
GENERAL COUNSEL NOTE

March 2009

In December 2008, the U.S. Department of Education amended its student privacy regulations. Under the authority of the Family Education Rights and Privacy Act (FERPA), the Department adopted new regulations to implement provisions of the USA Patriot Act and the Campus Sex Crimes Prevention Act, both of which created exceptions to student privacy rights by mandating disclosures of student records in certain circumstances without a student's consent. At the same time, the Department amended other parts of its regulations to give effect to some of its interpretations of the FERPA statute which, though previously known, had lacked legal force.

Among the changes in the new regulations, the most significant ones for Vanderbilt are the following:

Social Security Numbers. The new regulations prohibit the University from using student social security numbers to identify records in the process of confirming or disclosing student information. This means that when someone, e.g. a parent or relative, seeks to obtain information about a student, the University may not verify the identity of the student with the outside party by using a social security number, even for the purpose of releasing directory information about the student. Generally, such information as a student's name, address, e-mail address, year in school, and major field of study are deemed directory information and subject to disclosure without the student's consent.

The new rule clarifies a position the Department has taken for some time, namely that disclosing information in response to a request linked to a social security number in effect discloses the number by verifying its relationship to the particular student. Those offices at Vanderbilt which receive requests for student information must ensure that their procedures for responding to such requests do not involve the use of a student's social security number to link a student name to a particular record. Alternative measures should be adopted instead and these may include obtaining advance written consent from students for disclosures of education records to specific persons, e.g. parents or relatives, or, where the requests involve directory information that may be disclosed without a student's consent, the use of information other than social security numbers to identify the student. Acceptable alternative identifiers may include date of birth, hometown, year of graduation, and major field of study.

Health or Safety Emergencies. FERPA has always had an exception for non-consensual disclosure of education records in health or safety emergencies. The new regulations create three new provisions concerning this exception. First, they clarify that a student's parents may always be notified in an emergency involving a student where disclosure of otherwise protected information is necessary to protect the student or others. Even if parents are not immediately able to act on the information, the regulations make clear that they may, nevertheless, be informed.

Second, the rules clarify that in the event of a health or safety emergency the University may release information to any person whose knowledge of the information, in the institution's reasonable judgment, is necessary to protect the student or others. This new standard was implemented to clarify the scope of discretion allowed to schools after Virginia Tech cited FERPA as a reason for its failure to share and act on information about the student who committed the shootings on its campus in 2007.

The third significant change with respect to the health and safety emergency exception is that the University is explicitly required, when it utilizes this exception, to create a record of what it considered the health or safety emergency to consist of and to whom information was disclosed in response to the emergency. This change imposes new record-creating and record-keeping requirements on those who communicate about student crises or emergency situations.

Preventing Disclosures to Unauthorized Persons. FERPA has always prohibited unauthorized, e.g. unconsensual, disclosures of student education records, but the new regulations require universities to take affirmative steps to guard against such disclosures. The Department's new rules require all schools to implement "reasonable methods" to authenticate the identity of students, parents, school officials, or any person to whom education records are disclosed.

The Department does not require the use of any particular method of identity authentication, recognizing that needs and means will differ among the institutions affected by the regulation. Among the methods it discusses as acceptable are the uses of PINs, passwords, and photo and biometric identification. Uses of two-factor identification methods are also acceptable, though not required.

In response to this change Vanderbilt offices involved in the disclosure of student records to persons outside the University, or to officials within Vanderbilt on a need to know basis, should begin developing policies requiring the authentication of the identity of all those who receive protected student information.

Disclosures for Educational Studies or Research. Another significant change to the FERPA regulations imposes the requirement that certain contract terms must be enacted when identifiable student information is disclosed to outside organizations who conduct studies with the information. A long-standing FERPA exception has allowed the sharing of student information without consent for the purpose of educational research designed to develop or validate predictive tests or improve instruction. These exceptions have been used by Vanderbilt researchers conducting studies with data received from other, e.g. K-12 schools.

The recent regulatory change requires that such disclosures not take place unless written agreements contain provisions for how the identifiable information will be protected. Specifically, the agreements must specify the purpose, scope, and duration of the study, limit the use of the personally identifiable information to the purpose of the study, require that identifiable information be protected against disclosure, and require that the information will be returned or destroyed upon completion of the study. Those who receive student data for research, or assist with research agreements involving such information, should attend carefully to these new requirements.

Outsourcing. The new regulations also clarify the Department's interpretation of the law that universities may disclose student information to third parties who perform services or functions that would otherwise be performed by the institution's employees. This provision allows disclosure of student records to a variety of contractors who perform services on behalf of Vanderbilt. A condition of such disclosures is that the service providers must be subject to Vanderbilt's control concerning their use of student records through, for instance, contract restrictions. Third parties must be made subject to the restriction that they, in turn, may not disclose the protected information without students' consent.

It is always important when dealing with contractors who offer to provide services to the University to ensure that restrictions on their use of student information are included in written agreements.

Records of Former Students. Information about former students generally does not fall within the category of protected student information unless it relates specifically to the individual's attendance as a student. It has always been clear that education records continue to be protected after students leave school, but the new regulation clarifies that newly acquired information about former students could be protected against disclosure if the information relates specifically to the person's attendance as a student. This change does not alter the legal standard so much as clarify an interpretation of the law that was already widely accepted.

Questions concerning these and other student privacy issues may be directed to the Office of the General Counsel, 322-5155.

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