student is placed in a private school under IDEA, the placing public agency (typically the LEA) remains responsible under FERPA for that specific student’s records and compliance with FERPA.
- Note that by “educational agency or institution,” we mean schools, school districts, colleges and universities where a student attends.

**Slide 5:**

- Now let’s look at some of the basic provisions in FERPA. Understanding the definitions in FERPA will help you understand how to apply FERPA to your particular situations.

**Slide 6:**

- The most basic definition is the term “education records.” Education records are broadly defined to mean 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.

**Slide 7:**

- There some exceptions to the definition of education records. They include :
  - Sole possessions (notes used as a personal memory aid by a teacher or other officials);
  - Law enforcement unit records (that is, law enforcement records created and maintained by the school’s law enforcement unit, such as a campus police department or security office);

- Alumni records (that is, information about a student after he or she is no longer a student, such as the former student now serves in the military or is president of his own company); and
- Peer-graded papers before they are collected and recorded by the teacher.

**Slide 8:**

- Another important definition to keep in mind is the definition of “personally identifiable information.” This works together with “education records” in determining what information must be protected from disclosure.

**Slide 9:**

- PII includes not only direct identifiers, obvious items such as name, address, SSN, but also indirect identifiers that would have the effect of identifying a student. The standard is, can a “reasonable person in the school community” – someone without personal knowledge of the circumstances – identify the student.
- Also, PII includes information requested by a person whom the school believes knows the identity of the student.

**Slide 10:**

- Directory Information is defined as PII that is not generally considered harmful or an invasion of privacy if disclosed. These are items that you might find in a school yearbook, a sports program, or a student directory.
- Directory information cannot include a student’s social security number and generally cannot include a student ID number.
- In the regulations released on December 2<sup>nd</sup>, we amended the definition of “directory information” to include a student ID number or other unique personal identifier that is displayed on a student ID badge, 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. (This is used mostly at postsecondary level when students use their ID numbers to get into various systems, inside and outside the college.)

**Slide 11:**

- Now we are going to talk about the rights of parents and eligible students under FERPA.
- One important thing to note is that FERPA affords full rights to either parent, custodial or noncustodial, unless there is a legally binding document or State law that specifically provides otherwise.

**Slide 12:**

- As stated earlier, when a student turns 18 or enters college at any age, the rights under FERPA transfer from the parents to the student. However, nothing in FERPA prevents a school from disclosing education records to parents under one of the exceptions that might apply. (This applies at the high school level, as well as at the college level.)

**Slide 13:**

- Schools must comply with a request for access within 45 days of receiving the request. (That's "comply," not just "respond.") In some states, there may be a law that addresses access to education records. Some states may require schools to provide access in fewer than 45 days and other states may require that school provide access in more than 45 days. If your state law requires access be provided in, say, 60 days, the school must comply with FERPA and provide access in no more than 45 days after receiving a request.
- Also note that FERPA doesn't generally require that you maintain education records and a school can destroy records – unless there is an outstanding request for access.
- LEAs and SEAs may charge for copies of education records within reason – unless doing so prevents a parent or student from exercising their right to inspect and review education records.

- And, schools need to be careful when a record contains information on more than one student – the parent or student may see or be informed of only the specific information that relates to the student.

**Slide 14:**

- Another right under FERPA is the right to seek to amend information in education records.
- The right to seek amendment is not unlimited; a school is not required by FERPA to afford a parent the right to seek to change substantive decisions (or opinions) made by school officials, such as grades or other evaluations of a student. So, while FERPA affords parents the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade, disciplinary rulings, disability placements, or other such determinations.

**Slide 15:**

- Another right that parents and eligible students have under FERPA is the right to provide consent before PII from education records is disclosed. Consents must be signed and dated and must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made.

**Slide 16:**

- Parents or eligible students may file a written complaint with FPCO regarding an alleged violation of FERPA. Complaints must be submitted to FPCO within 180 days of the alleged violation.

**Slide 17:**

- Schools are required to annually notify parents and eligible students of their rights under FERPA. We have a model notification on FPCO's website that schools can download and adapt to their situations. Some schools include their directory information notification within the annual notification.

- Note here that the annual notification must include the criteria for who your school considers to be a school official and what you consider to be a legitimate educational interest. We have sample language for that in the model notice as well.

**Slide 18:**

- So, when is prior consent NOT required before disclosing PII in education records?

**Slide 19, 20:**

- There are a number of exceptions to FERPA's general consent rule. Here are some that generally relate to LEAs.

**Slide 21:**

- The audit or evaluation exception to FERPA's general consent rule is the exception under which LEAs typically disclose PII on students to their SEA.
- Note that authorized representatives of SEAs (or the other specific entities or officials listed in the regulations that can receive information under this exception) may have access to PII from education records only 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 which relate to those programs.
- The SEA must protect information in a manner that does not permit the redisclosure of that PII to anyone else and destroyed when no longer needed for the purposes listed above – except as described in § 99.35 of the regulations.

**Slide 22:**

- The December 2011 regulations included a new definition of “authorized representative.”

**Slide 23:**

- The 2011 regulations also included a definition of education program.

**Slide 24:**

- There is no research exception per se under FERPA. However, there is an exception for the conducting of studies. LEAs may enter into agreements with organizations for studies conducted for or on their behalf for specific purposes. Also, the December regulations amended FERPA to clarify that the entities listed in § 99.31(a)(3) of the regulations – such as an SEA -- are not prevented from redisclosing PII from education records as part of agreements with researchers to conduct studies for, or on behalf of, educational agencies.
- Studies must be for the purpose of developing, validating, or administering predictive tests; or administering student aid programs; or improving instruction.
- Further, the 2011 regulations clarified that “for, or on behalf of” does not require the assent of or express approval by the original disclosing educational agency. For example, it is not necessary for an SEA to secure the approval of an LEA prior to making redisclosures for, or on behalf of the LEA, so long as the SEA is acting with express or implied legal authority and for the benefit of the LEA.

**Slide 25:**

- Both the studies exception and the audit evaluation exception specifically require that the parties execute a written agreement when disclosing PII from education records without consent. The mandatory elements of that agreement vary slightly between the two exceptions. You should review the regulations at § 99.31(a)(6) and § 99.35 for a description of the requirements under the two exceptions.

**Slide 26:**

- When disclosing PII from education records under the audit or evaluation exception to authorized representatives, LEAs and SEAs are required to use

“reasonable methods” to ensure to the greatest extent practicable that your authorized representative is FERPA-compliant. This specifically means ensuring that your authorized representative [read points from slide].

**Slide 27:**

- In the last few years, we have gotten a lot of questions about disclosures that relate to health or safety emergencies. In 2008, we clarified that if a school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose PII to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- There are several guidance documents on our website that explain this provision.
- Based on the information available at the time and if there is a rational basis for the disclosure, the Department will not substitute its judgment for that of the school. However, school officials need to remember that this exception relates to emergencies. This provision cannot be used for disclosures on a routine, non-emergency basis, such as the routine sharing of non-directory information on students with the local police department (which is not allowed). We’ve written extensively about this in the final regulations issued in 2008 and in several guidance documents, which appear on our website and which are listed at the end of this webinar.

**Slide 28:**

- Section 99.37 provides the conditions for disclosing directory information. Schools may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance concerning directory information.
- Also, the FERPA regulations were amended in 2011 to state that a parent or eligible student may not use the right to opt out of directory information in order to prevent a school from requiring the student to wear or otherwise

display a student ID badge or card that exhibits information that has been properly designated by the school as directory information.

- The regulations were also amended to clarify that schools may adopt a limited directory information policy that allows for the disclosure of directory information to specific parties, for specific purposes, or both. The school must specify its limited directory information policy in the public notice to parents and students.
- For instance, a district could make a policy that they will disclose directory information to entities or purposes that don't include marketers, but rather will provide directory information only for purposes such as yearbook information or a school directory. However, if they do so, the school has to adhere to its stated policy in the directory information notice. If a school's directory information notice to parents and students (for a limited policy) does not include disclosures to marketers (or specifically states that it will not make such disclosures) for instance, then it can't turn around and disclose directory information to those entities not permitted by the policy. (This would be considered an improper disclosure under FERPA.) The school could only do this by revising and reissuing its directory information notice and providing parents and eligible students another opportunity to opt out.

**Slide 29:**

- Just as a reminder, under FERPA, all of the disclosures a school can make without consent are permitted disclosures, not required disclosures – except, of course, for disclosures to the parent or the eligible student, which are required.

**Slide 30:**

- School officials need to be familiar with FERPA's recordkeeping requirements, which you can read about in § 99.32 of the FERPA regulations. Generally, you must record to whom you disclose PII from education records and that party's legitimate interest in obtaining that

information. There are exceptions to this requirement to record disclosures, such as disclosures made with consent and disclosures to school officials.

**Slide 31:**

- There are limitations on the RE-disclosure of PII from education records, which are discussed in § 99.33. When you disclose PII to one of the parties listed in the exceptions to consent (§ 99.31), a school should inform the receiving party that it may not make further disclosures of the PII. However, this restriction does not apply if the third party makes disclosures on behalf of the school under one of the permitted disclosures in § 99.31.

**Slide 32:**

- FPCO is the office in the Department that administers FERPA. We are the office that investigates complaints filed by parents and eligible students and provide technical assistance on FERPA.
- In the 2011 regulations, we amended the enforcement provisions in FERPA so that if an State educational authority or another entity that receives funds under a program administered by the Department has access to PII from student education records and violates FERPA (regardless if they have students in attendance), FPCO may bring an enforcement action against that entity.
- We clarified that enforcement options against entities that receive funds under a program administered by the Department include: withholding payment, cease and desist orders, and compliance agreements. The regulations also clarified that the Department's option include the 5-year rule, which may be applied against any entity outside of the educational agency or institution whether or not such an entity receives funds under a program administered by the Department if the entity violates FERPA's re-disclosure provisions or the requirement under the studies exception to destroy the PII from education records when no longer needed for the purposes for which the study was conducted. This means, for example, if an

LEA provided PII from students' education records to an organization to conduct a study and that organization used the information for other purposes or did not destroy (or return) the PII to the LEA, we could impose a ban on the LEA providing education records to that organization for at least 5 years.

- Before we get to the point of recommending to the Secretary the enforcement options I just mentioned, such as withholding payments to an LEA or SEA, FPCO works with educational agencies and institutions to bring them into compliance with FERPA. Should we find that a school violated FERPA through our investigation, FPCO would require that the school take certain measures to come into compliance with FERPA and provide us with assurance that it has done so.

**Slide 33-36: Where to go for help**

[Describes information about FPCO's ListServ, guidance documents, and FPCPO contact information.]

**Slide 37:**

This completes the overview of the basic requirements in FERPA. As you may know, FERPA can be confusing. So, let's see how well you can apply FERPA. I will present a practical scenario for you to think about. I will give you a moment to read and study each scenario (just a few seconds) and then I will provide the answer and rationale.

Now remember, just like in the previous slides, we are *only* talking about how *FERPA* would apply. You may have State laws or even local policies that provide additional rights to parents and eligible students. If you have any questions in that regard, you need to consult with your legal counsel.

**Slide 38:**

No. You cannot link "directory information" with an item that cannot be designated as a "directory information" item, such as race or ethnicity. The school could notify the parents or eligible students and ask them to sign a consent form giving permission to disclose the students' names to the media.

**Slide 39:**

No. You cannot link “directory information” with an item that cannot be designated as a “directory information” item, such as disability status. The school could send home a note to the parents of these students and ask them to sign a consent form giving permission to disclose the students’ names to the organization.

**Slide 40:**

Technically, no. While the definition of “directory information” includes “dates of attendance,” we included a definition of that term in § 99.3 a few years ago because of all the questions we received about this matter. “Dates of attendance” means the period of time during which a student attends or attended an educational agency or institution, such as an academic year, a spring semester, or a first quarter. The term does not include the specific daily records of a student’s attendance at a school.

So, while you could not disclose that specific information to the policeman absent a subpoena, the school could call the student to the office to talk to the officer.

**Slide 41:**

No. The student disciplinary record, although now maintained by the school’s law enforcement unit, does not become exempt from the definition of “education records” merely because it is maintained by the security unit. As such, the disciplinary record is the student’s “education records” and could not be disclosed by the law enforcement unit to the media.

**Slide 42:**

Yes. This is because FERPA prohibits the improper disclosure of information derived from education records. Therefore, information that is based on observation or hearsay and not specifically contained in education records would not be protected from disclosure under FERPA.

**Slide 43:**

No. Generally, information about overdue material or payments owed by a student meets the definition of “education records” and there is no exception to the general consent rule that permits it to be publicly disclosed without consent.

And you certainly don’t want to send an email to all parents whose children owe money to the school where the recipients know who all received the email.

**Slide 44:**

FERPA does not require that a school disclose education records to a new school to which the student is transferring – it permits the disclosure. (FERPA only requires disclosure to parents and eligible students.) However, there is a provision in the Elementary and Secondary Education Act (ESEA) that requires that each State that receives funds under the ESEA have “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.”

LEAs should include a notice in their annual notification of rights under FERPA that they forward education records to other schools that have requested the records and in which the student seeks or intends to enroll. (See our model notification of rights.)

**Slide 45:**

It’s complicated.

At the high school, the rights under FERPA have NOT transferred to the student because the student is under 18. However, at the local college, the student is considered an “eligible student” and the rights belong to her for those records at the college. The high school and college may share records on students who are attending both schools. If the college sends the records to the high school, then the parents have the right to see them there. Otherwise, the college “may” but is not required to share the records with the parents if the parents claim the student as a dependent for federal income tax purposes.

**Slide 46:**

Yes. In the 2011 amendments to the FERPA regulations, we clarified that a parent or eligible student may not opt out of directory information in order to prevent a school from requiring the student to wear a student ID badge that exhibits information that has been properly designated by the school as “directory information.”

**Slide 47:**

Yes. More than likely, the student is still living at home and is probably claimed as a dependent by the parents for IRS tax purposes. If so, then the school can share any information from the student’s education records with the parents, even if the student hasn’t provided consent (or objects).

**Slide 48:**

FERPA. At the elementary/secondary level, any records that a school nurse or health center maintains that are directly related to a student are considered “education records” subject to FERPA – not the HIPAA Privacy Rule. A school nurse may share information on students with other school officials if these school officials have a legitimate educational interest in the records. Typically, if there is a health condition about which other teachers and school administrators need to be aware in order to provide a safe and healthy environment for the student, then the school could include such a criteria for what it considers to be a “legitimate educational interest.” See <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.

**Slide 49:**

Generally, we view after school programs as requiring parental consent before PII from students’ education records may be disclosed to the organizations running the programs. As you know, FERPA requires written consent from parents (and eligible students) before PII from students’ education records are disclosed. There are a number of exceptions to the general consent rule, but none appear to apply in this situation.

However, FERPA would permit the school district to disclose properly designated directory information on those students whose parents have not opted out of directory information, in conjunction with the school’s or school district’s directory

information policy. The YMCA could use directory information to contact parents about their program.

**Slide 50:**

Generally, parents or students, if they are eligible students, would need to provide consent (that meets the requirements of § 99.30) for the school to provide the advisor with non-directory PII from education records.

The high school may provide directory information on students whose parents (or they) have not opted out of directory information.

**Slide 51:**

FERPA requires that the parents of these students – or the students themselves once they turn 18 years old – provide consent so that the high schools may disclose the students' education records to them. This consent – which must follow § 99.30 – may be worked in as part of the initial information provided to parents and students. Grantees of the Department are required to comply with FERPA in carrying out their programs. There is no exception to FERPA's general consent rule that permits a grantee to have access to non-directory information without consent.

High schools may certainly provide programs with properly designated “directory information,” as long as the high school followed FERPA in designating and disclosing the information and parents or eligible students have not opted out.

*This completes the webinar. I would like to thank you for your participation.*

# Appendix 6.a.

September 17, 1999

Mr. Edward M. Opton, Jr.  
University Counsel  
The Regents of the University of California  
Office of General Counsel  
1111 Franklin Street, 8th Floor  
Oakland, California 94607-5200

Dear Mr. Opton:

This is in response to your March 15, 1999, letter to this Office requesting our guidance on the University of California's (University) response under the Family Educational Rights and Privacy Act (FERPA) to a subpoena duces tecum that may be issued for certain students' education records. Specifically, the California Public Employment Relations Board (PERB) has served (or will serve) a subpoena duces tecum for "directory information" about the University's teaching assistants. You ask for our advice on the following:

1. Whether the University would violate FERPA by complying with a subpoena that may be issued by the PERB.
2. Whether there is any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB.
3. Whether FERPA allows notice of a court order or subpoena to be made by publication in campus newspapers or on campus bulletin boards, or would individual letters be required.
4. What is the purpose of § 99.61 of the FERPA regulations?

This Office administers FERPA is responsible for providing technical assistance to educational agencies and institutions regarding issues related to education records. As you are aware, FERPA is a Federal law that affords parents and eligible students the right to have access to education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. See 20 U.S.C. § 1232g and 34 CFR Part 99. When a student turns 18 years of age or attends an institution of postsecondary education, the student becomes an "eligible student" and all FERPA rights transfer to the student. As explained more fully below, records of teaching assistants are education records under FERPA and may not be disclosed without written consent of the student or unless the disclosure meets one of the exceptions to the prior consent rule under FERPA. Each of your questions is addressed below.

**Can the University lawfully comply with a subpoena that may be issued by the PERB?**

In your March 15, 1999, letter you state that the PERB may issue a subpoena duces tecum to the University for "the names, departments where employed, and home addresses for several thousand students who are employed in various campus positions, chiefly as teaching assistants". You specifically ask if the University can provide this information under a subpoena for those students who have exercised their right to opt out of the disclosure of "directory information." The PERB wants the information "because it is planning representation elections this Spring at most of the University's nine campuses to determine whether the student employees wish to be exclusively represented by a labor union in their employment relationship with the University."

You indicated in your letter that you are concerned that "compliance with the subpoena duces tecum may violate FERPA." It appears you believe that if the PERB issues the University a subpoena duces tecum, it would not be valid or considered "lawfully issued" because, in your opinion, the PERB may not have the authority under its enabling statute to issue a subpoena for

the teaching assistant's education records. The enabling statute, according to your letter, states that the PERB shall have the authority:

To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of, any employer's or employee organization's records, books, or paper confidential under statute.

Cal. Gov't Code § 3563 (g).

In your letter, you also state that it "does not appear that FERPA conflicts with state or local law under the facts that I have described—instead, the conflict is between FERPA and a directive (and potentially a subpoena duces tecum) issued by a state agency."

As you aware, Ms. Margo A. Feinberg, counsel to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, also sent a letter to this Office regarding the potential subpoena duces tecum. In her letter, dated March 19, 1999, she makes the following statements:

The UAW has filed representation petitions to represent academic student employees in such titles as Teaching Assistants, Readers and Tutors at the University of California campuses. . . . PERB has held several lengthy hearings as to the status of these positions and has determined that they are employees as defined by the Higher Education Employment Relations Act (HEERA) (California Government Code Section 3560, et seq.), and as such have a right to representation.

It is our position first and foremost that any interpretation of HEERA rests with PERB and in certain circumstances the California courts. Therefore, it is not for the Department of Education to evaluate whether PERB's subpoena is legitimate.

We, however, share PERB's view that it has legitimate subpoena power.

As you are aware, FERPA broadly defines the term "education records" as those records that contain information that is directly related to a student and that are maintained by an educational agency or institution or a party acting for the agency or institution. FERPA specifically includes in the term, *those 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*. 34 CFR § 99.3 (b)(3)(ii). You indicated in your letter that teaching assistants are students in attendance at the University and one cannot be a teaching assistant unless one is a student. Therefore, it is our determination that records maintained by the University regarding teaching assistants are "education records" under FERPA.

This Office is not addressing the question of whether the records of readers and tutors are subject to FERPA because sufficient facts were not presented in either your letter or Ms. Feinberg's letter to enable us to determine whether the readers and tutors are students in attendance at the University. However, to the extent a University employs readers and tutors and their employment is contingent upon their being students in attendance at the University, then the same conclusion as teaching assistants would apply and their records would be considered "education records."

With regard to the disclosure of education records, FERPA generally provides that an educational agency or institution may only disclose a student's education record to a third party if the eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. However, FERPA does permit the nonconsensual disclosure of education records in certain limited circumstances, such as when the disclosure is made in compliance with a lawfully issued subpoena or court order. CFR § 99.31(a)(9). A student's decision to be excluded from the disclosure of "directory information" has no bearing on the institution's compliance with a lawfully issued subpoena or court order. That is, an institution may disclose personally identifiable information from education records in compliance with a lawfully issued subpoena or court order regardless whether a student has opted out of the disclosure of directory information (see below).

While FERPA does not specifically define what constitutes a "lawfully issued subpoena," this Office has consistently advised that institutions, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued because what would be considered a "lawfully issued subpoena" varies from State to State. In short, we have concluded previously that if a subpoena is issued in compliance with State law, it is "lawfully issued."

Please note that while a "lawfully issued subpoena" or court order may compel disclosure of information, *FERPA* does not require an educational institution to disclose information from a student's education record to anyone other than to the eligible student to whom the records relate. Rather, *FERPA* permits the disclosure of education records without prior written consent in certain limited situations, such as when the records are the subject of a subpoena or court order. In addition, unless the subpoena is a Federal grand jury subpoena or other subpoena issued for a law enforcement purpose, and the subpoena contains a provision that the eligible student must not be informed of the existence of the subpoena, the institution must make a reasonable effort to notify the eligible student in advance of compliance with the subpoena. This permits the eligible student to seek protective action from the court, such as limiting the scope of the subpoena.

**Is there any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB?**

Absent prior written consent, no. As mentioned above, records containing information on teaching assistants are education records under FERPA. FERPA does provide that written consent is not needed if the disclosure concerns information the educational agency or institution has designated as "directory information," under the conditions described in 34 CFR § 99.37. See 34 CFR § 99.31(a)(11). The definition lists items that would not generally be considered harmful or an invasion of privacy if disclosed which includes, but is not limited to: a student's name; address; telephone listing; date and place of birth; major field of study; participation in officially recognized activities and sports; weight and height of members of athletic teams; dates of attendance; degrees and awards received; and the most previous educational agency or institution attended. 34 CFR § 99.3 ("Directory information"). Should a school disclose the names and addresses of its teaching assistants under FERPA's directory information exception, the school would also be disclosing, at the same time, the fact that those students are teaching assistants. Under FERPA, the fact that a student is a teaching assistant is not directory information.

Ms. Feinberg states in her letter, however, that the "University has previously released the names and addresses of teaching assistants in identical proceedings." She lists situations or mechanisms in which she states the names of the teaching assistants, tutors, or readers have previously been disclosed or made public. They include printing the names in the course catalog, posting them to the web page of the University, in the tutorial center, in the departments, on the office doors and mailboxes. She also states that the "individuals when voting in the election release their name as part of the process and obviously assume the University will have to release information to verify if they are currently employees in the bargaining unit." In addition she states: "The University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers."

Although Ms. Feinberg states that the University has previously released the names and address of teaching assistants, the nature and circumstances in the situations she describes differ from the disclosure of information to a specific third party, the PERB. Our advice does not relate to the publishing of a teaching assistant's name and address on-campus, action that an individual who is acting as a teaching assistant knows is inevitable as part of his or her teaching curriculum. However, in general, it is our understanding that in circumstances such as those described by Ms. Feinberg, an educational institution would ordinarily have obtained the student's permission to make his or her name and designation as a teaching assistant available to certain students and staff as part of the actual employment application process for teaching assistants.

Also, Ms. Feinberg states that "the University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers." We do not have enough information to consider how FERPA applies to these disclosures. For example, we would need to know whether at any point in the employment application process the individual signed a consent form for the release of his or her education records.

As noted previously, records containing a student's name, address, and status as a teaching assistant are considered "education records" because of the teaching assistants' status as students. As such, under the circumstances provided and assuming the absence of any other exception, such as a lawfully issued subpoena, the University would be required to obtain the consent of the teaching assistants prior to disclosing such information to the PERB. No other provisions in FERPA are applicable to the particular circumstances you have presented. However, it appears from a subsequent communication that the University has taken action to overcome the problem of withholding the teaching assistants addresses for those who opted out. We are pleased that it appears you have resolved the issue. Although you did not elaborate on how the situation was resolved, we offer you the following two suggestions as possible solutions or actions the University may want to consider taking in the event it finds itself in a similar situation in the future.

1. The University could add a consent portion to the teaching assistant's application giving the teaching assistants the option of having their names and addresses released to the PERB for the purpose of elections.

OR

2. The University could volunteer to mail or deliver the literature that PERB presumably would like to have provided to the students via their mailing addresses. This would avoid any disclosures of education records to a third party.

**Is notice of a court order or subpoena by publication in campus newspapers and on campus bulletin boards sufficient or are individual letters required?**

This Office has consistently interpreted FERPA to require that students be notified in advance of the compliance with a court order or subpoena by individual notice. Notice on campus bulletin boards or in campus newspapers would not be adequate to meet this requirement. In contrast, the requirement in § 99.7 of the FERPA regulations that institutions must annually notify students of their FERPA rights may be provided by individual notice, publication in campus newspapers or on campus bulletin boards.

**What is the purpose of § 99.61?**

In your letter you ask whether the purpose of § 99.61 is to allow this Office to grant exceptions in appropriate cases to the restrictions that the FERPA places on the release of education records. If so, you then ask whether the University may be granted such an exception.

The purpose of § 99.61 is to require an educational agency or institution that determines that it cannot comply with FERPA, due to a conflict with a State law, to notify this Office regarding such conflict. Once notified, this Office reviews the law and any pertinent interpretations made by the State and provides guidance to the agency or institution regarding its applicability to FERPA. The Department has no authority to grant an exception or waiver to any of the provisions in FERPA. In sum, compliance with portions of a State law that conflict with FERPA may jeopardize an educational agency or institution's continued eligibility to receive Federal education funds. FERPA provides that the Department may not make funds available to any educational agency or institution that has a policy of denying parents or students their rights under FERPA. Thus, to the

extent that a conflict does exist between a State law and FERPA, and the agency or institution has a practice or policy of violating FERPA in order to comply with a State law, the agency or institution would be in jeopardy of losing Department of Education funds.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,

LeRoy S. Rooker

Director

Family Policy Compliance Office

# Appendix 6.b.

August 21, 2000

Mr. David J. Strom, In-house Counsel  
Ms. Stephanie S. Baxter, Senior Associate Counsel  
American Federation of Teachers  
555 New Jersey Avenue, N.W.  
Washington, DC 20001-2079

Dear Mr. Strom and Ms. Baxter:

This is in response to your August 4, 2000, letter, addressed to Deputy Secretary Frank Holleman, in which you asked that the Department interpret the Family Educational Rights and Privacy Act (FERPA) in such a way that universities may disclose to a union representing student graduate assistants who teach undergraduate classes personally identifiable information from the education records of such individuals. I have been asked to respond to your letter to the Deputy Secretary because, as you know, this Office administers FERPA. This also serves to respond to your July 14th letter to this Office, and as a follow-up to our July 19th meeting, on this issue.

You explained in your letter that the University of Oregon (University) and the Graduate Teaching Fellows Federation (GTFF), a union that represents graduate student teaching fellows at the University, have signed an agreement under which the University would disclose certain information regarding graduate teaching fellows to the GTFF. This information includes: name, social security number, department, terms of employment, changes in employment status or rate of pay, home addresses, bargaining unit status, terms of appointment, and major. The agreement provides that addresses disclosed by the University will only be used by GTFF for union business and that social security numbers will only be used for payroll deduction and insurance administration. The agreement further states that "The University will assume no liability for the unauthorized disclosure of information to parties outside the GTFF."

By letter dated April 3, 2000, Melinda W. Grier, general counsel of the University, advised you that based on a September 19, 1999, letter to the University of California from this Office, the University could no longer disclose information from education records of graduate teaching fellows to the GTFF absent prior written consent. In relevant part, we advised in that letter that the records of teaching assistants are education records subject to the provisions of FERPA. We also explained in that letter that when an educational agency or institution chooses to comply with a State law that is in conflict with FERPA, it puts its continued eligibility for Federal education funds in jeopardy. That is, FERPA provides that the Department of Education may not make funds available to any educational agency or institution that has a policy or practice of denying students their rights under FERPA. You stated in your letter to this Office that you disagree with "this construction of the statute as it leaves education institutions in the untenable situation of choosing between complying with FERPA and conflicting state and federal law."

You stated that without information about graduate teaching fellows, the GTFF cannot meet its obligations under State and Federal law, and such individuals will be "deprived of important rights," such as health enrollment information to eligible non-participants and continuation of benefit notices required under COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. 99-272, Apr. 7, 1986, 100 Stat. 82) to teaching fellows who are separated from employment. Additionally, the GTFF would not be able to seek fees to which it is entitled. Finally, you stated that this issue is of concern because such situations exist regarding student graduate teaching assistants and fellows across the country.

You suggested in your letter that this Office interpret FERPA so that the records of graduate teaching fellows/assistants are employment, and not education, records under FERPA. You state that such individuals "are employed not because they are students, but, instead, because the

institution has decided to carry out [its] undergraduate teaching programs using a significant number of graduate teaching fellows rather than professors." You also argued that "the vast majority of public employee relations boards . . . have ruled that graduate student employees are 'employees' entitled to organize and bargain collectively," and, as such, their records should not be subject to FERPA. You alternatively suggested in your letter that this Office expand "directory information" to include: graduate employees teaching status, schedule, rate of pay, bargaining unit status and other pertinent employment information. You suggested that this information could not be considered "harmful or an invasion of privacy if disclosed."

FERPA protects privacy interests of parents in their children's "education records," and generally prohibits the disclosure of education records without the consent of the parent. The term "education records" is broadly defined as all records, files, documents and other materials which:

contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 232g(a)(4)(A); 34 CFR § 99.3 "Education records." When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student" under FERPA and all of the rights afforded by FERPA transfer from the parents to the student.

FERPA provides limited exemptions from the definition of "education records." FERPA states:

(B) The term "education records" does not include —

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose. . . .

20 U.S.C § 1232g(a)(4)(B)(iii); 34 CFR § 99.3 "Education records" (b)(3) (emphasis added). The FERPA regulations clarify this provision by explaining that: "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." 34 CFR § 99.3 "Education records"(b)(3)(ii) (emphasis added).

Thus, FERPA provides a very narrow exemption for records related to an individual's employment from the protections provided by FERPA. This exemption applies to those records related to the employment of individuals who are employed without regard to their status as students. For instance, if a secretary in the president's office takes a course at any given time, her employment records do not become education records because the secretary is not employed as a result of her status as a student. The regulations make clear that if an individual is employed at a school as a result of his or her status as a student, those records are education records under FERPA. While you did contend that graduate fellows/assistants are employed out of necessity for the schools at which they work, you did not contend that graduate fellows would be employed if they were not also enrolled as graduate students in a program at such schools.

You further asked that this Office interpret the records of graduate fellows/assistants as "employment records" rather than as "education records" because some public employee relations boards have ruled that graduate student employees are "employees" entitled to organize and bargain collectively. However, whether graduate student fellows/assistants have the right to organize and bargain collectively as employees does not affect whether records regarding such individuals are education records under FERPA. Further, the fact that certain records may be related to an individual's employment does not prevent such records from also being education

records under FERPA. Rather, as discussed above, records regarding an individual's employment at a school **are education records** if the individual's employment is contingent on the fact that he or she is also a student at that school. As stated above, it appears that this is the case with respect to graduate student teaching fellows/assistants.

With regard to your question about directory information, FERPA generally provides that an educational agency or institution may only disclose a student's education records to a third party if the parent or eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. FERPA does permit the nonconsensual disclosure of education records in certain limited circumstances that are clearly specified by statute, such as when the information has been appropriately designated as "directory information." 20 U.S.C. § 1232g(b)(1); 34 CFR § 99.31(a)(11). FERPA provides that a school may disclose directory information if it has given public notice of the types of information which it has designated as "directory information," the student's right to restrict the disclosure of such information, and the period of time within which a student has to notify the school in writing that he or she does not want any or all of those types of information designated as "directory information." 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37(a).

With respect to what information can be considered "directory information," FERPA states:

For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A).

In administering FERPA, the Department recognizes that there are other similar types of information that an educational agency or institution may wish to designate and disclose as directory information. In this regard, the FERPA regulations further define directory information as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3 "Directory information." The regulations then specifically list those items set forth as "directory information" in the statute. The recently amended regulations (published in the Federal Register on July 6, 2000) also state that electronic mail address, grade level, and student status (part-time, full-time, graduate, undergraduate) can be specified as directory information.

This Office has made determinations on various occasions, in response to specific inquiries from school officials or in connection with the investigation of complaints of alleged violations of FERPA, as to whether a particular type of information can appropriately be considered directory information. In so doing, this Office fully considers the relationship of the potential new type of directory information to those types of information clearly specified by statute. For instance, a photograph or an e-mail address are very similar to those types of information listed in the statute. They identify the student or provide a means to contact the student, without disclosing to the individual receiving the directory information any additional data that the student would generally expect to be private or that he or she would perceive as harmful if others had access to it.

Much of the information you have specified cannot be designated and disclosed as directory information because it is not similar to those types of information clearly specified by the statute and because it would be an invasion of privacy if disclosed without consent. Specifically, we find that rate of pay and bargaining unit status cannot be designated and disclosed by educational agencies and institutions as directory information.

Additionally, we note that a social security number, or other identification number, is generally linked to significant amounts of other information about an individual. An individual's social security, or other identification, number is a private identification number, the disclosure of which is generally expected to be controlled by the individual. Therefore, the designation and disclosure of a student's social security, or other identification, number as "directory information" is not permitted under FERPA.

However, we agree with your assertion that a graduate fellow's/assistant's status as a graduate fellow/assistant and his/her teaching assignment may be designated as directory information, should an educational agency or institution so choose. This information is similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class. We note that if a school publishes and/or posts the names of teaching fellows/assistants with course selection or other registration information, it should be designating these two items as directory information.

With regard to your concern that FERPA's requirement that educational agencies and institutions comply with FERPA even if that means choosing to not comply with conflicting State law, any other interpretation would render FERPA meaningless in the context of any State law that permitted disclosure of education records outside the scope of FERPA's provisions. Further, with regard to your claim that schools are forced to choose between FERPA and conflicting Federal statutes, we are not convinced that an irreconcilable conflict exists. Generally, in such cases, we begin with the presumption that Congress does not intend two statutes to conflict. Thus, when determining which of two Federal laws controls in an apparent conflict, it is especially important to try to avoid reading them as being in conflict, which Congress presumably does not intend.

The purpose of FERPA is to protect the privacy interests of eligible students in education records. These privacy interests should not be viewed as barriers to be minimized or overcome, but as important public safeguards to be protected and strengthened. Exceptions to the rule of prior written consent under FERPA should be construed narrowly to achieve its statutory purpose — protecting the privacy interests of students. From the circumstances you have presented, a plausible method for sharing personally identifiable information from education records with the union is to obtain the consent of the graduate student fellow/assistant before personally identifiable information is disclosed to the GTFF. Alternatively, the University could provide information to the students on behalf of the GTFF and the graduate student fellows could then submit the required information to the GTFF. Finally, based on the advice we give herein, the GTFF will be able to learn who are graduate teaching fellows through the directory information exception.

As we discussed in our meeting, another option is to seek a legislative amendment to FERPA that would specifically permit the nonconsensual disclosure of information from education records to graduate student teaching fellows/assistants unions. Should you choose to take this step, this Office would, of course, offer any assistance in drafting appropriate language.

Finally, as a matter of note, the agreement between the University and GTFF states: "The University will assume no liability for the unauthorized disclosure of information to parties outside the GTFF." Even if the University could lawfully disclose the information sought by GTFF without consent, this provision in the agreement is not in compliance with FERPA's redisclosure provisions. FERPA provides that a school may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not redisclose the information without the prior consent of the parent or eligible student, unless the redisclosure is on behalf of the educational agency or institution and meets the requirements of § 99.31 of the regulations. 20 U.S.C. § 1232(g) (b)(1) and (b)(4)(A); 34 CFR § 99.33. 34 CFR § 99.33(a)(1) and (b). Further, if this Office determines that a third party has improperly redisclosed information from education records, the educational agency or institution may not allow that third

party access to personally identifiable information from education records for at least five years. 34 CFR § 99.33(e). The redisclosure provisions do not, however, apply to disclosures of directory information.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to the issue you have raised. Please let us know if this Office can be of further assistance to you.

Sincerely,

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

# Appendix 6.c.

March 2, 2005

Dr. Pascal D. Forgione, Jr.  
Superintendent  
Austin Independent School District  
1111 West 6<sup>th</sup> Street  
Austin, Texas 78703-5300

Dear Dr. Forgione:

This is in response to your January 25, 2005, request for technical assistance under the Family Educational Rights and Privacy Act (FERPA). You state that the District has received a request for information from students' education records that raises confidentiality concerns under FERPA, the Individuals with Disabilities Education Act (IDEA), and the Rehabilitation Act of 1973, Section 504. Specifically, the District has received a request from a third party for information on students in the deaf education program so that the party (a cheerleading company for the deaf) may send the students recruitment letters. This Office administers the Family Educational Rights and Privacy Act (FERPA) and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations (20 U.S.C. § 1232g; 34 CFR Part 99).

FERPA applies to an educational agency or institution that receives funds under any program administered by the Secretary of Education, which includes virtually all public school districts. 34 CFR § 99.1. An educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or non-directory personally identifiable information from education records, without the prior written consent of the parent or eligible student<sup>1</sup> except as provided by law. 20 U.S.C. § 1232g(b); 34 CFR Subpart D. "Education records" are defined as "those records, files, documents, and other materials which –

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(i) and (ii). See also 34 CFR § 99.3 "Education records."

An agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of IDEA is also a "participating agency" subject to the Part B Confidentiality of Information requirements codified at 34 CFR §§ 300.560 – 300.577. See 34 CFR § 300.560(c). These requirements contain many of the same provisions

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<sup>1</sup> "Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary institution at any age. See 34 CFR § 99.3 "Eligible student." The rights under FERPA belong to the parents of students under the age of 18 at the elementary/secondary level and transfer to the student when he or she becomes an "eligible student."

that exist in FERPA and apply, along with FERPA, to any public school district that provides Part B services to students. The records of a student which pertain to services provided to that student under IDEA are “education records” under FERPA and are subject to the confidentiality provisions under IDEA (see 34 CFR § 300.560-300.576) and to all of the provisions of FERPA. Please note that while Section 504 of the Rehabilitation Act of 1973 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the U.S. Department of Education, it does not generally address the disclosure of personally identifiable information from student’s education records.

An exception to FERPA’s prior consent rule is the disclosure of information that has been appropriately designated as “directory information” by educational agencies and institutions. FERPA defines directory information as “information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed.” 34 CFR 99.3 (“Directory Information”). Directory information includes, but is not limited to, the following items:

student’s name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), 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.

See Family Educational Rights and Privacy; Final Rule, 65 Fed. Reg. 41853, July 6, 2000.

A school may disclose directory information to third parties if it has given public notice of the types of information which it has designated as “directory information,” the parent’s or eligible student’s right to refuse to let the school designate any or all of the types of information about the student as directory information, and the period of time within which a parent or eligible student has to notify the school in writing that he or she does not want any or all of those types of information designated as “directory information.” 20 U.S.C. § 1232g(b)(5)(B); 34 CFR § 99.37(a). The Department has consistently advised that social security numbers and other student identifiers cannot be designated as “directory information” because disclosure of such information generally would be considered an invasion of privacy. Likewise, we have advised that categories of information such as race, ethnicity, and disability may not be designated as “directory information” for the same reason. Please note that, under FERPA, a school may not disclose the names, addresses, and other “directory information” that is linked to non-directory information. For instance, a school may not disclose “directory information” on all students who are receiving services under IDEA or, like in the case before us, all children in the deaf education program.

In sum, FERPA would not permit the District to disclose the requested information to the requesting third party, without consent. However, please note that nothing in FERPA would prohibit the District from obtaining the recruitment information from the third party and providing it to the students and parents.

I trust that the above information is helpful in explaining the scope and limitations of FERPA as it relates to your inquiry. Please do not hesitate to contact us again if you need further assistance.

Sincerely,

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

cc: Edward Anthony  
Office of Special Education  
and Rehabilitative Services

# Appendix 7

## Legislative History of Major FERPA Provisions

The Family Educational Rights and Privacy Act of 1974 (“FERPA”), § 513 of P.L. 93-380 (The Education Amendments of 1974), was signed into law by President Ford on August 21, 1974, with an effective date of November 19, 1974, 90 days after enactment. FERPA was enacted as a new § 438<sup>1</sup> of the General Education Provisions Act (GEPA) called “Protection of the Rights and Privacy of Parents and Students,” and codified at 20 U.S.C. § 1232g.<sup>2</sup> It was also commonly referred to as the “Buckley Amendment” after its principal sponsor, Senator James Buckley of New York. FERPA was offered as an amendment on the Senate floor and was not the subject of Committee consideration. Accordingly, traditional legislative history for FERPA as first enacted is unavailable.

Senators Buckley and Pell sponsored major FERPA amendments that were enacted on December 31, 1974, just four months later, and made retroactive to its effective date of November 19, 1974. These amendments were intended to address a number of ambiguities and concerns identified by the educational community, including parents, students, and institutions. On December 13, 1974, these sponsors introduced the major source of legislative history for the amendment, which is known as the “Joint Statement in Explanation of Buckley/Pell Amendment” (“Joint Statement”). See Volume 120 of the Congressional Record, pages 39862-39866.

Congress has amended FERPA a total of nine times in the nearly 28 years since its enactment, as follows:

- P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974 (Buckley/Pell Amendment)
- P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978)
- P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education)
- P.L. 101-542, Nov. 8, 1990 (Campus Security Act)
- P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992)
- P.L. 103-382, Oct. 20, 1994 (Improving America’s Schools Act)
- P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998)
- P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act)
- P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)

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<sup>1</sup> The Improving America’s Schools Act (1994) renumbered GEPA so that FERPA is now § 444.

<sup>2</sup> Congress addressed two additional and related privacy concerns in P.L. 93-380 -- Protection of Pupil Rights, enacted as § 439 of GEPA (now §445) and codified at 20 U.S.C. § 1232h, and Limitation on Withholding of Federal Assistance, enacted as § 440 of GEPA (now §446) and codified at 20 U.S.C. § 1232i.

## Scope and Applicability

FERPA is a “Spending Clause” statute enacted under the authority of Congress in Art. I, § 8 of the U.S. Constitution to spend funds to provide for the general welfare. (“No funds shall be made available under any applicable program ....” unless statutory requirements are met.)

### I. Covered institutions

Initially, FERPA applied to “any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution.” The 1974 amendments substituted the term “educational agency or institution,” defined as “any public or private agency or institution which is the recipient of funds under any applicable program.”

The 1994 IASA amendments extended the right to inspect and review to education records maintained by State educational agencies, whose records are not otherwise subject to FERPA. Modification of inaccurate records that SEAs receive from educational agencies and institutions still takes place at the local level.

### II. Covered records

As first enacted, FERPA provided parents with the right to inspect and review “any and all official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.” The 1974 amendments substituted the term “education records” for the “laundry list” of records subject to FERPA.

“Education records” was defined in the 1974 amendments as “those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution.”

Four categories of records were excluded:

- 1) records in the sole possession of instructional, supervisory, and administrative personnel;
- 2) records of a law enforcement unit which are kept apart from “education records,” are maintained solely for law enforcement purposes, and are not made available

to persons other than law enforcement officials of the same jurisdiction, provided that personnel of a law enforcement unit do not have access to “education records”;

3) records of employees who are not also in attendance; and

4) physician, psychiatrist, or psychologist treatment records for eligible students.

The conferees stated their intention that the Department interpret the term “treatment” narrowly to limit the exemption for such records to those similar to those enumerated, and not remedial educational records made or maintained by education professionals. They also stated they did not intend to disrupt existing parental and student rights to confidentiality. Conference Report No. 93-1409, Joint Explanatory Statement of the Committee of Conference, for P.L. 93-568.

At the request of the Secretary of Education, Congress amended the “law enforcement unit exception” in 1992 to eliminate the unworkable and unintended results of the prohibition on sharing education records with the law enforcement unit. The exclusion now applies to “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.”

As originally enacted, all FERPA rights transfer from parents to students who are 18 years old or attending postsecondary institutions. The term “eligible students” is regulatory.

### Rights of Parents and Eligible Students

#### I. Right to Inspect and Review/Right to Access Education Records

Parents have the right to inspect and review the education records of their children. In the 1974 amendments, Congress clarified that when a record or data pertains to more than one child, parents “have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.”

The 1974 amendments limited the right to inspect and review records so that postsecondary students do not have access to 1) financial records of their parents, and 2) confidential letters of recommendation placed in records before January 1, 1975, or if the student has voluntarily waived access to these letters, provided that the waiver cannot be required as a precondition of admission, employment, or receipt of awards. In order to ensure that a rejected applicant was not given the right to challenge letters of recommendation or the institution’s admission decision, “student” was defined as “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.”

## II. Right to Challenge the Content of Education Records

Parents originally had the right to a hearing to challenge the content of records to insure they are not “inaccurate, misleading, or otherwise in violation of the privacy or other rights of students” and to provide an opportunity for the “correction or deletion of any such inaccurate, misleading or otherwise inappropriate data.” The 1974 amendments strengthened this right by prohibiting the Department from making funds available to an agency or institution unless parents are provided an opportunity for a hearing. This amendment also gave parents the right to insert a written explanation regarding the contents of the records. The 1994 IASA amendments limited challenges to the violation of the “privacy rights of students,” deleting the reference to “other rights.” The purpose was to ensure that parents do not attempt to use FERPA to enforce rights under other laws, such as the Individuals with Disabilities Education Act (IDEA).

The 1994 IASA amendments also added a new subsection (h) regarding treatment of disciplinary records, which states that nothing in FERPA prohibits an agency or institution from including in a student’s records appropriate information regarding disciplinary actions 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,” or from disclosing that information to teachers and other school officials who have legitimate educational interest in the student’s behavior.

## III. Right to Consent to the Disclosure of Education Records

As originally enacted, covered institutions could not have a policy of permitting the release of personally identifiable records or files (or personal information contained therein)(§1232g(b)(1)), or a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records (§1232g(b)(2)), unless there is written consent from parents specifying records to be released, reasons for release, and parties to whom records may be released. The 1974 amendments clarified that agencies and institutions may not have “a policy or practice of permitting the release of [or providing access to] education records (or personally identifiable information contained therein other than directory information” without a parent’s prior written consent.

“Directory information” in the 1974 amendments was defined to include “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” Educational agencies and institutions were required to provide public notice of any designated categories of directory information and to allow a reasonable time for parents to refuse to allow release of directory information without prior consent.

The No Child Left Behind Act of 2001, P.L. 107-110 (Jan. 8, 2002), addresses the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. Congress included similar language in the National Defense Authorization Act for Fiscal Year 2002. Both laws, with some exceptions, require schools to provide directory-type information to military recruiters who request it. Typically, recruiters request information on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military.

### Exceptions to the "Prior Written Consent" Rule

As first enacted, FERPA contained five exceptions to the prior written consent rule for disclosures to:

1. Other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests. The 1974 amendments clarified that the agency or institution determines which school officials have "legitimate educational interests." The 1994 IASA amendments added a requirement that the specific educational interests of the child for whom consent would otherwise be required are included among legitimate educational interests of school officials.

The 1994 amendments also clarified that nothing in FERPA prohibited an agency or institution from disclosing information about disciplinary actions taken against students to teachers and school officials, including those in other schools, who have legitimate educational interests in the behavior of the student. The No Child Left Behind Act amended the Elementary and Secondary Education Act to require each State to provide an assurance to the Secretary that it has a procedure in place to facilitate the transfer of disciplinary records regarding a student's suspension or expulsion to any elementary or secondary school where the student is enrolled or intends to enroll.

2. Officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record. The 1974 amendments added "seeks or" before "intends to enroll."

3. Authorized representatives of (i) the Comptroller General of the U.S.; (ii) the Secretary; (iii) an administrative head of an education agency (as defined in section 409 of GEPA) (deleted after reorganization of the Department); or (iv) State educational authorities.

As first enacted, FERPA provided that these recipients may have access to records "which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs" provided that, except when collection of personally identifiable data is specifically authorized by Federal law, "data collected by such officials with respect to individual students shall not include information (including

social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected.”<sup>3</sup> The final clause was amended on December 31, 1974, to read: “any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.”

On August 6, 1979, Congress clarified that FERPA does not “prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program,” subject to the conditions on redisclosure set forth elsewhere in the statute. The legislative history explains that this amendment corrects an “anomaly” caused by the Department’s interpretation of FERPA as precluding State auditors from requesting student records in order to conduct State audits of local and State-supported programs.

The 1998 Higher Education Amendments added a provision that also allows disclosure to authorized representatives of “the Attorney General for law enforcement purposes” under the same conditions as apply to the Secretary under this provision, as described above.

4. Appropriate officials in connection with a student’s application for, or receipt of, financial aid. The conferees of the 1974 Amendments stated their intention that this exception should allow the use of social security numbers in connection with a student’s application for, or receipt of, financial aid.

5. Designees of a judicial order or any lawfully issued subpoena, upon condition that parents and students are notified in advance of compliance by the educational institution or agency. The 1994 IASA amendments added a new, related exception for law enforcement purposes that allows agencies and institutions to disclose information to designees of a Federal grand jury subpoena without first notifying parents or students, and to designees in any other subpoena issued for a law enforcement purpose with notice to parents or students at the discretion of the court or other issuing agency.

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<sup>3</sup> Conference Report No. 93-1026 of the Joint Explanatory Statement of the Committee of Conference adds that “nothing in these provisions ... shall preclude official audits of federally supported education programs, but that data so collected shall not be personally identifiable .... In approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out the evaluations .... The need to protect students’ rights must be balanced against legitimate Federal needs for information.”

The 1974 amendments added five additional exceptions to the prior written consent rule:

6. State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974 (“grandfather clause”). The Joint Statement explained that in establishing a minimum Federal standard for record confidentiality and access, FERPA was not intended to preempt the States’ authority in the field. Accordingly, States may further limit the number or type of State or local officials who will continue to have access or provide parents and students with greater access to records than under FERPA.

The 1994 IASA amendments eliminated the “grandfather clause” and substituted an exception for disclosure to State and local officials in connection with the State’s juvenile justice system under specified conditions.

7. Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted.

The Senate amendment permitted access for testing purposes if the “information will not permit the identification of any person by the organization receiving such information.” The House amendment, which was adopted, provides that this exemption for such agencies as the College Entrance Examination Board or the Educational Testing Service will allow representatives of those organizations to have access to personally identifiable information under the conditions stated. Conference Report No. 93-1409.

The 1994 IASA amendments added that if an organization conducting studies fails to destroy information in violation of the requirements, the educational agency or institution may not permit access to that organization for not less than five years.

8. Accrediting organizations in order to carry out their accrediting functions.

9. Parents of dependent students as defined in the Internal Revenue Code.

10. Appropriate persons in connection with an emergency, if the knowledge of such information is necessary to protect the health or safety of the student or other persons. The Joint Statement explains: “In order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.”

In 1990, Congress enacted the Campus Security Act, which added a new exception to the prior written consent rule:

11. Postsecondary institutions may disclose to an alleged victim of any crime of violence (as defined in U.S. Code Title 18, § 16) the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of the crime, regardless of the outcome of the proceeding. Congress amended this provision in the Higher Education Amendments of 1998 by including “nonforcible sex offenses” and clarifying that only “final results” may be disclosed (i.e., name of student perpetrator, violation committed, and sanction imposed. Written consent is still required to disclose the name of any other student).

The following new exception was also added in the 1998 HEA amendments.

12. Postsecondary institutions may disclose the final results of any disciplinary proceeding for a crime of violence (as defined above) or nonforcible sex offense to anyone, including members of the general public, if the institution determines that the student committed a violation of its rules or policies with respect to the crime.

13. The 1998 HEA amendments also added a new exception that allows institutions of higher education to disclose to a parent or legal guardian information regarding a student’s violation of any law or institutional rule or policy governing the use or possession of alcohol or a controlled substance if the student is under 21 and the institution determines that the student has committed a disciplinary violation with respect to the use or possession.

Since 1998 Congress has enacted two additional exceptions to the statutory prior consent rule:

14. The 2000 Campus Sex Crimes Prevention Act added a new subsection (b)(7) to the statute to ensure that an educational institution may disclose information concerning registered sex offenders provided to it under State sex offender registration and community notification programs.

15. The USA Patriot Act of 2001 added a new subsection (j) that allows the U.S. Attorney General to apply for an ex parte court order requiring an educational agency or institution to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism (domestic or international). The Attorney General must certify that there are specific facts giving reason to believe that the records are likely to contain the required information. An educational agency or institution that in good faith produces records in accordance with the court’s order is not liable to any person for that production.

## Administrative Requirements Applicable to Educational Agencies and Institutions

### I. Recordkeeping

As first enacted, FERPA required those desiring access to education records to sign a written form, kept permanently with the student's file, indicating specifically the "legitimate educational or other interest" the person had in seeking the information. The 1974 amendments modified this provision so that each educational agency or institution is required to maintain a record, kept with the education records of each student, indicating all individuals, agencies, or organizations that have requested or obtained access to a student's education records and indicating specifically the legitimate interest that each has in obtaining the information. School officials with legitimate educational interests were excluded. The record of access is available only to parents and school officials responsible for custody of records and auditing the system.

The 2001 USA Patriot Act excludes from the recordkeeping requirement disclosures in response to a court's ex parte order based upon the Attorney General's certification regarding terrorism investigations and prosecutions.

### II. Redisclosure of records

As first enacted, FERPA provided that personal information from covered records could only be transferred to a third party on the condition that the recipient would not permit any other party to have access without a parent's written consent. The 1994 IASA amendments added that if a third party recipient permits access to education records without prior written consent (except in compliance with a subpoena or court order), the educational agency or institution may not permit access to that party for not less than five years.

### III. Notification of rights

As first enacted, FERPA required the recipient of funds to inform parents and eligible students of their rights. The 1994 IASA amendments changed the term to "effectively informs" to ensure that agencies and institutions carry out this requirement in a way that ensures that parents and students actually receive notice.

## Administrative Requirements Applicable to the Department

As originally enacted, FERPA required the Department to issue regulations to protect privacy rights of students and families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Department. These activities must also be authorized by law. The 1994 IASA amendments directed the Department to adopt or identify appropriate regulations within 8 months.

Any action to terminate Federal financial assistance may be taken only if the Secretary finds that there has been a failure to comply, and compliance cannot be secured voluntarily.

In accordance with the statute, the Secretary has designated an office and review board within the Department to investigate, process, review and adjudicate FERPA violations and complaints of alleged FERPA violations.

The 1974 amendments prohibit the regionalization of the enforcement of FERPA by providing that, except for the conduct of hearings, none of the functions of the Secretary may be carried out in any regional offices of the Department.

Last updated June 2002