



Washington Insights

NEWS and VIEWS

Federal Scene - Student Aid - Legal Issues

Prepared for DETC

by Sharon H. Bob, Ph.D., Special Consultant on Student Aid

202-872-677; fax 202-785-1756; e-mail Sharon.Bob@ppsv.com

December 29, 2008

Volume VII, Number 16

Final Regulations on the Family Educational Rights and Privacy Act of 1974 (“FERPA”)

On December 9, 2008, the Secretary of Education published final regulations on the Family Educational Rights and Privacy Act of 1974 (FERPA). The final regulations is designed to implement amendments to FERPA contained in the USA Patriot Act and the Campus Sex Crimes Prevention Act, to implement two U.S. Supreme Court decisions interpreting FERPA, and to make necessary changes identified as a result of the Department of Education’s (ED) experience in administering the FERPA. A notice of proposed rulemaking was published on March 24, 2008. The regulations are effective January 9, 2009. A copy of the final regulations may be found at: <http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.html>

Substantive issues are discussed by section numbers as follows:

1. Definitions (§ 99.3)

Attendance:

Prior Regulations: The term “attendance” includes attendance in person or by correspondence and the period during which a student in working in an FWS position. The rules did not address distance learners.

Final Regulations: Adds to the attendance definition attendance by videoconference, satellite, internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom.

Discussion: Because of the new formats and methods that do not require attendance, the final regulations clarify that students who are not physically present in the classroom may be in attendance at the institution. The Preamble language also notes that the “definition of attendance should not be limited to receipt of instruction leading to a diploma or certificate because this would improperly exclude many instructional formats.” (See page 74807 of the Preamble.)

Biometric Record:

Final Regulations: This is a new definition as used in the definition of “personally identifiable information.” It 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.”

Directory Information:

Prior Regulations: Defined as information contained in an education record of a student that would not be considered harmful or an invasion of privacy if disclosed and includes information listed in FERPA, which did not specify whether a student’s Social Security Number, official student identification number, or personal identifier for use in electronic systems may be designated and disclosed as directory information.

Final Regulations: An educational agency or institution may not designate as directory information a student’s SSN or other student ID number. However, directory information may include a student’s user ID or other unique identifier used by the student to access or communicate in electronic systems, but only if the electronic identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the student’s identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the student.

Discussion: The final regulations are needed to ensure that educational agencies do not disclose personal identifiers that are used to identify for purposes of gaining access to or confirm private information. The Preamble states on page 74808 that “We have revised the definition of directory information in § 99.3 to provide that directory information includes a student ID number if it cannot be used to gain access to education records except when used with one or more other factors to authenticate the user’s identity.”

Page 74808 of the Preamble states that the disclosure of directory information is permissive under FERPA, and an “institution is not required to designate and disclose any student identifier (or any other item) as directory information.” An institution is not required to make directory information available to the general public just because the information is shared within the institution. “For example, under FERPA, an institution may decide to make students’ electronic identifiers and e-mail addresses available within the institution but not release them to the general public as directory information.”

Finally page 74808 of the Preamble points out that with regard to student ID numbers, an institution may print an ID number on a student’s ID card whether or not the ID number is treated as directory information because “under FERPA simply printing the ID number on a card, without more, is not a disclosure and, therefore, is not prohibited.”

Disclosing Directory Information:

Prior Regulations: The term means permitting access to or release, transfer, or other communication of personally identifiable information from an education record to any party by any means. The rules do not address issues relating to the return of records to the party that provided or created them.

Final Regulations: Excludes from the definition of disclosure the release or return of an education record or personally identifiable information from an education record to the party that provided or created the record.

Discussion: This modification allows an educational agency or institution to send a transcript, letter of recommendation, or other record that appears to have been falsified back to the institution or school official identified as the creator or sender of the record for confirmation of its status as an authentic record. School

officials have reported to ED an increase in frequency of what appears to be falsified documents and the new regulations permit a “targeted release of records back to the stated source to be able to verify its authenticity.” (See page 74810 of the Preamble.) Further, the Preamble states on page 74810 that “the return of an education record to its source does not have to be recorded, because it is not a disclosure.” Finally, according to the same page of the Preamble, a transcript does not lose its protection under FERPA, including written consent requirements, when an institution returns it to the source and the transcript remains an “education record” under FERPA when it is returned to its source.

Education Records:

Prior Regulations: Excludes records that only contain information about an individual after he or she is no longer a student.

Final Regulations: Clarifies that with respect to former students, the term excludes records that are created or received by the educational agency or institution after an individual is no longer a student in attendance and is not directly related to the individual’s attendance as a student.

Discussion: There has been confusion about the provision that excludes certain alumni records from the definition. The rule clarifies that the exclusion is intended to cover records that concern an individual or events that occur after the individual is no longer a student in attendance, such as alumni activities.

Peer-Grading Practices:

Prior Regulations: There is no guidance on the status of student-graded tests and assignments before they have been collected and recorded by a teacher.

Final Regulations: Clarifies that peer-graded papers that have not been collected and recorded by a teacher are not considered maintained by an educational agency or institution and, therefore, are not educational records under FERPA.

Discussion: This change would implement the U.S. Supreme Court’s decision on peer-graded tests in *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 436 (*Owasso*). In *Owasso*, the Court held that peer-grading does not violate FERPA because “the grades on students’ papers would not be covered by FERPA at least until the teacher has collected them and recorded them in his or her grade book.” Pages 74811-74812 of the Preamble state “FERPA is not intended to interfere with a teacher’s ability to carry out customary practices, such as group grading of team assignments within the classroom...FERPA does not prevent teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though the grade may eventually become an education record.” “The process of assigning grades or grading papers falls outside the definition of education records in FERPA because the records are not ‘maintained’ by an educational agency or institution at least until the teacher has recorded the grades.”

Personally Identifiable Information:

Prior Regulations: Includes the student’s name and other personal identifiers, such as the student’s SSN, as well as indirect identifiers, such as the name of the student’s parent or other family members.

Final Regulations: Biometric records, as well as other indirect identifiers, such as date and place of birth and mother's maiden name, would be added to the list of personally identifiable information. The final regulations further clarify that the definition includes "other information that, along 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."

Discussion: The Department refers to the discussion of "Personally Identifiable Information and De-identified Records and Information found in § 99.31(b). See below.

State Auditor:

Prior Regulations: Educational agencies and institutions may disclose personally identifiable information from education records, without prior written consent, to State and local educational authorities and officials for the audit or evaluation of Federal or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements.

Final Regulations: The NPRM proposed adding that State Auditors would have access to education records without consent for purposes of conducting state audits. State auditors are not included in the final regulations.

Discussion: Commenters had expressed concern that the definition of State auditor would permit non-consensual disclosures of education records to a variety of officials for purposes not supported by the statute. ED decided to remove the definition of State auditor to permit further study as to how to limit the definition and perhaps issue new regulations in the future. (See page 74812 of the Preamble.)

2. Disclosures to Parents of Eligible Students (§§ 99.5, 99.36)

Prior Regulations: An eligible student is a student who has reached 18 years of age or attends a postsecondary institution, and the rights transfer from parents to eligible students when the student meets the definition of an eligible student. Information from educational records may be disclosed to parents of a dependent student as defined in Section 152 of the IRS Code.

§ 99.31(a)(8) permits disclosure of educational information, without written consent, to parents of a student who violates any Federal, State, or local law, or any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, if the institution determines that the student has committed a disciplinary violation with respect to use or possession and the student is under 21 at the time of the disclosure to the parents. On page 15577 of the Preamble in the NPRM, ED stated that § 99.31(a)(10) provides that an educational agency or institution may disclose personally identifiable information from education records, without consent, if the disclosure is in connection with a health or safety emergency under conditions described in § 99.36. § 99.36 provides that an educational agency or institution may disclose personally identifiable information from education records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Final Regulations: Clarifies that parents are appropriate parties to whom an educational agency or institution may disclose personally identifiable information from education records, without consent, in a health or safety emergency.

Discussion: According to page 15577 of the NPRM, ED indicated that some institutions are under the mistaken impression that FERPA prevents them from providing parents with any information about a college student. The exceptions of health or safety emergency apply whether or not the student is a dependent of a parent for tax purposes. FERPA, however, does not mandate that institutions have a policy of not disclosing education records to parents of eligible students in these circumstances.

The Department also clarifies on page 74813 of the Preamble of the final regulations that the Secretary does not have the statutory authority to apply the exception of § 99.31(a)(8) [disclosure to an eligible student's parents if the student is a dependent as defined in section 152 of the IRS Code of 1986] to any other family member other than the parents.

The Secretary did note on page 74813 of the Preamble to the final regulations that “in most cases, when an educational agency or institution discloses education records to parents of an eligible student, we expect the disclosure to be made under the dependent student provision ...in connection with a health or safety emergency..., or if a student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance...”

3. Authorized Disclosure of Education Records Without Prior Written Consent to School Officials and Outsourcing (§ 99.31(a)(1))

Prior Regulations: Disclosure of personally identifiable information from education records, without consent, to school officials, including teachers, is permitted if the educational agency or institution has determined that they have legitimate educational interests in the information.

Final Regulations: The school official exception is expanded to include contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions that it would otherwise use employees to perform. The outside agency must be under the “direct control” of the agency or institution and subject to the same conditions governing the use and re-disclosure of education records that apply to other school officials under § 99.33(a).

Discussion: Resolves uncertainty when institutions outsource for services and functions, such as legal services, debt collection, transcript distribution, fundraising and alumni communications, development and management of information systems, and degree and enrollment verification.

By direct control, the Department means that an educational agency or institution does not disclose education records to an outside service provider unless it can control that party's maintenance, use, and re-disclosure of education records. Page 74816 of the Preamble states that the direct control standard strikes a balance in identifying the relationship between the school and its outside parties that are serving as “school officials.” “[O]ne way to ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract.”

Reminder: Institutions must specify in its annual notice the criteria for determining who constitutes a school official and what constitutes legitimate educational interests under § 99.31(a)(1). Therefore, institutions should update their annual notice to include contractors, volunteers, and others performing institutional functions. (See page 74847 of the Preamble.)

Access to Education Records by School Officials:

Prior Regulations: An educational agency or institution may disclose personally identifiable information from education records, without consent, to school officials, including teachers. The annual disclosure must include the criteria the institution uses to determine what constitutes a school official and what constitutes legitimate educational interests.

Final Regulations: An educational agency or institution must use reasonable methods to ensure that teachers and other school officials obtain access to only those education records, whether on paper or electronic format, in which they have legitimate interests.

Discussion: The purpose of this section is to ensure that teachers and other school officials only gain access to education records in which they have a legitimate educational interest. An educational agency or institution needs to implement controls to protect student records. The controls should consist of a combination of appropriate physical, technical, administrative and operational controls which will allow access to be limited when required. An educational agency or institution that does not use some kind of physical or technological controls to restrict access “must ensure that its administrative policy for controlling access to education record is effective and remains in compliance with the legitimate educational interest...” (§ 99.31(a)(3)(ii))

Page 74816 of the Preamble points out that “while schools are certainly free to implement a policy requiring school officials and parties to whom services have been outsourced to undergo fingerprint and background investigations, there is no statutory authority in FERPA to include such a requirement in the regulations.”

§ 99.31(a)(2) Disclosure to a School Where Student Seeks or Intends to Enroll:

Prior Regulations: An educational agency or institution may disclose education records, without consent, to officials of another school, school system, or postsecondary institution where the student intends to enroll or seeks to enroll provided the educational agency or institution complies with the requirements of § 99.34(a) regarding notification to the parent or eligible student of the disclosure and, upon request, provides a copy of the records and an opportunity for a hearing.

Final Regulations: An educational agency or institution may disclose educational records, without consent, to another institution even after a student has already enrolled or transferred, if the disclosure is for purposes related to the student’s enrollment or transfer.

Discussion: Resolves uncertainty about whether consent is required to send a student’s records to the student’s new school after the student has already transferred and enrolled. This rule is intended to ease administrative burdens on educational agencies and institutions by allowing them to send transcripts and other information from education records to schools where a student seeks or intends to enroll without meeting the formal consent requirements in § 99.30. Page 74818 of the Preamble states that “the regulations are intended to clarify that, after a student has already enrolled in a new school, the student’s former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school.” Further, “these regulations apply to any school that a student previously attended, not just the school that the student attended most recently.”

An educational agency or institution may update, correct, or explain information it has disclosed to another institution as part of the original disclosure.

Following the shooting at Virginia Tech, the final regulations resolves some questions which arose during discussions as to whether FERPA prohibits the disclosure of certain types of information from students' education records to new schools or postsecondary institutions to which they applied. Page 74818 of the Preamble notes that an institution may disclose the treatment records under one of the exceptions to written consent under § 99.31(a), including § 99.31(a)(2), or with the student's written consent under § 99.30. If an institution discloses an eligible student's treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of education records.

According to page 74818 of the Preamble, FERPA does not contain any particular restrictions on the disclosure of a student's disciplinary records. "Further, Congress has enacted legislation to ensure that schools transfer disciplinary records to a student's new school in certain circumstances." Pages 74818 of the Preamble states that "nothing in FERPA prevents an educational agency or institution from including in a student's records and disclosing to teachers and school officials, including those in other schools, appropriate information about disciplinary actions that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community."

§ 99.31(a)(6) Organizations Conducting Studies for or on behalf of an Educational Agency or Institution:

Prior Regulations: An educational agency or institution may disclose personally identifiable information from education records, without consent, to organizations conducting studies for or on behalf of the agency or institution.

Final Regulations: An educational agency or institution that discloses education records without consent under § 99.31(6) must enter into a written agreement with the recipient organization stating that the information from education records may only be used to meet the purposes of the study stated in the agreement.

Discussion: Clarifies the circumstance when an educational agency or institution may disclose to them personally identifiable information. These sections provide a number of constraints on an institution when it collaborates with another entity which is conducting a study.

§ 99.31(a)(9) Ex Parte Court Orders under the USA Patriot Act:

Prior Regulations: The USA Patriot Act provisions are not addressed.

Final Regulations: The disclosure of education records, without consent, would be in compliance with FERPA if it was disclosed to comply with an ex parte court order obtained by the Attorney General.

Discussion: Implements the statutory amendment of the USA Patriot Act. Page 74819 of the Preamble states that the USA Patriot Act provisions have not been ruled unconstitutional and do not sunset in 2009; therefore, should be included in the FERPA regulations. The Preamble also notes that FERPA does not prohibit an institution from notifying a parent or student or recording the disclosure, however, the institution that does so may violate the terms of the court order and "may fail to meet the good faith requirements in the USA Patriot Act for avoiding liability for the disclosure."

§ 99.31(a)(16) Registered Sex Offenders:

Prior Regulations: The Campus Sex Crimes Prevention Act (CSCPA), section 1601(d) of the Victims Trafficking and Violence Protection Act of 2000 (P.L. 106-386), amended FERPA, and is not addressed in current regulations.

Final Regulations: A new exception to the consent requirement in § 99.31(a)(16), is added to permit an educational agency or institution to disclose information that the agency or institution received under a State community notification program about a student who is required to register as a sex offender in the State.

Discussion: Implements the CSCPA amendment to FERPA, which allows educational agencies and institutions to disclose information about registered sex offenders without consent if the information was received through and complies with the guidelines regarding a State community notification program issued by the U.S. Attorney General under the Wetterling Act. The Wetterling Act sets forth minimum national standards for sex offender registration and community notification programs.

4. De-Identification of Information (§ 99.31(b))

Prior Regulations: Personally identifiable information under § 99.3 includes personal identifiers such as a student’s name, address, and identification numbers, as well as personal characteristics or other information that would make the student’s identity easily traceable.

Final Regulations: Allows for the release of education records without consent after the removal of all personally identifiable information has taken place and there has been a reasonable determination that a student’s identity is not personally identifiable.

Discussion: Page 74835 of the Preamble states that it is not possible to prescribe or identify a single method to “minimize the risk of disclosing personally identifiable information in redacted records or statistical information that will apply in every circumstance...”

5. Identification and Authentication of Identity (§ 99.31(c))

Prior Regulations: Prior regulations did not address whether an educational agency or institution must ensure that it has properly identified a party to whom it discloses personally identifiable information from education records.

Final Regulations: Requires an educational agency or institution to 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.

Discussion: Ensures that educational agencies and institutions disclose personally identifiable information from education records only to authorized recipients. Identification in this context means determining who the intended or authorized recipient is. When asked by commenters, the Department declined to provide a list of identification and authentication methods due to the differences in size, complexity, and access to technology available to educational agencies and institutions. The Department also noted that a “sliding scale of protection is not mandated per se. However, it may not be ‘reasonable’ to use the same methods to protect

students' SSNs or credit card numbers from unauthorized access and disclosure that are used to protect students' names and other directory information.” (See pages 74840-74841 of the Preamble.)

6. Re-disclosure of Education Records by Officials Listed in § 99.31(a)(3) (§§ 99.32, 99.35)

Prior Regulations: Four officials or authorities (U.S. Comptroller General, the Secretary of Education, State and local educational authorities, and the U.S. Attorney General) may receive education records, without consent, for specified audit, evaluation, or compliance and enforcement purposes. § 99.31(a)(3) does not permit personal identification of individuals by anyone except the officials in § 99.31(a)(3).

§ 99.33(c) establishes specific exceptions to the general statutory prohibition on re-disclosure of information from education records. § 99.33(b) also allows an educational agency or institution to disclose education records with the understanding that the recipient can make further disclosure and if the agency or institution has complied with the recordation requirements. § 99.32(a) requires an educational agency or institution to maintain a record of each request for access and each disclosure of personally identifiable information from the education records of each student.

Final Regulations: Permits officials and authorities listed in § 99.31(a)(3)(i) to re-disclose personally identifiable information from education records under the same conditions as set forth in § 99.33(b), which apply to parties that receive personally identifiable information from education records under other exceptions in § 99.31.

Discussion: Schools districts and postsecondary institutions typically disclose education records or personally identifiable information from education records, to their SEA or State higher education authority, without prior written consent, for audit, evaluation, or compliance and enforcement purposes. The Department notes on page 74821 of the Preamble that ED agrees with the commenters that this change will “ease administrative burdens at all levels and facilitate the creation and operation of statewide data sharing systems that support the student achievement, transfer of records, and other objectives of Federal and State education programs while protecting the privacy rights of parents and students in students’ education records.”

Several SEAs that maintain Statewide, consolidated systems for school district records have questioned whether they may allow a student’s new school district to obtain access to personally identifiable information submitted to the system by the student’s former district. This final rule would permit re-disclosure and would be able to take advantage of the regulatory exception under § 99.33(b). Page 74821 of the Preamble states that educational agencies and institutions retain primary responsibility for disclosing and authorizing re-disclosure of their education records without consent. The purpose of allowing re-disclosure has always been to ease administrative burdens and the final regulations clarify previous regulations that were unclear by permitting that State and Federal authorities and officials to re-disclose information, including transferring education records to a student’s new school and sharing information among other State and local educational authorities and Federal officials for audit or evaluation purposes without violating the statutory prohibitions on re-disclosing.

Limitations on the Re-disclosure of Information from Education Records (§ 99.33)

§ 99.31(a)(9) Subpoenas and Court Orders:

Prior Regulations: An educational agency or institution is permitted to disclose personally identifiable information only on the condition that the recipient will not re-disclose the information to any other party without the prior consent of the parent or eligible student. There are certain exceptions in § 99.33(b). An educational agency or institution may disclose personally identifiable information from education records with the understanding that the party receiving the information may make further disclosures on behalf of the educational agency or institution if the disclosures meet the requirements of § 99.31(a) and the educational agency or institution complies with the recordkeeping requirements of § 99.32(b).

Final Regulations: Requires a party that has received personally identifiable information from an educational agency or institution to provide notice to parents and eligible students, before it re-discloses personally identifiable information from the records on behalf of an educational agency or institution in compliance with a judicial order or lawfully issued subpoena.

Discussion: Clarifies which party is responsible for notifying parents and eligible students before an SEA or other third party outside of the educational agency or institution complies with a judicial order or subpoena to re-disclose personally identifiable information from education records. The Secretary notes on page 74836 of the Preamble that “We have revised the regulation to provide that the burden to notify a parent or eligible students rests with the recipient of the subpoenas or court order.” The educational agency or institution could assist the third party by providing it with contact information. Further, § 99.33(e) has been revised to provide that if the Department determines that a third party does not provide the notification, the educational agency or institution may not allow that third party access to educational records for at least 5 years.

Disclosures Required Under the Clery Act:

Prior Regulations: § 99.33(c) excludes from the statutory prohibition on re-disclosure information that an educational agency or institution may disclose without consent to any member of the public, such as directory information and the final results of a disciplinary proceeding for acts constituting crimes of violence or non-forcible sex offenses when a postsecondary institution has determined that the student committed the violation. The current regulations do not exclude from the re-disclosure prohibition disclosures made by postsecondary institutions to an alleged victim of a crime of violence or non-forcible sex offense they are required to make under the Clery Act.

Final Regulations: Excludes from the statutory prohibition on re-disclosure of education records information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding alleging a sexual offense.

Discussion: Clarifies that postsecondary institutions may not require the accuser to execute a non-disclosure agreement or otherwise interfere with the re-disclosure or other use of information disclosed under the Clery Act.

7. Health and Safety Emergencies (§ 99.36)

Prior Regulations: An educational agency or institution may disclose personally identifiable information from education records to appropriate parties if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Final Regulations: Permits the educational agency or institution with flexibility instead of “strict construction” in evaluating the health or safety exception to FERPA:

- In making the determination as to whether to invoke the health or safety exception, institutions may take into account the “totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals;”
- If the institution “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;” and
- “If based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”

Another change is found in § 99.36, where institutions may, in connection with an emergency, disclose personally identifiable information from an education record to appropriate parties, which now include parents of an eligible student, “if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”

The recordation requirements under § 99.32(a) have been modified to require an agency or institution to record the articulable and significant threat that formed the basis for the disclosure.

Discussion: In the wake of the tragic shootings at Virginia Tech, the Secretary concluded that greater flexibility and deference should be provided to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals. (See page 74837 of the Preamble.)

8. Directory Information (§ 99.37)

§ 99.37(b) Disclosure of Directory Information About Former Students:

Prior Regulations: An educational agency or institution must provide public notice to parents of students and eligible students in attendance of the types of directory information that may be disclosed and the parent’s or eligible student’s right to opt out.

Final Regulations: The final regulations clarify that an agency or institution must continue to honor any valid request to opt out of directory information disclosures made while the individual was a student unless the parent or eligible student rescinds the decision to opt out.

Discussion: Clarifies that an agency or institution does not have to notify its former students about its policy but directory information may not be disclosed once a student is no longer a student but made a valid request to opt out while a student in attendance and has not rescinded that request. Page 74808 of the Preamble states that “institutions are not required under FERPA to disclose directory information to any party. Therefore, parents and students have no basis for objecting if an agency or institution does not disclose directory information because it is not certain whether the parent or student opted out. The regulations provide an educational agency or institution with the flexibility to determine the process it believes is best suited to serve its population as long as it honors prior elections to opt out of directory information disclosures.”

§ 99.37(c) Identification of Students and Communications in Class:

Prior Regulations: The rules did not address whether parents or students may use their right to opt out of directory information disclosures to prevent school officials from identifying the student by name or disclosing the student’s electronic identifier or institutional e-mail address in class.

Final Regulations: A parent or student may not use their right to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student’s name, electronic identifier, or institutional e-mail address in a class in which the student is enrolled.

Discussion: The right to opt out of directory information does not include the right to remain anonymous in class and may not be used to impede classroom communications.

§ 99.37(d) Prohibition on Use of SSNs to Identify Students When Disclosing or Confirming Directory Information:

Prior Regulations: The use of SSNs to identify students when disclosing directory information was not prohibited.

Final Regulations: An educational agency or institution is prohibited from using an SSN either alone or combined with other data elements to identify a student’s records to confirm directory information.

Discussion: Provides legal binding interpretation that the practice of releasing a student’s SSN violates FERPA. Page 74809 of the Preamble states that “in releasing or confirming directory information about a student, the school may not use the student’s SSN (or other non-directory information) supplied by the requester to identify the student or locate the student’s records unless a parent or eligible student has provided written consent. This is because confirmation of information in education records is considered disclosure under FERPA.” Pages 74809-74810 of the Preamble further notes that “if a school wishes to use the student’s SSN to confirm enrollment or other directory information about the student, it must ensure that the written consent provided by the student includes consent for the school to disclose the student’s SSN to the requester.”

9. Enforcement (§§ 99.62, 99.64, 99.65, 99.66, and 99.67)

§99.64 What is the Investigation Procedure?

Prior Regulations: The Family Policy Compliance Office may require an educational agency or institution to submit reports containing information needed by the Office to resolve complaints.

Final Regulations: Specifies materials that the Family Policy Compliance Office may require to carry out its investigation. § 99.64(a) states that the complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution.

Discussion: Clarifies the kinds of information that may be required by the Family Policy Compliance Office. Page 74841 states that the Department does not agree with commenters that only conduct that involves a policy or practice or that affects multiple students is serious enough to warrant an investigation. “An

educational agency or institution may not even be aware of FERPA violations committed by its own school officials until the Office [Family Policy Compliance Office] investigates an allegation of misconduct.”

§ 99.65 Content of Notice of Investigation:

Prior Regulations: The Family Policy Compliance Office may ask an educational agency or institution to submit a written response to a notice of investigating.

Final Regulations: The Family Policy Compliance Office may ask for an educational agency or institution for a written response and other relevant information.

Discussion: Clarifies that the Family Policy Compliance Office may ask for other relevant information.

§ 99.66 Enforcement Responsibilities of the Office:

Prior Regulations: The Family Policy Compliance Office reviews a complaint and response from an educational agency or institution and may permit the parties to submit further written or oral arguments or information.

Final Regulations: Permits the Family Policy Compliance Office to issue a notice of findings.

Discussion: In light of the Supreme Court’s ruling in *Gonzago University v. Doe*, 536 U.S. 273 (2002) (*Gonzaga*), the rule clarifies that consistent with current practice, the Family Policy Compliance Office may issue a notice of findings or take some other kind of enforcement action without finding a policy or practice in violation of FERPA. However, there may be circumstances that the Office would have to find that an educational agency or institution has a policy or practice in violation of a FERPA requirement before taking certain enforcement actions, such as an action to terminate funding for a non-disclosure violation. (See page 74842 of the Preamble.)

§ 99.67 Enforcement Actions:

Prior Regulations: The Secretary may withhold further payments under any applicable program, issue a complaint to compel compliance through a cease and desist order, or terminate eligibility to receive funding only if an educational agency or institution fails to comply voluntarily with a notice finding that the agency or institution has not complied with the Act.

Final Regulations: Clarifies that the Family Policy Compliance Office may take enforcement action even if there is no finding of a policy or practice in violation of FERPA.

Discussion: Pages 74842-74843 of the Preamble notes that “the statute and *Gonzaga* decision suggest that with respect to violations of FERPA’s non-disclosure requirements, the Secretary must find that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking actions to terminate, withhold, or recover funds for those violations. However, there is no requirement under the statute (or the *Gonzaga* decision) for the Secretary to find a policy or practice in violation of FERPA requirements on the part of an educational agency or institution before taking other kinds of enforcement actions for violations of the non-disclosure requirements, such as seeking an injunction or a cease-and-desist order.”

In response to commenters that the available penalties are not severe enough to discourage FERPA violations, the Department noted that the “Secretary has authority to terminate, withhold, and recover program funds and take other enforcement actions in accordance with part E of GEPA.” (See page 74843 of the Preamble.)

Safeguarding Education Records

In order to encourage educational agencies and institutions to utilize appropriate methods to protect educational records, especially in electronic data systems. The Department also recognizes that there are many courses available concerning information security technology and processes. The Department republished the Department Recommendations for Safeguarding Education Records, which was in the Preamble of the March 24, 2008 Notice of Proposed Rulemaking on pages 15598-15599. It is now found on pages 74843-74844 of the Preamble of the final regulations.

#