Family Educational Rights and Privacy Act (FERPA)

Bill Franz
General Counsel

November 5, 2012

What is FERPA?

The **F**amily **E**ducational **R**ights and **P**rivacy **A**ct (FERPA) is a federal law that affords parents the right to have access to their children's educational 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 otherwise provided by the law.

When a student turns 18 years old, or enters a postsecondary institution at any age (e.g., dual credit courses), the rights under FERPA transfer from the parent to the student ("eligible student").

Texas Higher Education Coordinating Board

Family Policy Compliance Office (FPCO)

The FPCO implements, offers assistance with and provides training related to FERPA. This presentation utilizes information, sometimes verbatim, from FPCO presentations that are freely available online at the U.S. Department of Education's website (http://www2.ed.gov/policy/gen/guid/fpco/index.html).

Recent Amendments to the FERPA Regulations (34 CFR 99)

http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf

- ✓ § 99.3 – Defines "Authorized representative" and "Education program"
- ✓ § 99.31(a)(6)(ii)-(iv) – Amends the studies exception
- ✓ § 99.35(a)(2) – Amends the audit or evaluation exception
- ✓ § 99.3 & 99.37(c)-(d) – Modifies definition of, and requirements relating to, "directory information"
- ✓ §§ 99.60 – 99.67 – Strengthens the enforcement provisions of FERPA

Texas Higher Education Coordinating Board

Education Records

§ 99.3 FERPA Definition of Education Records

"Education records" are 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.

Texas Higher Education Coordinating Board

Annual Notification Requirements

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

Colleges & universities must annually notify attending students of their rights under FERPA, to include the:

- ✓ Right to inspect and review education records;
- ✓ Right to request amendment of education records;
- ✓ Right to consent to disclosures; and
- ✓ Right to file a complaint with the U.S. Department of Education.

Texas Higher Education Coordinating Board

Annual Notification Requirements

The annual notification must also include:

- ✓ The institution's procedure for students to inspect and review education records; and
- ✓ A statement that their education records may be disclosed to school officials with legitimate educational interests without prior written consent, to include:
  - ✓ Specification of criteria used to determine whether one is a school official; and
  - ✓ What constitutes legitimate educational interests

Texas Higher Education Coordinating Board

Disclosure Provisions

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

The exceptions which relate to postsecondary institutions are:

- To school officials with legitimate educational interests (defined in annual notification). § 99.31(a)(1)

  School officials with legitimate educational interests can include a contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions, provided the outside party:

Texas Higher Education Coordinating Board

Disclosure Provisions (cont.)

- ✓ Performs an institutional service or function for which the agency or institution would otherwise use employees;
- ✓ Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- ✓ Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records; and,
- ✓ 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 (physical or technological access controls or administrative policy for controlling access).

Texas Higher Education Coordinating Board

Disclosure Provisions (cont.)

- ✓ To schools in which a student seeks or intends to enroll. § 99.31(a)(2)
- ✓ To authorized representatives of Federal, State, and local educational authorities conducting an audit, evaluation, or enforcement of educational programs. § 99.31(a)(3) and § 99.35

Texas Higher Education Coordinating Board

Disclosure Provisions (cont.)

- ✓ 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:
  - ✓ Determine eligibility for the aid;
  - ✓ Determine the amount of the aid;
  - ✓ Determine the conditions of the aid; or
  - ✓ Enforce the terms and conditions of the aid. § 99.31(a)(4)

Texas Higher Education Coordinating Board

Disclosure Provisions (cont.)

- ✓ To organizations conducting studies on behalf of schools. § 99.31(a)(6)
- ✓ To accrediting organizations. § 99.31(a)(7)
- ✓ To parents of a dependent student. § 99.31(a)(8)
- ✓ To comply with a judicial order or subpoena (reasonable effort to notify). § 99.31(a)(9)
- ✓ In a health or safety emergency. § 99.31(a)(10) and § 99.36
- ✓ Directory information. § 99.37

Texas Higher Education Coordinating Board

Redisclosure

§ 99.33 What limitations apply to the redisclosure of information?

- ✓ When disclosing information from education records to one of the parties listed under the exceptions to the general consent rule (§ 99.31), a school should inform the receiving party that the information may not be further disclosed, except when:
  - ✓ The disclosure is to the parent or eligible student;
  - ✓ The receiving party discloses information on behalf of the school under § 99.31;
  - ✓ The disclosure was made pursuant to a court order, subpoena, or in connection with litigation between the school and parent/student;
  - ✓ The disclosure is to the parents of a dependent student; or,
  - ✓ The information disclosed is directory information.

Texas Higher Education Coordinating Board

Audit or Evaluation

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

- ✓ Federal, State, and local officials listed under § 99.13(a)(3) may have access to 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.

Texas Higher Education Coordinating Board

Health and Safety Emergencies

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

- ✓ Disclosure to appropriate parties in connection with an emergency if knowledge of information is necessary to protect health or safety of the student or others.
- ✓ "Appropriate parties" may include parents of an eligible student.
- ✓ See "Addressing Emergencies on Campus," "FERPA and Disclosures Related to Emergencies and Disasters," and other guidance documents on FPCO's website.

Texas Higher Education Coordinating Board

Health and Safety Emergencies (cont.)

- ✓ If school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- ✓ If, based on the information available at the time, there is a rational basis for the determination, the Department will not substitute its judgment for that of the school's in evaluating the circumstances and making its determination.
- ✓ Must record (§ 99.32(a)(5)) the following information when it discloses personally identifiable information from education records under the health or safety emergency exception:
  - ✓ The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and
  - ✓ The parties to whom the agency or institution disclosed the information.

Texas Higher Education Coordinating Board

Directory Information

§ 99.37 What conditions apply to disclosing directory information?

- ✓ Institution may disclose directory information if it has given public notice to student in attendance concerning "directory information." See § 99.37 for requirements concerning public notice.
- ✓ ***New*** – Student ID Badge: Student may not use the right to opt out of directory information disclosures in order to prevent a school from requiring him/her to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that has been properly designated by the school as directory information in the public notice under § 99.37.
- ✓ ***New*** – Limited Directory Information Policy: An institution may now adopt a limited directory information policy that allows for the disclosure of directory information to specific parties, or for specific purposes, or both. It must specify this limited policy in the public notice to students and must limit directory information disclosures to those specified in the public notice.

Texas Higher Education Coordinating Board

Guidance Documents & FERPA Regulations on FPCO's Website

- ✓ Addressing Emergencies on Campus
  http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf
- ✓ Joint FERPA-HIPAA Guidance
  http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf
- ✓ FERPA & Disclosures Related to Emergencies & Disasters
  http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf
- ✓ New Amendments to FERPA Regulations (Effective 1/3/12)
  http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf
- ✓ Unofficial version of FERPA regulations showing changes
  http://www2.ed.gov/policy/gen/guid/fpco/pdf/2012-final-regs.pdf
- ✓ New Model Notifications for Postsecondary Institutions
  http://www2.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html

Texas Higher Education Coordinating Board