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UPDATE ON STUDENT PRIVACY AND
TRANSGENDER RIGHTS

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Student Confidentiality Laws

- FERPA: 20 U.S.C. Laws 1232(g)
- Ohio Law: RC 3319.321



Basic Student Privacy Responsibilities

- Educational agency or institution may not disclose personally identifiable information within education records to third-parties without prior written consent of the parent or eligible student (with exceptions).



Basic Student Privacy Responsibilities

- Educational agency must permit the parent or eligible student to inspect and review all education records unless such right has been waived (with exceptions).

Basic Student Privacy Rules



- Parent or eligible student has the right to request the correction of education records which they believe to be inaccurate or misleading (with limitations) – 34 C.F.R. 99.20.
- Student privacy laws involve multiple rules, concepts, definitions, exceptions and limitations.
- Educational agency must provide annual notification of rights – 34 C.F.R. 99.7.

Who is covered by student privacy laws?

- Any “educational agency or institution.”
- Educational agency or institution – any public or private agency or institution which is the recipient of funds under any program administered by the U.S. Department of Education (sole recourse is withholding funds).



Educational Records

- Educational records include, but are not limited to:
 - Student GPAs and transcripts; final course grades
 - Admission materials
 - Financial aid records
 - Disciplinary records
 - Attendance records
 - Academic counseling records



Educational Records

- Personally identifiable information within the above documents cannot be disclosed unless:
 - directory information;
 - prior written consent; or
 - an exception to general rule.

Educational Records

Education records do **NOT** include:

- Records kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to anyone except a substitute.
- Unrecorded observations of teachers and school officials.
- Student memorialized by recording in the plain view of other students, school personnel (who lack legitimate educational interest) and, possibly, the general public, in the same setting. A more appropriate view, frequently taken by the courts, is that the recording must be education-related and personal to the student.
- Information about a person after he/she is no longer a student at the institution.
- Peer-graded assignments.
- Certain records of a law enforcement unit of an educational agency or institution (SRO).

Directory Information

- Educational records often include personally identifiable information that is also “directory information” (34 C.F.R. 99.3).
 - Information that would not generally be considered harmful or an invasion of privacy if disclosed.
 - Examples – student’s name, address, telephone listing, electronic mail address, photograph, data and place of birth, etc.
 - Common uses: Yearbooks, concert programs, telephone directories.
- May be disclosed without consent of the parent/student.
- Annual notification requirement – 34 C.F.R. 99.7.
- Remember that parents have a right to opt-out.

Prior Written Consent

- Generally required for any personally identifiable information from education records that is not directory information (34 C.F.R. 99.30).
 - Signed and dated;
 - Specify the precise record(s);
 - State the purpose of the disclosure; and
 - Identify the party or class of parties to whom disclosure is permitted.

No Consent Required



- Officials/teachers within the school with a “legitimate educational interest.”
- Other schools to which the student seeks or intends to enroll.

No Consent Required

- Judicial order/lawfully issued subpoenas.
 - Law Enforcement
 - Grand Jury
 - Ex parte orders under USA PATRIOT Act
- State/local authorities acting pursuant to a State statute.
- Health and Safety Emergency
 - Disclosure limited to “appropriate parties”
 - Only when “necessary to protect the health or safety of the student or other individuals”
- Federal audit or evaluation of Federal or State supported education programs.

Administrative Requirements: Record Maintenance

- In general, maintain record of each request for access to, and each disclosure of, personally identifiable information (34 C.F.R. 99.32(a)(i)).
- Retain as long as the primary records are kept (34 C.F.R. 99.32(a)(2)).
- Must include the recipient of the information and justification for disclosure (34 C.F.R. 99.32(a)(3)).

Administrative Requirements: Record Maintenance

- No requirement of record of request if the requester is:
 - A school official.
 - The parent of eligible student (or a party with written consent).
 - A party seeking directory information.
 - Federal grand jury, law enforcement subpoena, or court order.

Policy Guidance (2007)

- The Secretary of Education issued policy guidance regarding FERPA on October 30, 2007.
- Policy guidance was mainly a “refresher.”
- New wrinkles...

Policy Guidance (2007)

- Interpretation that permits institutions to disclose information from education records to parents in a health or safety emergency (as “appropriate parties”).
- Security videos – Not considered education records covered by FERPA.
- Personal knowledge or observation of school official – Not considered education records covered by FERPA (answers questions from Va. Tech tragedy).



Use of Education Technology in Schools; Protecting Student Privacy While Using Online Educational Services

- The Privacy Technical Assistance Center (PTAC) issued guidance regarding student privacy rights while using online educational services. The guidance relates to the subset of educational services that are:
 - Computer software, mobile applications (apps), or web-based tools;
 - Provided by a third-party to a school district;
 - Accessed via the internet by students and/or parents; and
 - Used as part of a school activity.

School Official Exception

- Schools can use the School Official exception to disclose education records to a third-party provider (TPP) if the TPP:
 - Performs a service/function for the school for which it would be otherwise use its own employees.
 - Is under the direct control of the school with regard to the use/maintenance of the education records.
 - Uses education data in a manner consistent with the definition of the “school official with legitimate educational interest,” specified in the school/LEA’s annual notification of rights under FERPA.
 - Does not re-disclose or use education data for unauthorized purposes.

What about metadata?

- “Metadata” are pieces of information that provide meaning and context to other data being collected, for example:
 - Activity date and time
 - Number of attempts
 - How long the mouse hovered before clicking an answer
- Metadata that have been stripped of all direct and indirect identifiers are not protected under FERPA.
 - (NOTE: School name and other geographic information can be indirect identifiers in student data.)
- Properly de-identified metadata may be used by providers for other purposes (unless prohibited by other laws or by their agreement with the school.)

FERPA – Photos and Videos

Education Record	A photo or video of a student is an education record when the photo or video is: (1) directly related to a student; and (2) maintained by an educational institution or by a party acting for the institution.	
(1) Directly Related to the Student	Factors that may help determine if a photo or video (“Media”) should be considered “directly related” to a student: (1) Use of Media for disciplinary action, or other official purposes (2) Media depicts an activity in violation of the law (3) Student is specific focus (4) Media depicts a student getting injured, ill, or having a health emergency (5) Media contains personally identifiable information	
(2) Maintained by institution	Photo taken by parent would not be considered an education record	
MISC.	Exclusion of law enforcement unit records	Education record for multiple students

<https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>

STATUS OF TRANSGENDER LAW

- -May 13, 2016: Department of Education Office for Civil Rights Dear Colleague Letter; Transgender Students
 - Advised Title IX sex discrimination “prohibition encompasses discrimination based on student’s transgender status.”
- -February 22, 2017 letter was withdrawn
- -Accordingly, there is a regulatory “interpretive vacuum” which is now being filled by the courts
- However, in practice, earlier guidance is widely accepted by school districts

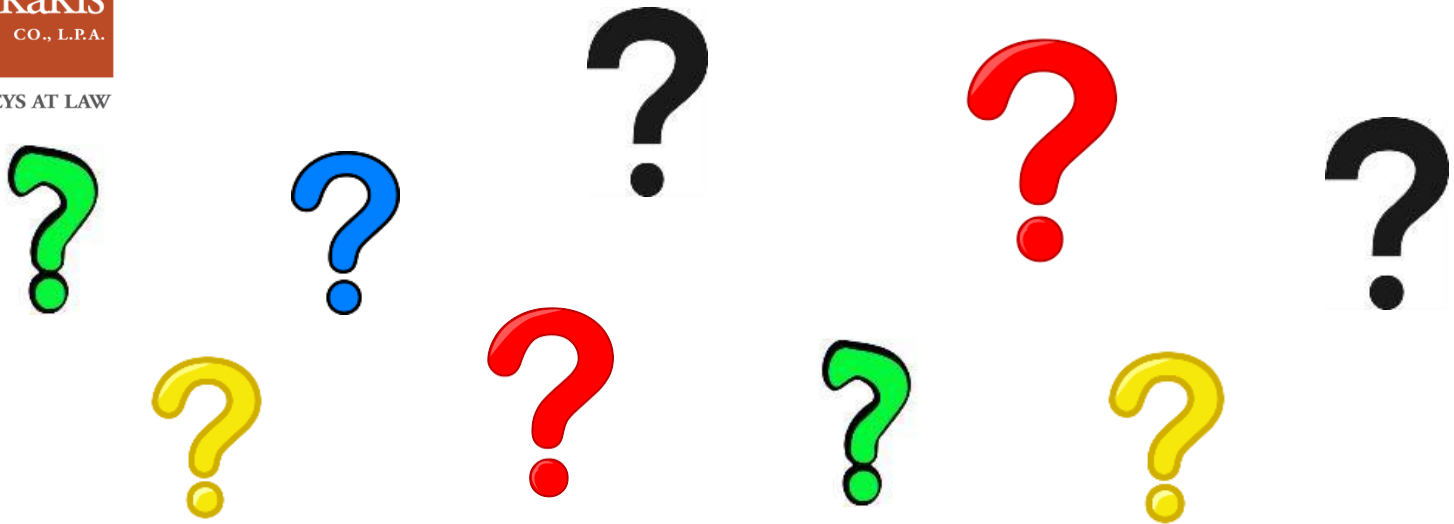
TRANSGENDER RIGHTS BATTLE IN SCHOOLS FOCUSES ON TWO AREAS

- 1. Equal access to restrooms/locker rooms
 - U.S. District Court for the Southern District of Ohio
 - The Department of Labor's Occupational Safety and Health Administration (“OSHA”) published *A Guide to Restroom Access for Transgender Workers*
- 2. High school athletics
 - The Ohio High School Athletic Association (“OHSAA”), with respect to participation in interscholastic sports, has published a *Transgender Policy* for its member schools consistent with its mission statement and stated purpose in accordance with the OHSAA *Constitution*.

Privacy in Transgender Status and Education Records

- Obligation to keep transgender status private.
 - Nonconsensual disclosure of personally identifiable information.
 - Directory information: do not include sex.
- Birth name or pronoun does not match student's gender identity.
- Request to amend inaccurate or misleading records.

Questions?



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