

## **Student Records and Special Education: When and How to Disclose Confidential Student Information**

by

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### **Applicable Laws and Regulations**

#### **Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g.**

FERPA is the federal law that sets forth basic privacy requirements for personally identifiable information contained in educational records maintained in schools.

#### **Federal regulations implementing FERPA, at 34 C.F.R. Part 99 (§§99.1-99.67).**

The Part 99 regulations, drafted by the Department of Education, set forth confidentiality requirements and provisions in much greater detail, in order for FERPA to be implemented by the schools. These regulations contain the specific provisions with which schools must comply under FERPA. A set of amended FERPA regulations were issued on November 21, 1996.

#### **Individuals with Disabilities Education Act (IDEA), at 20 U.S.C. §1417(c), 1412(2)(D).**

The federal law orders the Department of Education to take appropriate action to assure the protection of confidentiality of personally identifiable information maintained by school districts and state educational agencies. The Department of Education took such appropriate action by promulgating the IDEA regulations that confirm and reinforce school districts' confidentiality duties with respect to personally identifiable information relating to IDEA-eligible students. In addition, IDEA requires that state plans (required for federal funding eligibility) contain policies and procedures to ensure protection of confidential information located in the schools.

#### **Federal regulations implementing IDEA, at 34 C.F.R. §§300.129, 300.560-300.576.**

As part of the set of federal regulations implementing IDEA, the Department of Education also promulgated 17 regulations that serve to confirm and reinforce that personally identifiable information contained in

educational records relating to IDEA-eligible students is subject to the requirements of FERPA.

The preceding statutes and sets of regulations contain the legal requirements that apply to schools with respect to confidentiality of education records. In some instances, the IDEA regulations add certain provisions specific to parents of IDEA-eligible students. The following materials will outline the requirements of the provisions together, citing the different regulations as appropriate.

### **Broad Outline of Basic FERPA Provisions**

<b>Coverage</b>	Any educational agency that receives any type of federal funding.
<b>Purposes</b>	To allow parents access to educational records relating to their children.  To prohibit disclosure of education records to third parties unless the school obtains prior written parental consent for such disclosure, or an exception to the consent requirement applies.
<b>Notice</b>	School districts must notify parents of students annually regarding their rights under FERPA.
<b>Amendment of Records</b>	Schools must set up procedures to allow parents to request amendments to educational records, as well as a hearing process, in case the parents disagree with a school's decision to not amend a certain record.
<b>Enforcement</b>	Department of Education has set up the Family Policy Compliance Office (FPCO) and the Office of Administrative Law Judges to enforce compliance with FERPA, review and investigate complaints, and, in the case of FPCO, provide technical assistance regarding compliance with FERPA.

### **Important FERPA Definitions (34 C.F.R. §99.3)**

<b>Education Records</b>	Records that are <b>directly related to a student, and maintained by an educational agency or a party acting on behalf of the educational agency.</b>
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The term “education records” does **not** include:

- 1) **Records kept in the sole possession of the maker of the record that are not accessible or revealed to any other person except a temporary substitute for the maker of the record.**

For example, lesson plans kept privately by a teacher and not shared with anyone except a substitute would not be education records subject to parental access under FERPA. Likewise, any other notes or documents created by a staffperson that are kept privately and not shared with other personnel are the private property of the staffperson and are not subject to parental access under FERPA.

[Test protocols are not considered education records as long as they do not contain personally identifiable information or the student’s name. *Letter to MacDonald, 20 IDELR 1159 (OSEP 1993)*. Thus, the most advisable course of action if a District wishes for protocols to not be accessible to parents is to not put students’ names on them.]

- 2) **District police force records, if maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to other members of a school police force. The school must not disclose education records to the campus police (unless with parent consent, or if an exception to the consent requirement applies).**
- 3) **Records relating to an employee of the educational agency that are maintained in the normal course of business, relate exclusively to the employee’s capacity as an employee, and are not available for any other purpose (but does not include records of students employed by the school under a vocational program, office assistant, or work-study project).**

- 4) **Records of a student who is 18 years or older, or is attending college** that are maintained by health professionals, and are maintained or used only in connection with **physical or mental health treatment issues.**
- 5) **Records that contain information about a student after he or she are no longer students** at that educational agency.

<b>Directory Information</b>	Information which would not generally be considered harmful or private, including name, address, telephone listing, date and place of birth, major field of study, participation in sports, dates of attendance, awards, and most recently attended previous educational agency.
<b>Disclosure</b>	Permitting access to information, or releasing information by any means, including orally, in writing, or electronically.
<b>Parent</b>	Includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian (very similar to the IDEA definition of “parent” under 34 C.F.R. §300.13).
<b>Personally Identifiable Information</b>	Name, names of family members, address, social security or student ID number, list of personal characteristics, or any other information that would make identity easily traceable.
<b>Records</b>	Information recorded in any way (e.g., handwriting, print, computer media, video or audiotape, film, microfilm, and microfiche).

## **Student and Parent Rights**

### **General Rights**

Either parent is accorded full rights under FERPA, unless the school has been provided with evidence of a court order, statute, or legally binding document relating to divorce, separation, or custody that specifically revokes those rights. 34 C.F.R. §99.4.

Thus, **non-custodial parents** in a divorce situation are still entitled to access to FERPA records, unless the divorce or custody decree specifically takes those rights away from the non-custodial parent.

**When a student becomes 18** or enrolls in a postsecondary institution, the rights afforded to parents under FERPA transfer to the student. 20 U.S.C. §1232g(d), 34 C.F.R. 99.5(a). At that point, the student is called an “eligible student” in the regulations.

This means that when an IDEA-eligible student turns 18, the rights to access records and prevent disclosure to third parties without consent transfer to the student, unless the student has been determined to be incompetent by a court of law. The IDEA regulations, moreover, appear to recognize this issue. See Note to 34 C.F.R. §300.574.

Thus, an 18-year-old student who is not held incompetent could presumably prevent his parents from accessing his educational records. But the District must still try to ensure the participation of parents in ARD meetings. See 34 C.F.R. §300.344(a)(3), 19 TEX. ADMIN. CODE §1050(b) (requiring compliance with §300.344 in constituting Texas ARD committee meetings). The only way to reconcile these provisions would be to understand that an adult student can prevent his or her parents from reviewing or accessing education records, but not from participating in ARD committee discussions and deliberations, although some personally identifiable information would likely be disclosed to the parents incidentally.

### **Parent and Eligible Students’ Rights to Inspect and Review Records**

A District must comply with requests to access records within a reasonable period of time, without unnecessary delay, and before an ARD meeting or hearing, and **in no case later than 45 days after the request** is made. See 34 C.F.R. §99.10(b) and 34 C.F.R. §300.562(a).

Parents have a right to have the District respond to **reasonable requests for explanations and interpretations** of the records. 34 C.F.R. §99.10(c).

Parents have the **right to request that the District provide copies** of the records if failure to provide copies would effectively prevent the parents for exercising the right to inspect and review the records. 34 C.F.R. §99.10(d)(1) and 34 C.F.R. §300.562(b)(2).

The District can charge a **fee for copies** if the fee would not effectively prevent the parent from accessing the records. No fee can be charged for searching for or retrieving records. 34 C.F.R. §99.11, 34 C.F.R. §300.566.

The IDEA regulations allow parents the **right to have their representatives inspect and review the records** (representatives must have a written parent consent). 34 C.F.R. §300.562(b)(3).

Upon request, parents must be provided with a **list of the types and locations of education records** kept by the District. 34 C.F.R. §300.565.

**Parents can only obtain information about their children.** If a record contains information about more than one student, it must be redacted accordingly before the parents can obtain access. 34 C.F.R. §99.12(a).

Students do not have a right access their parents' **financial records** that are part of Districts' education records. In addition, students do not have to be permitted to access **confidential letter and statements of recommendation** under certain circumstances. See 34 C.F.R §99.12(b)(2), (3).

### **Amendment of Education Records**

Parents can request a District to make amendments to education records that they believe are **inaccurate, misleading, or in violation of their privacy rights**. 34 C.F.R. §99.20, 34 C.F.R. §300.567.

**If the District decides not to amend a record** as requested, it must inform the parents of its refusal and their right to seek a hearing. The District must decide whether to amend the record as requested within a reasonable time (probably safe to stay under 45 days).

The **hearing** must be held within a reasonable time after it receives a request for a hearing. The parents must be provided notice of the date, time, and place of the hearing reasonably in advance of the hearing. The hearing can be conducted by any individual, including an employee of the District, as long as such person has no direct interest in the outcome of the hearing. Parents can present evidence and be represented by any person, including an attorney. The District must render a decision in writing within a reasonable time after the hearing, and such decision must be based on the evidence alone. 34 C.F.R. §99.22.

If, as a result of the hearing, the District decides that the parents are correct in their allegations regarding the records, it must amend the

record accordingly and inform the parent of such action in writing. 34 C.F.R. §99.21(b)(1). If not, the District must inform the parents that they have a right to place a statement in the record commenting on the contested information and/or the results of the hearing. Such a statement must be thereafter treated as an integral part of the record.

## **District Duties and Responsibilities**

### **Annual District Notice of FERPA Rights**

The new FERPA regulations do not require that Districts maintain policies explaining FERPA requirements, but now require only the annual notification of FERPA rights to parents and eligible students. In fact, however, the new notice provisions incorporate many of the statements that had to be included in the old policies. *See old 34 C.F.R. §99.6 (now removed and reserved).*

#### **Contents of the required notification (34 C.F.R. §99.7):**

- 1) Statement of **right to inspect and review education records.**
- 2) Statement of **right to seek amendment of records.**
- 3) Statement of **right to consent to disclosures** of personally identifiable information to third parties, except where the regulations allow disclosure without consent.
- 4) Statement of **right to file a complaint** with the FPCO.
- 5) The District **procedure for inspecting and reviewing records.**
- 6) The District **procedure for requesting amendment of records.**
- 7) A specification of the **criteria used by the District for determining who constitutes a “school official” and what constitutes a “legitimate educational interest”** (since schools can disclose information without parent consent to other District employees with a legitimate educational interest in the information—see *below*).

With respect to **disabled parents or eligible students**, the notice must “effectively” notify such persons. This is a higher standard of notice than for non-disabled parents and students, who are only entitled to notice “by any means that are reasonably likely to inform the parents or eligible students who are disabled.” *See 34 C.F.R. §99.7(b)(1).* For disabled parents, this section is likely to require notice in an

appropriate communication medium, depending on the parent's disability (i.e. Braille or large-print for visually impaired parents).

**Practical Note:** The parental rights booklet published by TEA to inform parents of their procedural safeguards under IDEA contains most of the requirements of the FERPA notice. The booklet, however, does not include a specification of the criteria used by the District for determining who constitutes a "school official" and what constitutes a "legitimate educational interest." If Districts add such a provision, the booklet could constitute the annual notification required by FERPA (for IDEA-eligible students).

## **Disclosure of Education Records or Information**

### **General Rule**

**Unless an exception applies, a District may not disclose personally identifiable information in a student's education records unless the parent or adult student provides a signed and dated written consent to such disclosure. 34 C.F.R. §99.30(a), 34 C.F.R. §300.571.**

The written consent must (1) specify the records that are to be disclosed, (2) state the purpose of the disclosure, (3) identify the party to whom the record is being disclosed. 34 C.F.R. §99.30(b).

The parent can request a copy of any record that is disclosed, or can request that a copy be provided to the student. 34 C.F.R. §99.30(c).

### **Exceptions to the Consent Requirement (34 C.F.R. §99.31)**

- 1) Disclosures to **other school officials or employees** that the District has determined have a **legitimate educational interest** in the information. 34 C.F.R. §99.31(a)(1).

In its annual notice, the District must inform the parents of the criteria under which it determines who is a "school official" with "legitimate educational interests." That provision does not appear in the TEA "Explanation of Procedural Safeguards" booklet. *See above.*

**Contract staffpersons** who assist in providing a child with an appropriate education have been held to have legitimate educational interests in reviewing pertinent education records. *Marshfield School (Union 102), 22*

IDELR 198 (Maine Hearing Officer's Decision, January, 1995).

Schools do not have to obtain parental consent to release education records to their **attorneys**, since they perform "professional services as part of the operation of the institution." *Letter to Diehl*, 22 IDELR 734 (OSEP 1995).

- 2) Disclosures to **other Districts where the student seeks or intends to enroll**. 34 C.F.R. §99.31(a)(2).

In such situations, the disclosing **District must attempt to notify the parent or eligible student** at their last known address unless the parent or eligible student initiated the disclosure or the District has included in its annual notice a statement indicating that it routinely forwards education records to other Districts where the student seeks or intends to enroll. 34 C.F.R. §99.34(a)(1).

**Practical Note:** If the District's annual FERPA notice indicates that the District routinely complies with such requests from other schools, it does not need to attempt to contact the parents when disclosing.

In addition, the **District must also provide copies of the disclosed records, upon request** of the parent.

Finally, the District must also provide the parents an **opportunity for a FERPA hearing** (see above), upon request.

Districts are not *required*, however, to disclose records to another District in which the child seeks or intends to enroll. 34 C.F.R. §99.31(b). It is a matter of inter-District courtesy, but not legal obligation. In addition, it is probably wise not to provide information over the telephone until some evidence is received to the effect that the information is truly being requested from a school employee (i.e. a fax verification) working for the District that is requesting the records.

With respect to release of educational information to **Juvenile Justice AEPs**, the Travis County agreement provides that schools will seek permission from parents to release records to the JJAEP, and if they refuse, the school/JJAEP liaison will inform the juvenile court of the

potential need for an order requiring the District to release the records. *Memorandum of Understanding for the Juvenile Justice Alternative Education Cooperative of Travis County*, §4.2.

This is probably the smartest way of handling release of records to JJAEP, since it will be unclear whether the JJAEP is a “school” where the student “seeks or intends” to enroll, which would allow the District to disclose without parental consent. The Travis County agreement clearly errs on the side of caution to protect participating Districts from possible FERPA challenges due to release of records to the JJAEP.

- 3) **Disclosures to authorized representatives of certain government agencies, including the Comptroller General of the U.S., the Department of Education, or state and local educational authorities.** 34 C.F.R. §99.31(a)(3).

These agencies may have access to records in connection with an audit or evaluation of education programs, or enforcement of federal legal requirements relating to those programs. 34 C.F.R. §99.35(a).

- 4) **Disclosures in connection with student financial aid for which the student has applied or which the student has received.** 34 C.F.R. §99.31(a)(4).

The information must be necessary for determining eligibility for aid, amount of aid, conditions for aid, or to enforce the terms and conditions of the aid.

- 5) **Disclosures to state and local officials or authorities to whom the information is specifically allowed to be disclosed pursuant to a state statute.** 34 C.F.R. §99.31(a)(5).

**If the statute was adopted before November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed.**

**If the statute was adopted after November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed, prior to adjudication. The authorities to**

whom the records are disclosed must certify in writing to the District that the information will not be disclosed to other parties except as provided by state law, unless they have the written consent of the parents. 34 C.F.R. §99.38.

- 6) **Disclosures to organizations conducting studies** on behalf of educational agencies or institutions. 34 C.F.R. §99.31(a)(6).

The disclosure must be for the purpose of developing, validating, or administering testing, improving instruction, or to administer student aid programs.

The study must be conducted in a manner that does not permit personal identification of parents and students by persons other than representatives of the organization, and the information disclosed must be destroyed when no longer needed.

If the FPCO determines that an educational study organization fails to destroy disclosed information when the information is no longer needed for the study's purpose, the District cannot allow that organization access to records for at least five years.

- 7) **Disclosures to accrediting organizations** as necessary to carry out their accrediting functions. 34 C.F.R. §99.31(a)(7).

- 8) **Disclosures to parents of a dependent student**, as defined in the Internal Revenue Code. 34 C.F.R. §99.31(a)(8).

Under the Internal Revenue Code, dependents must (1) be relatives, (2) not married filing jointly, (3) a citizen or legal resident, (4) earn less than \$2,550.00, (5) be supported at least 50% by the person claiming them as dependents.

- 9) **Disclosures required by judicial order or lawfully issued subpoena.** 34 C.F.R. §99.31(a)(9).

Districts must make reasonable efforts to notify the parent or eligible student of the order or subpoena in advance of disclosure, so that they may seek protective action.

This requirement does not apply if the disclosure is in compliance with a federal grand jury subpoena or a law enforcement subpoena, where the court

has ordered that the contents of the subpoena or the information furnished in response not be disclosed.

If the District has filed suit against a parent or student and has notified the parent or student that it intends to disclose education records relevant to the legal action to the court, it does not need a court order or subpoena to accomplish the disclosure.

Districts must comply with “**lawfully issued subpoenas,**” as they are, in essence, court orders. Failure to comply can lead to fines, and outright refusal to comply can lead to jail time, under the contempt powers of the courts. TEX. R. CIV. P. 180. In Texas, a subpoena is lawfully issued if it issued by the clerk of a state district court or county court, a justice of the peace. TEX. R. CIV. P. 176. The subpoena must be dated and attested by the clerk or justice. TEX. R. CIV. P. 177.

Districts sometimes receive requests for records issued by litigation support businesses that purport to be subpoenas, but are not issued by a clerk of a court or a justice of the peace. These subpoenas are not technically in compliance with the Texas Rules of Civil Procedure, and are thus, not “**lawfully issued subpoenas.**” **Districts should carefully scrutinize any document that appears to be a subpoena for records.** A school District does not have to comply with invalidly issued subpoenas, but can invite the issuer to obtain a validly issued subpoena in accordance with the rules set forth above. Upon receipt of a lawfully issued subpoena, the District should comply accordingly.

- 10) **Disclosures in connection with health or safety emergencies.** 34 C.F.R. §99.31(a)(10).

The disclosure must be **necessary to protect the health or safety of the student or other individuals,** and only to appropriate parties in connection with the emergency. 34 C.F.R. §99.36(a).

Schools are free to include in a student’s education records information concerning disciplinary actions taken against the student for conduct that posed a significant risk to the

safety or well-being of the student, other students, or other members of the school community.

Such information can be disclosed to employees with legitimate educational interests in the student's behavior, or to teachers and school officials **of other schools** who have been determined to also have legitimate educational interests in the student's behavior.

Thus, if a student has committed a serious offense that posed a significant risk to the safety or well-being of the student, staff, or other students, and the District knows that the student tends to go to another school in a neighboring District to visit his girlfriend, the District may inform the neighboring District about the student's offense.

The regulations explicitly state that the **health or safety emergency exception** "will be strictly construed," meaning that the FPCO will closely scrutinize a District's determination of what constitutes a health or safety emergency. 34 C.F.R. §99.36(c).

- 11) **Disclosures of directory information** (see above for definition of directory information). 34 C.F.R. §99.31(a)(11).

Districts must notify parents regarding (1) the types of information it considers directory information, (2) parents' right to refuse to allow the District to designate any or all of their child's information as directory information, and (3) the period of time within which a parent must elect to exercise their right to refuse designation of information as directory information. 34 C.F.R. §99.37(a).

Directory information regarding **former** students may be disclosed without complying with the above conditions.

- 12) **Disclosures to the parent of a student (who is not 18 or attending college) or to the student.** 34 C.F.R. §99.31(a)(12).

Schools should remember that these exceptions to the consent requirement do not *require* the school to disclose records, except when the parent, eligible student, or their representative seeks access. 34

C.F.R. §99.31(b). The exceptions merely *allow* the schools to disclose without parental consent if they wish to do so, and in accordance with any conditions set forth under the applicable exception.

In addition, keep in mind that the **Texas Open Records Act** grants persons additional rights to seek disclosure of certain materials. TEX. GOV'T CODE §§552.001-552-353. The Act, however, does not cover materials that are considered confidential by law—these records are an exception, among others, to the Acts open records requirements. TEX. GOV'T CODE §§552.101. In fact, distribution of confidential information is a misdemeanor criminal offense under the Act and constitutes official misconduct. TEX. GOV'T CODE §§552.352.

### **Redisclosure of Records**

The general rule is that a **District may disclose confidential information from education records, subject to the provisions of FERPA, only on the condition that the party to whom the information is disclosed will not disclose it to any other party** without parental or eligible student consent. 34 C.F.R. §99.33(a)(1).

Schools are not strictly prohibited, however, from disclosing records to a party with the understanding that that party might make further disclosures on the school's behalf, if the original disclosure is appropriate under FERPA, and the record of access shows to whom there might be redisclosure (*see below*).

The general rule above does not apply to disclosures pursuant to subpoenas, disclosures of directory information, or disclosures to a parent or eligible student. 34 C.F.R. §99.33(c).

Districts must inform parties who access information of the requirement to not redisclose without parental consent, unless one of the above exceptions applies. 34 C.F.R. §99.33(d).

If the FPCO determines that a third party violated these requirements, the District that released records to that party may not release records to the party for at least five years. 34 C.F.R. §99.33(d).

### **Retention and Destruction of Records**

Since IDEA records can be extensive, Districts may wish to destroy certain sets of old files to make better use of facility space and to maintain proper organization of records. The law allows for

destruction of records under certain conditions, and if state retention schedules are followed.

Under Texas law, Districts must maintain records for a certain period of time after a student no longer attends school. The period of time cannot be shorter than that set forth by the Texas State Library and Archives Commission Local Records Retention Schedules, Local Schedule SD (school district). TEX. LOC. GOV'T. CODE §203.042(b)(2). The current Local Schedule SD requires that special education program records be retained for at least **seven years after the cessation of services** to the student. Local Records Retention Schedules, Local Schedule SD, §3-1, p. 8.

Records covered under this schedule include documents relating to referral, assessment, reevaluations, enrollment and eligibility forms, ARD reports and IEPs, ITPs, consent forms, and other records of services required under federal and state regulations. *Id.* Thus, most eligibility folder information is subject to destruction.

**The following information must be retained permanently, however, with respect to each student in grades 9-12 participating in a special education program:** name, last known address, student ID or Social Security number, grades, classes attended, and grade level and year completed. *Id.* at 8-9.

The federal regulations require that the District inform parents when their children's records are no longer needed (per the retention schedule), and that the District wishes to destroy them. 34 C.F.R. §300.573. Parents should also be informed that they may need the records for other purposes, such as Social Security benefits. Note to 34 C.F.R. §300.573. Parents may elect to obtain the original records instead, or may request that the District destroy the records. The regulations allow Districts to maintain records permanently if they wish, unless parents request destruction. Parents, however, cannot demand destruction of information required to be maintained permanently, as set forth above.

If a District cannot locate parents at their last known address, and have published notice of their intent to destroy old records in local or regional newspapers, the District is probably safe in destroying old records after a reasonable time.

In destroying records, the District, through the actions of its custodian of records (*see below*) must protect the confidentiality

of the personally identifiable information contained in the records. 34 C.F.R. §300.572(a).

Destruction could take the form of incineration, recycling, or some other means that would ensure the confidentiality of the materials through the destruction process.

### **Electronic Retention of Records**

Some Districts are beginning to inquire about electronic retention of records, for improved efficiency in storing older records that must be retained under the schedules, but are not currently active.

The Texas State Library's State and Local Records Management Division publishes a bulletin entitled "Electronic Records Standards and Procedures" that contain the applicable provisions from the Local Government Code and the Texas Administrative Code that govern electronic record retention. TEX. LOC. GOV'T CODE §§205.001-205.009; 13 TEX. ADMIN. CODE §§7.71-7.79. Districts interested in electronic record retention should contact the Texas State Library and Archives Commission at (512) 463-5455.

### **District Record of Persons Accessing Records**

Districts must maintain a **record of parties obtaining access** to education records each time records are accessed or disclosed. 34 C.F.R. §99.32(a)(1), 34 C.F.R. §300.562(c). The record must include the party's name, the date of access, and the purpose for which the party is allowed to access the records.

If the party to whom the records are disclosed might **redisclose** records or information contained therein on behalf of the District, the record of access must also include the names of the persons to whom the information may be redisclosed, and a statement of the legitimate interests of such persons. 34 C.F.R. §99.32(b). *See above* for additional discussion of redisclosure issues.

**Practical Note:** Districts can keep an access log sheet on the front of student eligibility folders. The form used should contain spaces for the party's name, date of access, and purpose.

## **Exceptions to the Record-of-Access Requirement**

A record of access does **not** have to be documented for the following parties when they access education records (34 C.F.R. §99.32(d)):

- 1) Parents or eligible students accessing their children or their own records, respectively.
- 2) School officials or employees with legitimate educational interest in the records or information.
- 3) Parties with written consent from the parent or eligible student.
- 4) Parties seeking directory information.
- 5) Parties accessing records as directed by a federal grand jury or other law enforcement subpoena (if the grand jury or subpoena orders that the contents or existence of the subpoena, as well as information furnished in response, not be disclosed).

## **District Custodian of Records**

IDEA regulations also require that Districts appoint at least one **official to assume responsibility for ensuring the confidentiality of education records**. In addition, all persons collecting or using personally identifiable information must receive “**training or instruction**” regarding the requirements of applicable laws. Districts must also maintain a **list of those employees who may have access to education records**. 34 C.F.R. §300.572(b).

The custodian of records (or whatever the person’s title may be) and his or her assistants are expressly allowed to inspect and review records (even if they are not considered to have a “legitimate educational interest”). 34 C.F.R. §99.32(c)(2).

## **Enforcement of FERPA**

### **Complaints with the Family Policy Compliance Office (FPCO)**

The Department of Education was ordered by Congress to “take appropriate action” to enforce FERPA and deal with violations. 20 U.S.C. §1232g(f). The ultimate enforcement action against a District is termination of all federal financial assistance, where the Department of Education is unable to secure compliance by voluntary means. The statute specifically ordered the Department of Education to establish

and designate an office and review board to investigate, process, review, and rule on violations and complaints. 20 U.S.C. §1232g(g).

The office designated by the Department of Education for enforcement of FERPA is the **Family Policy Compliance Office (FPCO)**. 34 C.F.R. §99.60. In addition, the Department designated the Office of Administrative Law Judges to act as the review board required under the Act.

Parents or eligible students can file written complaints regarding alleged violations of FERPA and its regulations at:

**Family Policy Compliance Office  
U.S. Department of Education  
Washington, DC 20202-4605**

The complaint must state **specific allegations of fact** giving reasonable cause that a violation has occurred. 34 C.F.R. §99.64. A complaint is untimely unless it is submitted within 180 days after the date of the violation or the date on which the complainant knew or should have known of the violation. The FPCO may extend the timeline for extenuating circumstances.

Districts must be notified in writing of the complaint, and are also asked to submit a written response. 34 C.F.R. §99.65. The FPCO will also notify a District if it received a complaint against it that did not meet the requirements for a valid complaint.

The FPCO will issue written findings after allowing the parties to submit additional information and argument. 34 C.F.R. §99.66. If the District is found in violation, the FPCO will include a specific statement of the steps required for compliance and provide a reasonable timeline during which the District may comply voluntarily.

If the District refuses to comply, the Department of Education can withhold further payments of federal assistance due the District, issue a cease-and-desist order, or terminate eligibility to receive any federal funding.

### **§1983 Civil Rights Actions**

The federal courts are in agreement that FERPA does not confer a private cause of action, which means that the statute does not expressly provide for a suit to enforce its provisions or provide compensatory damages to redress violations. *Klein Independent School District v.*

*Mattox*, 830 F.2d 576 (5th Cir. 1987), cert. denied, 108 S.Ct. 1473 (1988); *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977).

In some situations, however, a statute that does not confer a private cause of action can still form the basis for a civil rights action under the Civil Rights Act of 1871, codified at 42 U.S.C. §1983. Section 1983 provides a cause of action in the federal courts for actions by state government officers or employees depriving a person of rights clearly established rights under the Constitution or a federal law, where such law does not provide an exclusive remedy at law.

The two circuit courts of appeals to have encountered the issue have held that **a person can bring a civil rights action under §1983 to vindicate a deprivation of their rights under FERPA**. In addition, the §1983 avenue clears the way for **money damages** in cases where they are appropriate.

In *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989) and *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990), the Fifth Circuit held that although no private cause of action exists under FERPA, a §1983 action can be maintained to vindicate the interests created under FERPA. In these lawsuits, a student challenged the University of Texas' actions in denying him access to letters of recommendation included in his application file, and in the second suit, the correctness of a grade given him in a physics course. The court upheld lower court rulings granting summary judgment and dismissal, respectively.

In *Fay v. South Colonie Central School District*, 802 F.2d 21 (2nd Cir. 1986), the Second Circuit determined that FERPA creates interests that may be vindicated in a §1983 action, since Congress did not demonstrate in the language of FERPA any intention to preclude such a remedy. In *Fay*, a divorced mother refused to provide her ex-husband with copies of education records regarding their children. When he sought these records directly from the school district, the school refused (incorrectly—see *above* regarding rights of non-custodial parents in divorce context). He was awarded nominal damages without a hearing by the lower court. The Second Circuit remanded the case back to the lower court for a hearing on the amount, if any, of damages.

Thus, although there are no cases in the books that have awarded significant money damages for FERPA violations as §1983 actions, the legal avenue exists for a parent to make a case that a school's mishandling of confidential information resulted in the need for compensatory relief in the form of actual money damages.

