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EDUCATION DEPARTMENT RELEASES NEW FERPA REGULATIONS

On December 9, 2008 the U.S. Department of Education (the “Department”) published final regulations¹ that are intended to clarify certain provisions of the Family Educational Rights and Privacy Act (“FERPA”). The new regulations will take effect on January 8, 2009. While the new regulations do not effect dramatic changes to FERPA, colleges and universities nonetheless will need to take stock of their current systems and processes to ensure they comply. The following is an overview of the changes and clarifications that are reflected in the new regulations:

HEALTH OR SAFETY EMERGENCY

- The new regulations remove language that required strict construction of the provision in FERPA that permits disclosure of education records, without consent, to “appropriate parties,” including the parents of an eligible student, to deal with health or safety emergencies. Educational institutions may now take into account the totality of the circumstances pertaining to a threat to the safety or health of the student or other individuals.
- If an educational institution makes a disclosure for health or safety reasons, it must record the significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. If there is a rational basis for the determination, the Department will not substitute its judgment for that of the school in deciding to release the information.

INFORMATION SECURITY

- The new regulations expand the definition of “personally identifiable information” to include information that, alone or in combination, is linkable to a specific student such that it would allow a reasonable person in the school community to identify the student with reasonable certainty. The new definition also includes indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name, and information requested by a person who the institution believes knows the identity of the student to whom the education record relates.
- An educational institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the institution discloses personally identifiable information from education records.
- An educational institution must use “reasonable methods” to ensure that school officials have access to only those education records in which the official has a legitimate educational interest. An educational institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective.
- Educational institutions must ensure that an outside party providing institutional services or functions does not use or allow access to educational records except in strict accordance with the requirements established by the institution that discloses the information. The regulations do not specifically require that institutions provide annual training to school officials that handle education records.

¹ Family Educational Rights and Privacy, 73 Fed. Reg. 74851 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99).

However, for entities subject to the Individuals with Disabilities Education Act, that Act requires that all persons collecting or using personally identifiable information must receive training or instruction regarding their State's policies and procedures under 34 CFR 300.123 (Confidentiality of personally identifiable information) and 34 CFR Part 99 (the FERPA regulations).

- An educational institution must specify its policy regarding the disclosure of education records to contractors, and other outside parties serving as "school officials," in its annual notification to parents and eligible students.

DIRECTORY INFORMATION

- The new definition of "directory information" provides that a school may not designate a student's social security number ("SSN") as directory information. An institution may only designate a student's user ID, or other electronic identifier, as directory information if the identifier functions essentially like the student's name such that disclosure would not be considered harmful or an invasion of privacy. That is, the identifier used in a school directory cannot be one that permits access to education records except when combined with one or more factors that authenticate the student's identity.
- In releasing or confirming directory information about a student, the school may not use the student's SSN 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 a disclosure under FERPA. A school's use of a student's SSN provided by the requester to confirm enrollment or other directory information implicitly confirms, and therefore discloses, the student's SSN.
- Once a parent or eligible student opts out of directory information disclosures, the school must continue to honor that election after the student is no longer in attendance. However, parents and students may not use their opt-out right to prevent disclosure of the student's name or other identifier in the classroom.

DISCLOSURE WITHOUT PRIOR CONSENT

- **Revised Definition of Disclosure:** The regulations revise the definition of "disclosure" to clarify that returning a record to a party identified as the party that provided or created the record is not a disclosure under FERPA. For example, under the current regulations, an educational institution may ask for a copy of a record from the presumed source when it suspects fraudulent activity. However, simply asking for a copy of a record may not be adequate if, for example, the original record no longer exists at the sending institution. In these circumstances, an institution will need to return a record to its identified source to be able to verify its authenticity. The new regulations permit a targeted release of records back to the stated source for verification purposes. The return of an education record to its indicated source does not have to be recorded, because it is not a disclosure.
- **Disclosures to Parents:** The regulations clarify that, even after a student has become an eligible student, an educational institution may disclose education records, without prior written consent, to an eligible student's parents if the student is a dependent as defined in the Internal Revenue Code.
- **Ex Parte Orders Under the USA PATRIOT ACT:** The new regulations permit an institution to disclose educational records without prior consent in response to an ex parte court order obtained by

the U.S. Attorney General, or a designee in a position not lower than an Assistant Attorney General, under the USA Patriot Act. A school that complies in good faith with the court order will not be liable under FERPA for producing the information. The regulations provide that the institution is not required to notify the parent or eligible student before complying with the order or to record the disclosure. The Department recommends that schools consult with legal counsel before notifying a parent or student or recording a disclosure of education records made in compliance with an ex parte court order under the USA Patriot Act.

- **Registered Sex Offenders:** The new regulations permit schools to disclose any information concerning registered sex offenders that was provided to the institution under the Wetterling Act (42 U.S.C. 14071) and applicable Federal guidelines. The Department interprets this to include any additional information about the student that is relevant to the purpose for which the information was provided to the school – protecting the public. This could include, for example, disclosure of the school or campus at which the student is enrolled.

- **Outsourcing:**
 - The regulations expand the definition of “school officials” to include contractors, consultants, volunteers and other outside parties to whom an institution has outsourced institutional services or functions it would otherwise use employees to perform. Once a school has determined that an outside party is a “school official” with a “legitimate educational interest” in viewing certain educational records, that party may have access to the education records, without consent, in order to perform the required institutional services and functions for the school.

 - In order to be considered a “school official,” an outside party must be under the direct control of the institution. The term “direct control” is intended to ensure that an educational institution does not disclose education records to an outside service provider unless it can control that party’s maintenance, use, and redisclosure of the records. Exercising direct control could prove more challenging in some situations than in others. Schools outsourcing IT services, such as web-based and email services, should make clear in their service agreements or contracts that the outside party may not use or allow access to education records, except in accordance with the requirements established by the educational institution that discloses the information.

REDISCLOSURE BY GOVERNMENT AUTHORITIES

- State and local educational authorities and federal officials and agencies are permitted to redisclose information on behalf of educational institutions. The state and federal authorities will have the ability to redisclose information under any of the presently existing conditions which permit disclosure without consent. For example, under the new regulations, a student’s new school district or institution would be able to obtain the student’s prior education records from a single state agency instead of contacting and waiting for records from separate districts or institutions.

- A government agency that makes further disclosures of information from education records must record the names and legitimate interests of the additional parties to which it discloses information on behalf of an educational institution if the information was received from an institution that has not already recorded the disclosures, or received from another government agency.

- The original disclosing institution must maintain a record of the names of state and local educational authorities and federal officials and agencies that may make further disclosures of personally

identifiable information from the student's education records without consent.

- The disclosing institution also must record the names of the additional parties to which the government agency may redisclose the information on behalf of the institution and must record the legitimate educational interests such parties would have in receiving the records.
- The disclosing institution must also obtain a copy of the record of further disclosures maintained by government agencies which it has permitted to make further disclosures. These records must be made available in response to a parent's or eligible student's request to review the record.
- Authorized representatives of federal or state agencies engaging in audits or evaluations of federal or state supported education programs may also make further disclosures of education records on behalf of the educational institution.
- A party that receives a court order or subpoena and rediscloses personally identifiable information on behalf of the educational institution in response to that order, must provide notification to parents and eligible students before it discloses that information.

EDUCATIONAL RESEARCH

- An educational institution that discloses personally identifiable information without consent to an organization conducting studies on its behalf must enter into a written agreement with the organization, specifying the purposes of the study. In addition to other requirements, the written agreement must require the organization to destroy or return all personally identifiable information at the conclusion of the study.
- The new regulations permit an educational institution, or a party that has received personally identifiable information from education records, to release the records or information without prior consent after the removal of all personally identifiable information, provided that the educational institution has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.
- The regulations also permit an educational institution, or a party that has received education records or information, to release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source. The party releasing such data may not base the code on a student's SSN and must not disclose any information about how it generates and assigns record codes, or that would allow a recipient to identify a student based on the code.

MISCELLANEOUS

- **Revised Definition of Education Records:** The regulations clarify that records created or received by an educational institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student are not "education records" under FERPA. The regulations also clarify that grades on peer-graded papers before they are collected and recorded by a teacher are not "education records."
- **Transfer of Records to Student's New School:** The regulations clarify that an educational

institution may disclose a student's education records to officials of another school, school system, or institution of postsecondary education not just when the student seeks or intends to enroll, but after the student is already enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. The regulations are intended to clarify that, after a student has 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. These regulations apply to any school that a student previously attended, not just the school that the student attended most recently. The school's annual notification to eligible students and parents must include a notice that the school forwards education records to other schools that have requested the records and in which the student seeks to enroll or is already enrolled so long as the disclosure is for purposes related to the student's transfer.

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