



FERPA AND ONLINE LEARNING

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What is FERPA?

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of student education records. It affords parents¹ the right to access their student's education records and gives parents some control over the disclosure of personally identifiable information from student records. 20 USC §1232g; 34 C.F.R. Part 99. FERPA is enforced by the Student Privacy Policy Office (SPPO), formerly called the Family Policy Compliance Office (FPCO).

What records are protected by FERPA?

FERPA applies to “education records,” which are those records directly relating to a student and maintained by an educational agency or institution or a person acting for an agency or institution, and protects “personally identifiable information” contained within those education records. 20 USC §1232g, *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

What is “personally identifiable information”?

“Personally identifiable information” (PII) is information that can be used to distinguish or trace a student's identity. PII includes certain direct identifiers, including:

- The student's name;
- The name of the student's parent or other family member;
- The address of the student or student's family; and
- A personal identifier (e.g., social security or student ID number).

PII also includes indirect identifiers (such as the student's date of birth, place of birth, or mother's maiden name).

Finally, PII includes other information that, alone or in combination, is linked to a specific student that would allow a reasonable person in the school community to identify the student with reasonable certainty and other information that is requested by someone who the agency reasonably believes knows the identity of the student to whom the records relate.

¹ A “parent” includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 CFR §99.3.

Are there situations when PII may be disclosed?

Yes. PII may be disclosed upon consent of the parent. PII may be disclosed *without parental consent* to the following parties:

- School officials who have a “legitimate educational interest” in the information;
- Schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school; and
- Accrediting organizations.

In addition, PII may be disclosed *without parental consent* under the following conditions:

- To comply with a judicial order or lawfully issued subpoena;
- To notify appropriate parties or officials in cases of health and safety emergencies; and
- When required by a specific state law, to release information to State and local authorities within a juvenile justice system.

Finally, schools may disclose directory information (such as a student’s name, address, telephone number, date of birth, honors, and dates of attendance), provided schools tell parents about the directory information within a reasonable time to opt out of disclosure. Parents, however, may not opt out of the disclosure of a student’s name, identifier, and institutional email address in a class in which the student is enrolled. 34 CFR §99.37.

For more information regarding permissible disclosure of PII under FERPA, see the SPPO FERPA and Coronavirus FAQ at:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf.

How is FERPA enforced?

A school entity’s failure to comply with FERPA may jeopardize federal funds. By its terms, FERPA provides that federal funds awarded by the United States Department of Education (USDOE) shall be unavailable to any educational institution that *has a policy or practice* of releasing, or providing access to, PII contained within such records. 20 USC §1232g(b).

There is no private cause of action under FERPA. However, the Individuals with Disabilities Education Act (IDEA) incorporates FERPA requirements. 34 CFR §300.622. Therefore, parents may be able to bring a legal action against districts for violating these incorporated confidentiality provisions under the IDEA. *C.M. v. Bd. Of Educ.*, 128 F. App’x 876 (3d Cir. 2005).

What are the consequences to school employees if they violate FERPA?

The failure to follow employer directives or policies related to FERPA could result in discipline to the employee. Therefore, school employees should be familiar with, and abide by, any such local directives or policies.

In addition, despite the fact that there is no private cause of action under FERPA, school employees may be personally liable for a constitutional violation if they disclose student medical information without consent. *L.S. v. Mount Olive Board of Education*, 56 IDELR 99 (D.N.J. 2011).

What are the FERPA considerations for online instruction?

USDOE released guidance in March 2020 related to virtual learning and FERPA. This guidance includes links to several resources regarding virtual learning and FERPA issues.

The guidance can be found at:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20%20Virtual%20Learning%20032020_FINAL.pdf.

As USDOE explains, some types of online educational services do use FERPA-protected information. School entities should evaluate the use of online educational services on a case-by-case basis to determine if PII from education records is implicated. If so, school entities must ensure that FERPA requirements are satisfied.

USDOE also notes that the “school official” exception may apply to the use of online educational services. Under this exception, PII may be disclosed to a provider of online educational services as long as the provider can be considered a school official with a legitimate need to know the information. For this reason, it is important that school employees utilize only those online learning platforms and tools approved by their employer, rather than asking students to enter information into platforms or online services that are not approved or recommended.

USDOE also provides information that may be helpful to school entities in reviewing and evaluating terms and conditions for use of educational technology services and includes a link to resources on security best practices covering topics such as data security, identity authentication, and data security and destruction.

Finally, the guidance includes a link to a video related to email and student privacy that identifies best practices in the use of emails, including recommendations that school employees:

- Follow school policy regarding emailing PII and consider encrypting emails containing PII;
- Use strong passwords for email accounts;
- Double check the recipient’s address before sending an email; and
- Consider putting sensitive information into an encrypted attachment rather than the body of an email.

Is it a problem under FERPA to conduct classroom sessions for viewing by students engaged in distance learning if the session may be viewed by others in the household (e.g., a parent)?

According to the guidance, the concerns related to observation of instruction by others are the same whether the instruction is in-person, streamed to students in a remote setting, or recorded for later viewing.

In this regard, the guidance includes a link to previous letter guidance related to classroom observation that is also applicable to virtual classrooms. The letter explains that FERPA would generally prohibit a teacher from disclosing information from a child's education records to other students in the classroom, as well as prohibit a teacher from disclosing information from a child's education records to the parents of another child who might be observing the classroom. Just as with in-person instruction, educators should take care not to disclose personally identifying information when engaged in distance instruction.

Since PII should not be disclosed during distance instruction, the determination of who can observe a virtual classroom, similar to an in-person classroom, is a local school entity decision.

Does the recording of an in-person classroom session for remote delivery to students engaged in distance learning create an education record under FERPA?

It depends. According to USDOE, a photo or video of a student is an education record when it is directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. See the USDOE FAQs on Photos and Videos Under FERPA at: <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>.

School entities that require recording of instruction or classroom sessions will need to determine whether those recordings are education records. It is likely that a recording of an in-person classroom session that is either streamed to students attending virtually or made available for students to view at a later time is not an education record if the video does not make a specific student the focus of the video and does not otherwise include PII that is contained in a student's education record. However, the recording of a one-on-one session between a teacher and students where the student's grades are discussed, for example, may be an education record as defined by FERPA if it is maintained by the district. School employees should follow the directives and policies of their employers related the maintenance, use, or sharing of any recorded instruction.

For additional information, see the SPPO webinar presentation on FERPA and Virtual Learning which is available at: <https://studentprivacy.ed.gov/>.