

**STUDENT RECORDS –
CONFIDENTIALITY AND
PRESERVATION UNDER
FEDERAL AND STATE LAW**

JUNE 2015

STUDENT RECORDS – CONFIDENTIALITY AND PRESERVATION UNDER FEDERAL AND STATE LAW

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EXECUTIVE SUMMARY OF FEDERAL AND STATE LAW RELATED TO THE CONFIDENTIALITY OF STUDENT RECORDS

The Family Educational Rights and Privacy Act of 1974 (FERPA) is a federal law that protects the privacy of education records.¹ FERPA applies to educational agencies and institutions, such as community colleges and school districts that receive federal funds under any program administered by the U.S. Department of Education.

The term “education records” is broadly defined under FERPA to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.² At the elementary or secondary level, a student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are “education records” subject to FERPA. In addition, records that schools maintain on special education students, including records on services provided to students under the IDEA are education records under FERPA. Such records are directly related to a student, maintained by the school or a party acting for the school, and are not excluded from the definition of “education records.”

In 2012, a number of changes were made to the federal regulations implementing FERPA and the California Education Code pertaining to student records.

The Secretary of Education has amended the regulations implementing FERPA, effective January 3, 2012. The regulations make clarifying changes to the provision that allows educational agencies to disclose information from student records to outside organizations conducting studies on behalf of the agency. The regulations also require an educational agency to enter into a written agreement when it designates a representative (other than an employee) to conduct an audit or evaluation of a federal- or state-supported educational program. In addition, the regulations make changes to the provisions authorizing disclosure of “directory information.”

Under federal law, all agencies which receive federal funds (including school districts) must provide parents and legal guardians with access and the right to challenge educational records.³ In California, the Legislature has adopted statutory provisions which set forth the rights of parents with respect to pupil records including access and the right to copy such records.⁴ Access must be granted no later than five business days following the date of the request.⁵ Where the parents are divorced, either parent is entitled to access, regardless of who has physical custody of the child.⁶ School districts may charge a reasonable fee for copying student records.⁷

¹ See, 20 U.S.C. Section 1232(g); 34 C.F.R. Section 99.

² 34 C.F.R. Section 99.3.

³ 20 U.S.C. Section 1232(g).

⁴ Education Code section 49069.

⁵ Education Code section 49069; see, also, Education Code section 56043(h), 56504.

⁶ Civil Code section 4600.5(g); Family Code section 3025.

⁷ Education Code section 49065.

Following an inspection and review of the pupil's records, the parent of a pupil or former pupil may challenge the content of any pupil's record. The parent of a pupil may file a written request with the superintendent of the district to correct or remove any information recorded in the written records concerning his or her child which he or she alleges to be inaccurate, misleading, an unsubstantiated personal conclusion or inference, a conclusion or inference outside the observer's area of competence, not based on the personal observation of the named person with the time and place of the observation noted or in violation of the privacy or other rights of the pupil.⁸

Within thirty days of the receipt of the request, the superintendent, or his designee, shall meet with the parent and the certificated employee who recorded the information in question if the employee is presently employed by the school district. The superintendent shall then sustain or deny the allegations. If the superintendent sustains any or all of the allegations, he or she shall order the correction or removal and destruction of the information.⁹ However, in accordance with Education Code section 49066, the superintendent shall not order a pupil's grade to be changed unless the teacher who determined the grade is, to the extent practicable, given an opportunity to state orally, in writing, or both, the reasons for which the grade was given and is, to the extent practicable, included in all discussions relating to the changing of the grade.¹⁰

If the superintendent denies any or all of the allegations and refuses to order the correction or removal of the information, the parent may, within thirty days of the refusal, appeal the decision in writing to the governing board of the school district.

Within thirty days of the receipt of an appeal, the governing board shall meet in closed session with the parent and the certificated employee (if such employee is presently employed by the school district) who recorded the information in question to determine whether or not to sustain or deny the allegations.¹¹ Prior to any grade being changed, the teacher who assigned the grade shall be given an opportunity to explain the grade given, to the extent practicable. If the governing board sustains any or all of the allegations, it shall order the superintendent to immediately correct or remove and destroy the information from the written records of the pupil. The decision of the governing board shall be final. If the final decision of the governing board is unfavorable to the parent or if the parent accepts an unfavorable decision by the district superintendent, the parent shall have the right to submit a written statement of the parent's objections to the information. This statement shall become a part of the pupil's school record until such time as the information objected to is corrected or removed.¹²

No persons other than the parents and specified agencies shall have access to school records without parental permission unless it is directory information.¹³ Directory information is defined as the student's name, address, telephone number, date and place of birth, major field of

⁸ Education Code section 49070.

⁹ Ibid.

¹⁰ Education Code section 49070. To change a grade the procedures in Section 49066 must be followed. See, Johnson v. Board of Education of Santa Monica-Malibu Unified School District, 179 Cal.App.3d 593 (1986).

¹¹ Education Code section 49070.

¹² Ibid.

¹³ Education Code sections 49070, 49073, 49074, 49076, 49077, 49078.

study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous private or public school attended by the student. Directory information may be released according to local policy as to any pupil or former pupil provided that notice is given at least on an annual basis of the categories of information which the school plans to release.¹⁴ However, directory information may not be released regarding any pupil when a parent has notified the school district that such information should not be released.¹⁵

A school district shall not permit access to pupil records to a person without written parental consent or under judicial order, except as set forth in Section 49076 of the Education Code, and as permitted by Part 99 (commencing with Section 99.1) of Title 34 of the Code of Federal Regulations.

Under federal law, all agencies which receive federal funds must protect the confidentiality of pupil records.¹⁶ Under most circumstances, parental consent is required to disclose student records to third parties, including law enforcement.¹⁷ A school district may disclose personally identifiable information from an education record of a student without the consent of the parent if the disclosure is to other school officials who are determined to have legitimate educational interests, to contractors or consultants under certain limited conditions, or to state and local officials specifically authorized by law.¹⁸ School districts may disclose student records to comply with a judicial order or lawfully issued subpoena, or in connection with a health or safety emergency.¹⁹

The United States Department of Education published a brochure entitled, “Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools.” The brochure notes that school officials are regularly asked to balance the interest of safety and privacy for individual students and that while FERPA generally requires schools to ask for written consent before disclosing a student’s personally identifiable information to individuals other than his or her parents, FERPA also allows schools to take key steps to maintain school safety.

In an emergency, FERPA permits school officials to disclose, without consent, education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals. At such times, records and information may be released to appropriate parties, such as law enforcement officials, public health officials, and trained medical personnel.²⁰ The period of disclosure is usually limited to the length of the emergency and generally does not allow for a blanket release of all personally identifiable information from the student’s education records.

¹⁴ Education Code section 49061.

¹⁵ Education Code section 49073.

¹⁶ Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. Section 1232g.

¹⁷ 34 C.F.R. Section 99.30.

¹⁸ 34 C.F.R. Section 99.31.

¹⁹ 34 C.F.R. Section 99.31(a)(9), (a)(10).

²⁰ See, 34 C.F.R. Sections 99.31(a)(10) and 99.36.

Under FERPA, investigative reports and other records created by school security staff to monitor safety and security in and around schools are not considered education records subject to FERPA. Therefore, schools may disclose information from law enforcement unit records to anyone, including outside law enforcement authorities, without parental consent.²¹

The U.S. Department of Education stated that law enforcement unit officials who are employed by the school district should be designated in the school district's FERPA notification as "school officials" with a "legitimate educational interest." As school officials, law enforcement unit officials may be given access to personally identifiable information from students' education records. The school's law enforcement unit officials must protect the privacy of educational records it receives and may disclose them only in compliance with FERPA. Therefore, law enforcement unit records should be maintained separately from education records.

The U.S. Department of Education also stated that images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA. As a result, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit may designate an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.

The U.S. Department of Education indicated that FERPA does not prohibit a school official from disclosing information about a student if the information is obtained through the school official's personal knowledge or observation, and not from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information, and the teacher may disclose what he or she overheard to appropriate authorities.

In 2014, the California Legislature enacted legislation to protect the privacy of student records. Assembly Bill 1584 added Education Code Section 49073.1 which authorizes a local educational agency to enter into a contract with a third party to provide cloud based services for the digital storage, management or retrieval of pupil records or to provide digital educational software that authorizes a third party provider of digital educational software to access, store and use pupil records. Section 49073.1 requires that any contract entered into with a third party must ensure the confidentiality of pupil records.

²¹ See, 44 C.F.R. Section 99.8.

FEDERAL AND STATE LAW RELATED TO THE CONFIDENTIALITY OF STUDENT RECORDS

OVERVIEW OF FERPA

The Family Educational Rights and Privacy Act of 1974 (FERPA) is a federal law that protects the privacy of education records.²² FERPA applies to educational agencies and institutions, such as community colleges and school districts that receive federal funds under any program administered by the U.S. Department of Education.

A community college district or school district subject to FERPA may not have a policy or practice of disclosing the education records of students, or personally identifiable information from education records, without a parent or eligible student's written consent.²³ FERPA contains several exceptions to this general consent rule.²⁴ An eligible student is a student who is at least 18 years of age or who attends a postsecondary institution at any age.²⁵ Under FERPA, parents and eligible students have the right to inspect and review the student's education records and to seek to have the records amended under certain circumstances.²⁶

The term "education records" is broadly defined under FERPA to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.²⁷ At the elementary or secondary level, a student's health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are "education records" subject to FERPA. In addition, records that schools maintain on special education students, including records on services provided to students under the IDEA are education records under FERPA. Such records are directly related to a student, maintained by the school or a party acting for the school, and are not excluded from the definition of "education records."

At postsecondary institutions, such as community colleges, medical and psychological treatment records of eligible students are excluded from the definition of "education records" if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment.²⁸ Such records are generally referred to as "treatment records." An eligible student's treatment records may be disclosed for purposes other than the student's treatment provided the records are disclosed under one of the exceptions to written consent or with the student's consent.²⁹ If a community college discloses an eligible student's treatment records for purposes other than treatment, the records are no longer excluded from the definition of "education records" and are subject to all other FERPA requirements.

²² See, 20 U.S.C. Section 1232(g); 34 C.F.R. Section 99.

²³ 34 C.F.R. Section 99.30.

²⁴ 34 C.F.R. Section 99.31.

²⁵ 34 C.F.R. Sections 99.3 and 99.5(a).

²⁶ 34 C.F.R. Sections 99.10-99.12 and 99.20-99.22.

²⁷ 34 C.F.R. Section 99.3.

²⁸ 34 C.F.R. Section 99.3.

²⁹ See, 34 C.F.R. Section 99.31(a); 34 C.F.R. Section 99.30.

FERPA REGULATIONS

Section 99.3 (Definitions):

Directory Information; Disclosure of Social Security Numbers (SSN's) and ID Numbers.

An educational agency or institution may designate and disclose student ID numbers as directory information if the number cannot be used by itself to gain access to education records. Such disclosure is permissible only if the ID number functions as a name; that is, it cannot be used without a PIN, password, or some other authentication factor to gain access to education records. Social security numbers may never be disclosed as directory information.

Education Records; Former Students. The regulations clarify that records pertaining to an individual that are created or received after the individual is no longer a student at the school are nevertheless considered "education records," unless the records are not directly related to the individual's attendance as a student.

Education Records; Grades. Grades on peer-graded papers are not "education records" until they are collected and recorded by a teacher.

Personally Identifiable Information. The regulations clarify that "Personally Identifiable Information" includes, among other things, "any information that, alone 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." In addition, "Personally Identifiable Information" also includes information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.³⁰

Section 99.31 (Disclosure):

Disclosure to Contractors, Volunteers and Other Non-Employees. Educational agencies and institutions may disclose education records, or personally identifiable information from education records, without consent to contractors, volunteers, and other non-employees, as long as the individual is performing an institutional service that otherwise would be performed by an employee, and the individual is performing such service under the direct control of the educational agency or institution. The individual must have a legitimate educational interest in the record. Educational agencies and institutions will have to amend their annual notification of FERPA rights to include these parties as school officials with legitimate educational interests. 99.31(a)(1)(i)(B).

Access Control and Tracking. Educational agencies and institutions must use reasonable methods to ensure that teachers and other school officials (as well as contractors, volunteers and other non-employees) obtain access to only those education records in which they have legitimate educational interests. 99.31(a)(1)(ii).

³⁰ 34 C.F.R. Section 99.3 (Definitions).

Disclosure to Other Educational Institutions. An educational agency or institution may disclose education records, or personally identifiable information from education records, to a student's new school even after the student is already attending the new school so long as the disclosure relates to the student's enrollment in the new school. 99.31(a)(2).

Educational Research. Educational agencies and institutions are required to enter into a written agreement before disclosing personally identifiable information from education records, without consent, to organizations conducting studies for, or on behalf of, the educational agency or institution to: (a) Develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. The regulations specifically prescribe the matters that must be addressed in such written agreements. 99.31(a)(6).

Identification and Authentication of Identity. Educational agencies and institutions must use reasonable methods to identify and authenticate the identity of parents, students, school officials and other parties to whom the agency or institution discloses personally identifiable information from education records. One reasonable method to confirm identity is to use a PIN process to provide access to records for parents, students, and school officials.³¹

Section 99.32 (Recordkeeping Requirements):

Record of Disclosure to Federal, State and Local Agencies. Educational agencies and institutions must maintain a listing in each student's record of the state and local educational authorities and federal officials and agencies that may make further disclosures of the student's education records without consent. Parents and eligible students are entitled to a copy of the record of further disclosures upon request. 99.32(a)(1); 99.32(a)(4).³²

Section 99.36 (Health and Safety Emergencies):

The regulations modify the standards to be used in determining whether to release information in connection with an emergency. Educational agencies and institutions may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.³³ In making this determination, the educational agency or institution 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 educational agency or 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. If, based on the

³¹ 34 C.F.R. Section 99.31 (Disclosure).

³² 34 C.F.R. Section 99.32 (Recordkeeping Requirements).

³³ The U.S. Department of Education and the U.S. Department of Health and Human Services recently issued "Joint Guidance on the Application of FERPA and HIPAA to Student Health Records (November 2008)." In the Guidance, the agencies make clear that the HIPAA Privacy Rule generally does not apply to elementary and secondary schools. Further, student health records are considered "education records," and are therefore exempt from the definition of "protected health information" under HIPAA. Thus, the analysis as to whether such records may be disclosed in an emergency must be conducted under FERPA, not HIPAA.

information available at the time of the determination, there is a rational basis for the determination, the Department of Education will not substitute its judgment for that of the educational agency or institution.³⁴

The listing of disclosures maintained in the student's record must include a description of the articulable and significant threat, as well as the parties to whom information was disclosed. 99.32(a)(5).³⁵

Section 99.37 (Disclosing Directory Information):

Directory Information Opt Outs. An educational agency or institution must continue to honor a parent's or student's decision to opt out of directory information disclosures even after the student leaves the institution. 99.37(b).

Prohibition against Using SSN's to Release or Confirm Directory Information. An educational agency or institution may not use a student's SSN (or other non-directory information) to identify the student when releasing or confirming directory information.³⁶ This change primarily impacts postsecondary institutions, for example, when a prospective employer submits an inquiry to determine whether a particular individual is a student or graduate of the institution. An educational agency or institution will need to ensure that the student has provided written consent for the disclosure, or must rely solely on a student's name and other properly designated directory information in answering the inquiry. (This may make it more difficult for the employer or other inquirer to ensure that the correct student has been identified because of the known problems in matching records without the use of a universal identifier.) 99.37(d).³⁷

2012 CHANGES TO FERPA REGULATIONS

In 2012, a number of changes were made to the federal regulations implementing FERPA and the California Education Code pertaining to student records.

The Secretary of Education has amended the regulations implementing FERPA, effective January 3, 2012. The regulations make clarifying changes to the provision that allows educational agencies to disclose information from student records to outside organizations conducting studies on behalf of the agency. The regulations also require an educational agency to enter into a written agreement when it designates a representative (other than an employee) to conduct an audit or evaluation of a federal- or state-supported educational program. In addition, the regulations make changes to the provisions authorizing disclosure of "directory information."

The following summarizes the major changes to the regulations:

The studies exception³⁸ allows for the disclosure of personally identifiable information from education records without consent of the student/parent to organizations conducting studies

³⁴ The regulations no longer specify that the requirements of the health and safety exception be "strictly construed."

³⁵ 34 C.F.R. Section 99.36 (Health and Safety Emergencies).

³⁶ Confirmation of information in education records is considered a "disclosure" under FERPA.

³⁷ 34 C.F.R. Section 99.37 (Disclosing Directory Information).

³⁸ 34 C.F.R. Section 99.31(a)(6).

for, or on behalf of, schools, school districts, or postsecondary institutions. Studies can be for the purpose of developing, validating, or administering predictive tests, administering student aid programs, or improving instruction. As an example, a state educational agency may disclose personally identifiable information from education records without consent of the student/parent to an organization for the purpose of conducting a study that compares program outcomes across school districts to further assess what programs provide the best instruction and then duplicate those results in other districts.³⁹

Even prior to January 3, 2012, the study's exception required the educational agency or institution to enter into an agreement with the organization conducting the study. The Secretary of Education has summarized the mandatory provisions educational agencies must include in their written agreements under the study's exception as follows:

1. Specify the purpose, scope, and duration of the study and the information to be disclosed. Your agreement must specify the purpose of the study, describe its scope and its duration, and identify the information being disclosed.
2. Require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement. Your agreement must specify that the personally identifiable information from education records must only be used for the study identified in the agreement.
3. Require the organization to conduct the study in a manner that does not permit the personal identification of parents and students by anyone other than representatives of the organization with legitimate interests. Your agreement must require the organization to conduct the study so as not to identify students or their parents. This typically means that the organization should allow internal access to personally identifiable information from education records only to individuals with a need to know, and that the organization should take steps to maintain the confidentiality of the personally identifiable information from education records at all stages of the study, including within the final report, by using appropriate disclosure avoidance techniques.
4. Require the organization to destroy all personally identifiable information from education records when the information is no longer needed for the purposes for which the study was conducted, and specify the time period in

³⁹ An educational agency or institution is not required to initiate the study or agree with or endorse the conclusions or results of the study.

which the information must be destroyed. Your agreement must require the organization to destroy the personally identifiable information from education records when it is no longer needed for the identified study. You should determine the specific time period for destruction based on the facts and circumstances surrounding the disclosure and study. The parties to the written agreement may agree to amend the agreement to extend the time period if needed, but the agreement must include a time limit.

The new regulations amended Section 99.31(a)(6) to clarify that an organization conducting a study must destroy the personally identifiable information in accordance with the written agreement; it is not sufficient for the organization to return the personally identifiable information to the educational agency in lieu of destroying the information. The regulations also include a list of items that are considered “best practices” for written agreements authorizing work under the studies exception and the audit/evaluation exception discussed.

The audit or evaluation exception⁴⁰ allows for the disclosure of personally identifiable information from education records without consent to authorized representatives of the Comptroller General of the U.S., the Attorney General, the Secretary of Education, and state or local educational authorities. Under this exception, personally identifiable information from education records must be used to audit or evaluate a federal- or state-supported education program, or to enforce or comply with federal legal requirements that relate to those education programs. The entity disclosing the personally identifiable information from education records is specifically required to use reasonable methods to ensure to the greatest extent practicable that its designated authorized representative complies with FERPA and its regulations.

As an example, a school district could designate a university as an authorized representative in order to disclose, without consent, personally identifiable information from education records on its former students to the university. The university then may disclose, without consent, transcript data on these former students to the district to permit the district to evaluate how effectively the district prepared its students for success in postsecondary education.

The new regulations state that educational agencies or authorities are responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or authority designated as its authorized representative under the audit/evaluation exception:

1. Uses personally identifiable information only to carry out an audit or evaluation of federal- or state-supported education programs, or for the enforcement of or compliance with federal legal requirements related to these programs;

⁴⁰ 34 C.F.R. Sections 99.31(A)(3) and 99.35.

2. Protects the personally identifiable information from further disclosures or other uses, [except as otherwise authorized by the regulations]; and
3. Destroys the personally identifiable information in accordance with the requirements [of the regulations].⁴¹

The regulations also now require that a state or local educational authority or agency must use a written agreement containing specified provisions to designate any authorized representative, other than an employee, in regards to an audit or evaluation. The Guidance issued by the Secretary of Education summarizes these provisions as follows:

1. Designate the individual or entity as an authorized representative. Your agreement must formally designate the individual or entity as an authorized representative.
2. Specify the personally identifiable information from education records to be disclosed. Your agreement must identify the information being disclosed.
3. Specify that the purpose for which the personally identifiable information from education records is being disclosed to the authorized representative is to carry out an audit or evaluation of federal- or state-supported education programs, or to enforce or to comply with federal legal requirements that relate to those programs. Your agreement must state specifically that the disclosure of the personally identifiable information from education records is in furtherance of an audit, evaluation, or enforcement or compliance activity.
4. Describe the activity with sufficient specificity to make clear that it falls within the audit or evaluation exception. This must include a description of how the personally identifiable information from education records will be used. Do not be vague – the agreement must describe the methodology and why disclosure of personally identifiable information from education records is necessary to accomplish the audit, evaluation, or enforcement or compliance activity.
5. Require the authorized representative to destroy the personally identifiable information from education records when the information is no longer needed for the purpose specified. Your agreement should be clear about how the

⁴¹ 34 C.F.R. Section 99.35(a)(2)(i-iii).

personally identifiable information from education records will be destroyed.

6. Specify the time period in which the personally identifiable information must be destroyed. Your agreement must provide a time period for destruction. You should determine the specific time period for destruction based on the facts and circumstances surrounding the disclosure and activity. The parties to the written agreement may agree to amend the agreement to extend the time period if needed, but the agreement must include a time limit.
7. Establish policies and procedures, consistent with FERPA and other federal and state confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in an audit, evaluation, or enforcement or compliance activity. The agreement must establish the policies and procedures, consistent with FERPA and other federal and state laws, to protect personally identifiable information from education records from further disclosure or unauthorized use.⁴²

Schools have always been permitted to disclose information on students if the information has been properly designated as directory information.⁴³ If a school has a policy of disclosing directory information, it is required to give public notice to parents of the types of information designated as directory information, and of the right to opt out of having their child's information so designated and disclosed. Under the new regulations, schools can now adopt limited directory information policies that allow the disclosure of directory information to be limited to specific parties, for specific purposes, or both.

Under the former regulations, parents were permitted to opt out of having their child's directory information disclosed. This continues to be the case. However, the new regulations provide that parents may not, by opting out of directory information, prevent a school from requiring a student to wear or present a student ID or badge. When a student turns 18 years old or enters college at any age, the rights afforded to parents under FERPA transfer to the student, such as the right to provide consent before information from education records is disclosed. Students who hold their own FERPA rights because they are over 18 or are enrolled in college

⁴² http://www2.ed.gov/policy/gen/guid/fpco/pdf/reasonablemtd_agreement.pdf. Educational agencies with written agreements in place prior to January 3, 2012, the effective date of the regulations, need not comply with these provisions until the written agreement is renewed or amended.

⁴³ 34 C.F.R. Section 99.37.

also have no right – under the new regulations – to refuse to wear or present a student ID or badge if that is a requirement of the local educational agency.

The new regulations also modify the definition of “directory information” to include a “student ID number that is displayed on a student ID or badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user’s identity, such as a PIN, password, or other factor known or possessed only by the authorized user.”⁴⁴

PARENTAL ACCESS TO STUDENT RECORDS

The governing boards of school districts are required to establish, maintain, and destroy pupil records according to regulations adopted by the State Board of Education.⁴⁵ The State Department of Education has adopted administrative regulations which classify records and indicate the length of time these records must be kept.⁴⁶

Under federal law, all agencies which receive federal funds (including school districts) must provide parents and legal guardians with access and the right to challenge educational records.⁴⁷ In California, the Legislature has adopted statutory provisions which set forth the rights of parents with respect to pupil records including access and the right to copy such records.⁴⁸ Access must be granted no later than five business days following the date of the request.⁴⁹ Where the parents are divorced, either parent is entitled to access, regardless of who has physical custody of the child.⁵⁰ School districts may charge a reasonable fee for copying student records.⁵¹

Following an inspection and review of the pupil’s records, the parent of a pupil or former pupil may challenge the content of any pupil’s record. The parent of a pupil may file a written request with the superintendent of the district to correct or remove any information recorded in the written records concerning his or her child which he or she alleges to be inaccurate, misleading, an unsubstantiated personal conclusion or inference, a conclusion or inference outside the observer’s area of competence, not based on the personal observation of the named person with the time and place of the observation noted or in violation of the privacy or other rights of the pupil.⁵²

Within thirty days of the receipt of the request, the superintendent, or his designee, shall meet with the parent and the certificated employee who recorded the information in question if the employee is presently employed by the school district. The superintendent shall then sustain

⁴⁴ 34 C.F.R. Section 99.3. The definition of “directory information” under California law, Education Code section 49061(c), is more restrictive than the definition under federal law. This definition will be discussed below.

⁴⁵ Education Code section 49062.

⁴⁶ 5 California Code of Regulations section 430 et seq.

⁴⁷ 20 U.S.C. Section 1232(g).

⁴⁸ Education Code section 49069.

⁴⁹ Education Code section 49069; see, also, Education Code section 56043(h), 56504.

⁵⁰ Civil Code section 4600.5(g); Family Code section 3025.

⁵¹ Education Code section 49065.

⁵² Education Code section 49070.

or deny the allegations. If the superintendent sustains any or all of the allegations, he or she shall order the correction or removal and destruction of the information.⁵³ However, in accordance with Education Code section 49066, the superintendent shall not order a pupil's grade to be changed unless the teacher who determined the grade is, to the extent practicable, given an opportunity to state orally, in writing, or both, the reasons for which the grade was given and is, to the extent practicable, included in all discussions relating to the changing of the grade.⁵⁴

If the superintendent denies any or all of the allegations and refuses to order the correction or removal of the information, the parent may, within thirty days of the refusal, appeal the decision in writing to the governing board of the school district.

Within thirty days of the receipt of an appeal, the governing board shall meet in closed session with the parent and the certificated employee (if such employee is presently employed by the school district) who recorded the information in question to determine whether or not to sustain or deny the allegations.⁵⁵ Prior to any grade being changed, the teacher who assigned the grade shall be given an opportunity to explain the grade given, to the extent practicable. If the governing board sustains any or all of the allegations, it shall order the superintendent to immediately correct or remove and destroy the information from the written records of the pupil. The decision of the governing board shall be final. If the final decision of the governing board is unfavorable to the parent or if the parent accepts an unfavorable decision by the district superintendent, the parent shall have the right to submit a written statement of the parent's objections to the information. This statement shall become a part of the pupil's school record until such time as the information objected to is corrected or removed.⁵⁶

ACCESS TO STUDENT RECORDS BY OTHERS

No persons other than the parents and specified agencies shall have access to school records without parental permission unless it is directory information.⁵⁷ Directory information is defined as the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous private or public school attended by the student. Directory information may be released according to local policy as to any pupil or former pupil provided that notice is given at least on an annual basis of the categories of information which the school plans to release.⁵⁸ However, directory information may not be released regarding any pupil when a parent has notified the school district that such information should not be released.⁵⁹

A school district shall not permit access to pupil records to a person without written parental consent or under judicial order, except as set forth in Section 49076 of the Education

⁵³ Id.

⁵⁴ Education Code section 49070. To change a grade the procedures in Section 49066 must be followed. See, Johnson v. Board of Education of Santa Monica-Malibu Unified School District, 179 Cal.App.3d 593 (1986).

⁵⁵ Education Code section 49070.

⁵⁶ Id.

⁵⁷ Education Code sections 49070, 49073, 49074, 49076, 49077, 49078.

⁵⁸ Education Code section 49061.

⁵⁹ Education Code section 49073.

Code, and as permitted by Part 99 (commencing with Section 99.1) of Title 34 of the Code of Federal Regulations. Access to those particular records relevant to the legitimate educational interests of the requestor shall be permitted to the following:

1. School officials and employees of the school district, members of a school attendance review board appointed pursuant to Section 48321 who are authorized representatives of the school district, and any volunteer aide, eighteen years of age or older, who has been investigated, selected and trained by a school attendance review board for the purpose of providing follow up services to pupils referred to the school attendance review board, provided that person has a legitimate educational interest to inspect a record.
2. Officials and employees of other public schools or school systems, including local, county, or state correctional facilities, or educational programs leading to high school graduation are provided, or where the pupil intends to or is directed to enroll, subject to the rights of parents.
3. Authorized representatives of the Controller General of the United States, the Secretary of Education, and state and local educational authorities, or the U.S. Department of Education's Office for Civil Rights, if the information is necessary to audit or evaluate a state or federally supported education program, or in connection with the enforcement of, or compliance with, the federal legal requirements that relate to such a program. Records released shall comply with the requirements of the Code of Federal Regulations.
4. Other state and local officials to the extent that information is specifically required to be reported pursuant to state law adopted before November 19, 1974.
5. Parents of pupils eighteen years of age or older who is a dependent.
6. A pupil sixteen years of age or older or having completed the tenth grade who request access.
7. A district attorney who is participating in or conducting a truancy mediation program or participating in the presentation of evidence in a truancy petition.

8. A district attorney's office for consideration against a parent or guardian for failure to comply with the compulsory education law or with the compulsory continuation education law.
9. A probation officer, district attorney or counsel of record for a minor for purposes of conducting a criminal investigation or an investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation.
10. A judge or probation officer for the purpose of conducting a truancy mediation program for a pupil, or for purposes of presenting evidence in a truancy petition.
11. A county placing agency, when acting as an authorized representative of a state or local educational agency.

School districts, county offices of education and county placing agencies may develop cooperative agreements to facilitate confidential access to an exchange of the pupil information by e-mail, facsimile, electronic format or other secure means, provided the agreement complies with the federal regulations.⁶⁰

School districts may release information from pupil records to the following:

1. Appropriate persons in connection with an emergency, if the knowledge of the information is necessary to protect the health or safety of a pupil or other person. Schools or school districts releasing the information shall comply with federal regulations.
2. Agencies or organizations in connection with the application of a pupil for financial aid.
3. Pursuant to the federal regulations, a county elections official, for the purpose of identifying pupils eligible to register to vote, or for conducting programs to offer pupils an opportunity to register to vote.
4. Accrediting associations in order to carry out their accrediting functions.
5. Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating or administering predictive tests,

⁶⁰ Education Code section 49076(a).

administering student aid programs, and improving instruction, if the studies are conducted in a manner that will not permit the personal identification of pupils or their parents by persons other than representatives of the organizations, the information will be destroyed when no longer needed for the purpose for which it is obtained, and the organization enters into a written agreement with the educational agency or institution that complies with the federal regulations.

6. Officials and employees of private schools or school systems where the pupil is enrolled or intends to enroll in compliance with federal regulations.
7. A contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant. A disclosure pursuant to this provision shall not be permitted to a volunteer or other party.⁶¹

A person, persons, agency or organization permitted access to pupil records shall not permit access to any information obtained from those records by any other person, persons, agency or organization, except as allowed under the federal regulations or state law without the written consent of the pupil's parent. A school district, including a county office of education or county superintendent of schools, may participate in an interagency data information system that permits access to a computerized data-based system within and between governmental agencies or school districts as to information or records that are nonprivileged and where release is authorized as to the requesting agency under state or federal law or regulation, if each of the following requirements are met:

1. Each agency and school district shall develop security procedures or devices by which unauthorized personnel cannot access data contained in the system.
2. Each agency and school district shall develop procedures or devices to secure privileged or confidential data from unauthorized disclosure.
3. Each school district shall comply with the access log requirements.

⁶¹ Education Code section 49076(a)(2).

4. The right of access granted shall not include the right to add, to read or alter data without the written permission of the agency holding the data.
5. An agency or school district shall not make public or otherwise release information on an individual contained in the database if the information is protected from disclosure or release as to the requesting agency by state or federal law or regulation.⁶²

Each school district shall release the information it has specific to a particular pupil's identity and location that relates to the transfer of that pupil's records to another school district within the state or any other state or to a private school in the state to a designated peace officer, upon his or her request when a proper police purpose exists for the use of that information. As permitted in the federal regulations, the designated peace officer or law enforcement agency shall show the school district that the peace officer or law enforcement agency has obtained prior written consent from one parent, or provide information indicating that there is an emergency in which the information is necessary to protect the health or safety of the pupil or other individuals, or that the peace officer or law enforcement agency has obtained a lawfully issued subpoena or a court order.⁶³

In order to protect the privacy interests of the pupil, a request to a school district for pupil record information pursuant to Section 49076.5 shall meet the following requirements:

1. For purposes of this section, "proper police purpose" means that probable cause exists that the pupil has been kidnapped and that his or her abductor may have enrolled the pupil in a school and that the agency has begun an active investigation.
2. Only designated peace officers and federal criminal investigators and federal law enforcement officers whose names have been submitted to the school district in writing by a law enforcement agency, may request and receive the information. Each law enforcement agency shall ensure that each school district has at all times a current list of the names of designated peace officers authorized to request pupil record information.
3. This section does not authorize designated peace officers to obtain any pupil record information other than that authorized by Section 49076.5.

⁶² Education Code section 49076(b).

⁶³ Education Code section 49076.5(a).

4. The law enforcement agency requesting the information shall ensure that at no time shall information obtained be disclosed or used for a purpose other than to assist in the investigation of suspected criminal conduct or a kidnapping. A violation of this paragraph shall be punishable as a misdemeanor.
5. The designated peace officer requesting information authorized for release shall make a record on a form created and maintained by the law enforcement agency that shall include the name of the pupil about whom the inquiry was made, the consent of a parent having legal custody of the pupil or a legal guardian, the name of the officer making the inquiry, the date of the inquiry, the name of the school district, the school district employee to whom the request was made, and the information that was requested.
6. Whenever the designated peace officer requesting information authorized for release does so in person, by telephone, or by some means other than in writing, the officer shall provide the school district with a letter confirming the request for pupil record information before any release of information.
7. A school district, or officer or employee of the school district, shall not be subject to criminal or civil liability for the release of pupil record information in good faith as authorized by Section 49076.5.⁶⁴

As a result of recent amendments to Education Code section 49076, contractors and consultants may have access to student records under certain limited conditions.⁶⁵

Pursuant to Education Code section 49076(a)(2)(g), a school district may release information from pupil records to a contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant. A legitimate educational interest would include school discipline and the investigation of alleged misconduct by students for the purpose of student discipline.

Therefore, a school district may enter into formal agreements with local law enforcement agencies to provide support to the school district to maintain school discipline and allow School Resource Officers limited access to pupil records when necessary to assist school administrators with school discipline. That limited access may be provided upon request of the School

⁶⁴ Education Code section 49076.5(b).

⁶⁵ Stats. 2012, ch. 388 (A.B. 733), effective January 1, 2013.

Resource Officer to see the records or have copies of the records of an individual student who is being investigated for a school disciplinary offense.

Under federal law, all agencies which receive federal funds must protect the confidentiality of pupil records.⁶⁶ Under most circumstances, parental consent is required to disclose student records to third parties, including law enforcement.⁶⁷ A school district may disclose personally identifiable information from an education record of a student without the consent of the parent if the disclosure is to other school officials who are determined to have legitimate educational interests, to contractors or consultants under certain limited conditions, or to state and local officials specifically authorized by law.⁶⁸ School districts may disclose student records to comply with a judicial order or lawfully issued subpoena, or in connection with a health or safety emergency.⁶⁹

In the preamble to the FERPA Final Rule issued December 9, 2008,⁷⁰ the United States Department of Education stated that police officers who are not employees of the school district to whom the school has outsourced its safety and security functions do not qualify as “school officials” under FERPA, unless they meet the following three requirements:

1. The individuals perform an institutional service or function for which the agency or institution would otherwise use employees;
2. The individual is under the direct control of the agency or institution with respect to the use and maintenance of educational records; and
3. The individual is subject to the requirements of Section 99.3(g) governing the use and redisclosure of personally identifiable information from educational records.⁷¹

If these requirements are met, the district would need to use reasonable methods to ensure that the school resource officers have access only to those educational records in which the school resource officer has a legitimate interest.⁷² In addition, the school district must identify the school resource officers as school officials in their annual notification to parents before disclosure would be permissible, and define the types of records in which the school resource officer might have a legitimate educational interest. Such notice would provide prior notice to parents and students that information from student records may be disclosed to school resource officers for the purpose of ensuring safe schools.

⁶⁶ Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. Section 1232g.

⁶⁷ 34 C.F.R. Section 99.30.

⁶⁸ 34 C.F.R. Section 99.31.

⁶⁹ 34 C.F.R. Section 99.31(a)(9), (a)(10).

⁷⁰ <http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf>

⁷¹ 34 C.F.R. Section 99.31(a)(1)(i)(B).

⁷² 34 C.F.R. Section 99.31(a)(1)(ii).

State law does allow school districts to share student records with law enforcement officers when there is an emergency if knowledge of the information is necessary to protect the health or safety of the student or other persons.⁷³ In addition, school districts are required to release information regarding a pupil's identity or location to a designated peace officer when there is an ongoing police investigation and probable cause that the pupil has been kidnapped or that the student's abductor may have enrolled the pupil in a school.⁷⁴ However, peace officers are not listed as appropriate recipients of student records pursuant to criminal investigation or an investigation in regards to declaring a person a ward of the court or involving a violation of a condition of probation. Only probation officers or deputy district attorneys are permitted access in situations involving a criminal investigation, an investigation declaring a person a ward of the court, or an investigation involving a violation of a condition of probation.⁷⁵

Education Code section 49068.6 requires law enforcement agencies to notify a school district or private school within 10 days of a child's disappearance. The notice is required to be given in writing with a copy of a photograph of the child, if available. A school must place a copy of the notice in the front of each missing child's school record that the child has been reported missing. If the school receives an inquiry or request from any person or entity for information about the missing child, they are required to notify the investigating law enforcement agency immediately.

Moreover, Section 49068.5 urges principals of public or private elementary schools to check to see if the child being enrolled or transferring into their school resembles a child listed as missing by the Department of Justice.

The California Attorney General works in partnership with the National Center for Missing & Exploited Children registry who issues the missing children bulletins. Other than the requirement under Section 49068.6, there is no legal requirement for school to post them on school grounds.

Information concerning a student must be furnished in compliance with a court order and the school district must make a reasonable effort to notify the parent and the pupil in advance of such compliance, if lawfully possible, within the requirements of the judicial order.⁷⁶

TRANSFER OF STUDENT RECORDS

The California Administrative Code, Title 5, Section 438, states that when a student transfers to another school district or to a private school a copy of the student's Mandatory Permanent Pupil Record shall be transferred upon request from the other district or private school. The original or a copy must also be retained permanently by the sending district. If the transfer is to another California public school, the student's entire Mandatory Interim Pupil Record shall be forwarded. If the transfer is to a private school or an out of state public school,

⁷³ Education Code section 49076(b)(1).

⁷⁴ Education Code section 49076.5.

⁷⁵ Education Code section 49076(a)(9).

⁷⁶ Education Code section 49077.

the Mandatory Interim Pupil Record may be forwarded. Permitted student records may also be forwarded.

MANDATORY PERMANENT PUPIL RECORDS

Section 432 defines Mandatory Permanent Pupil Records as those records which schools have been directed to compile by California statute or regulation. The Mandatory Permanent Pupil Record includes the following:

1. Legal name of pupil;
2. Date of birth;
3. Method of verification of birth date;
4. Sex of pupil;
5. Place of birth;
6. Name and address of parent of minor pupil;
7. Address of minor pupil if different than the above;
8. An annual verification of the name and address of the parent and the residence of the pupil;
9. Entering and leaving date of each school year and for any summer session or other extra session;
10. Subjects taken during each year, half year, summer session or quarter;
11. If marks or credits are given, the mark or number of credits toward graduation allowed for work taken;
12. Verification of or exemption from required immunization;
13. Date of high school graduation or equivalent.

MANDATORY INTERIM PUPIL RECORDS

The Mandatory Interim Pupil Records include the following;

1. A log or record identifying those persons (except authorized school personnel) or organizations requesting or receiving information from the record. The log or record

shall be accessible only to the legal parent or guardian or the eligible pupil, or a dependent adult pupil, or an adult pupil, or the custodian of records;

2. Health information, including Child Health Developmental Disabilities Prevention Program verification or waiver;
3. Participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge;
4. Language training records;
5. Progress slips and/or notices as required by Education Code sections 49066 and 49067;
6. Parental restrictions regarding access to directory information or related stipulations;
7. Parent or adult pupil rejoinders to challenged records and to disciplinary action;
8. Parental authorizations or prohibitions of pupil participation in specific programs;
9. Results of standardized tests administered within the preceding three years.

In addition, Education Code section 48918(k) states that records of expulsions shall be a non-privileged disclosable public record and that, “. . . the expulsion order and the causes for the expulsion shall be recorded in the pupil’s mandatory interim record and shall be forwarded to any school in which the pupil subsequently enrolls upon receipt of a request from the admitting school for the pupil’s school records.”

Education Code section 48201(b)(1) states:

“Upon a pupil’s transfer from one school district to another, the school district into which the pupil is transferring shall request that the school district in which the pupil was last enrolled provide any records that the district maintains in its ordinary course of business or receives from a law enforcement agency regarding acts committed by the transferring pupil that resulted in the pupil’s suspension from school or expulsion from the school district. Upon receipt of this information, the receiving school district shall inform any teacher of the pupil that the pupil was suspended from

school or expelled from the school district and shall inform the teacher of the act that resulted in that action.”

Based on Section 48201(b)(1), the receiving district is required to request records of suspension and expulsion. Therefore, the suspension records must be transferred as well.

All other pupil records are classified as Permitted Pupil Records.

DESTRUCTION OF PUPIL RECORDS

Mandatory Permanent Pupil Records must be preserved in perpetuity by all California schools. Mandatory Interim Pupil Records may be determined to be disposable when the student leaves the district or when their usefulness ceases. Destruction of Mandatory Interim Pupil Records may be destroyed during the third school year after the school year in which they originated. Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil’s completion of or withdrawal from the educational program.⁷⁷

STUDENT RECORDS AND THE NCLB

The NCLB of 2001, Public Law 107-110, amended existing provisions of federal laws relating to student records and student privacy, including FERPA.

The Act amended 20 U.S.C. Section 1232 by creating an exception to the release of student records when the United States Attorney General or an Assistant Attorney General of the United States who has been designated by the U.S. Attorney General, submits a written application to a court of competent jurisdiction for a court order requiring an educational agency to permit the Attorney General, or the Attorney General’s designee, to collect educational records in the possession of the educational agency that are relevant to an authorized investigation or prosecution of a terrorism offense or an act of domestic or international terrorism. An educational agency or institution that, in good faith, produces educational records in accordance with the order issued by the court is immune from liability to any person for that production. In addition, the educational institution is not required to maintain a record of the Attorney General’s access to the student’s educational records. It is expected that the major impact of this provision will be on community colleges, colleges and universities.

The Act amended 20 U.S.C. Section 1232 relating to the protection of student rights by requiring the development of local policies concerning student privacy, parental access to information and the administration of certain physical examinations to minors. Section 1232(c) requires that all local educational agencies that receive federal funds develop and adopt policies in consultation with parents regarding the following:

1. The right of a parent to inspect, upon the request of the parent, a survey created by a third party before the survey is administered or distributed by a school to a student.

⁷⁷ California Code of Regulations, Title 5, Sections 437 and 16027.

2. Arrangements to protect student privacy in the event of the administration or distribution of a survey to a student.
3. The right of a parent to inspect, upon the request of the parent, any instructional material used as part of the educational curriculum for the student.
4. The administration of physical examinations or screenings that the school or agency may administer to a student.
5. The collection, disclosure or use of personal information collected from students for the purpose of marketing or selling that information.
6. The right of a parent to inspect upon the request of the parent, any instrument used in the collection of personal information before the instrument is administered or distributed to a student.

The parent has a right to inspect, upon the request of the parent, any survey which contains or inquires into one or more of the following items:

1. Political affiliations or beliefs of the student or the student's parent.
2. Mental or psychological problems of the student or the student's family.
3. Sex, behavior or attitudes.
4. Illegal, antisocial, self-incriminating, or demeaning behavior.
5. Critical appraisals of other individuals with whom respondents have close family relationships.
6. Legally recognized, privileged, or analogous relationships, such as those of lawyers, physicians, and ministers.
7. Religious practices, affiliations or beliefs of the student or the student's parents.
8. Income.

The policies developed by a local educational agency shall provide for reasonable notice of the adoption or continued use of such policies directly to the parents of students enrolled in schools served by that agency. The notice, at a minimum, shall be provided at least annually at the beginning of the school year and within a reasonable period of time after any substantive change in such policies, and offer an opportunity for the parent to opt the student out of participation in an activity the parent finds objectionable based on the criteria discussed above. The local agency is required to directly notify the parent of a student, at least annually at the beginning of the school year, of the specific or approximate dates during the school year when the following activities are scheduled or expected to be scheduled:

1. Activities involving the collection, disclosure or use of personal information collected from students for the purpose of marketing or selling that information.
2. The administration of any survey containing one or more of the items discussed above.
3. Any non-emergency invasive physical examination or screening that is required as a condition of attendance administered by the school and scheduled by the school in advance and not necessary to protect the immediate health and safety of the student or other students.

If a local agency has in place, on or before January 8, 2002, policies meeting the requirements of the new federal law, the agency is not required to develop and adopt new policies.

Section 1232(c)(4) states that the following items are not subject to the requirements of the Act:

1. College or other post-secondary education recruitment or military recruitment.
2. Book clubs, magazines and programs providing access to low cost literary products.
3. Curriculum and instructional materials used by elementary schools and secondary schools.
4. Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students and the subsequent analysis and public release of the aggregate data from such tests and assessments.

5. The sale by students of products or services to raise for school related or educational related activities.
6. Student recognition programs.

In addition, the provisions of Section 1232 do not apply to surveys administered to students in accordance with the IDEA.⁷⁸ The term “invasive physical examination” is defined as any medical examination that involves the exposure of private body parts or any act during such examination that includes incision, insertion, or injection into the body, but does not include a hearing, vision or scoliosis screening. The term “personal information” is defined as individually identifiable information, including a student’s or parent’s first and last name, a home or physical address, a telephone number, or a social security identification number. The term “survey” includes an evaluation.

STUDENT HEALTH RECORDS – FERPA AND HIPAA

In November 2008, the U.S. Department of Health and Human Services and the U.S. Department of Education issued the “Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records.”

The purpose of the Guidance is to explain the relationship between FERPA and HIPAA and to address any possible confusion as to how these two laws apply to records maintained on students. The Guidance also addresses certain disclosures that are allowed without consent or authorization under FERPA and HIPAA, especially those related to health and safety emergency situations.

In general, most records, including student health records, maintained by community college districts and school districts are “education records” subject to FERPA and not subject to HIPAA. Only in very limited circumstances would HIPAA apply.

The HIPAA Privacy Rule specifically excludes from its coverage those records that are protected by FERPA including student health records. In determining whether personally identifiable information from student health records maintained by a community college district or school district may be disclosed, districts should refer to FERPA and its requirements and consult with legal counsel.

OVERVIEW OF HIPAA

Congress enacted HIPAA in 1996 to improve the efficiency and effectiveness of the health care system through the establishment of national standards and requirements for electronic health care transactions and to protect the privacy and security of individually identifiable health information. Under HIPAA, “covered entities” include health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions.⁷⁹ “Health care providers” include institutional

⁷⁸ 20 U.S.C. section 1400 et seq.

⁷⁹ 45 C.F.R. Section 160.103.

providers of health or medical services, such as hospitals, as well as non-institutional providers, such as physicians, dentists and other practitioners, along with any other person or organization that furnishes bills or has paid for health care in the normal course of business. Covered transactions are those for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan.⁸⁰

The HIPAA Privacy Rule requires covered entities to protect individuals' health records and other identifiable health information by requiring appropriate safeguards to protect privacy, and setting limits and conditions on the uses and disclosures that may be made of such information without patient authorization. HIPAA gives patients rights over their health information, including the right to examine and obtain a copy of their health records and to request corrections.

INTERSECTION OF FERPA AND HIPAA

When a school provides health care to students in the normal course of business, such as through its health clinic, it is also a "health care provider" as defined by HIPAA. If a school also conducts any covered transactions electronically in connection with that health care, it is then a covered entity under HIPAA. As a covered entity, the school must comply with HIPAA with respect to its transactions. However, many schools, even those that are HIPAA covered entities, are not required to comply with HIPAA because the only health records maintained by the school are "education records" or "treatment records" of eligible students under FERPA, both of which are excluded from coverage under HIPAA.⁸¹

CHANGES TO THE CALIFORNIA EDUCATION CODE

Assembly Bill 143, effective January 1, 2012, made several changes to Education Code sections 49061 and 49076 regarding pupil records in K-12 education. The definition of "directory information" was modified to no longer include a pupil's place of birth and to include a pupil's e-mail address. Education Code section 49061(c) now provides:

“‘Directory information’ means one or more of the following items: pupil’s name, address, telephone number, date of birth, e-mail address, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the pupil.”

Assembly Bill 143 also modifies Education Code section 49076, which requires school districts to allow access to pupil records without written parental consent under certain circumstances. Section 49076(a)(1)(I) now provides access to education records for the counsel of record for a minor in regards to a criminal investigation or probation violation, or in regards to proceedings to declare the person a ward of the court. Probation officers and district attorneys continue to have access for these purposes as well.

⁸⁰ See, 45 C.F.R. Section 160.103; 45 C.F.R. Section 162.

⁸¹ 45 C.F.R. Section 160.103.

Existing law requires the recipient of pupil records to be notified of the prohibition against transmitting the information to others without the written consent of the parent. Assembly Bill 143 modifies Education Code section 49076(b) to require certain officials and authorities receiving pupil records to certify in writing to the school district that the information shall not be disclosed to another party, except as required by law. This requirement applies to law enforcement agencies that receive reports of suspected criminal activity from school administrators pursuant to Education Code section 48902, and individuals who receive pupil records pursuant to Education Code section 49076(a)(1)(I) discussed above. Education Code section 49076(b) now provides:

“The officials and authorities to whom pupil records are disclosed pursuant to subdivision (f) of Section 48902 and subparagraph (I) of paragraph (1) of subdivision (a) shall certify in writing to the disclosing school district that the information shall not be disclosed to another part, except as provided under the federal Family Educational Rights and Privacy Act of 2001 (20 U.S.C. Sec. 1232g) and state law, without the prior written consent of the parent of the pupil or the person identified as the holder of the pupil’s educational rights.”

Finally, Assembly Bill 143 clarifies that districts **may** release pupil records to any person or party without written parental consent, if the records have been de-identified, which requires the removal of all personally identifiable information, provided the district has made a reasonable determination that a pupil’s identity is not personally identifiable, whether through single or multiple releases, and has taken into account other pertinent reasonably available information.⁸²

Assembly Bill 733 amends Education Code section 49076(a)(2), effective January 1, 2013, to state that school districts **may** release information from student records to:

“(G)(i) A contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant.

(ii) Notwithstanding Section 99.31(a)(1)(i)(B) of Title 34 of the Code of Federal Regulations, a disclosure pursuant to this paragraph shall not be permitted to a volunteer or other party.”

Assembly Bill 733 also broadens the “audit” exception, which requires districts to disclose student records to certain governmental agencies. Education Code section 49076(a)(1) is amended to state that “access to those particular records relevant to the legitimate educational interests of the requester shall be permitted to:

⁸² Education Code section 49076(c).

“(C) Authorized representatives of the Comptroller General of the United States, the Secretary of Education, and state and local educational authorities, or the United States Department of Education’s Office for Civil Rights, if the information is necessary to audit or evaluate a state or federally supported education program, or in connection with the enforcement of, or compliance with, the federal legal requirements that relate to such a program. Records released pursuant to this section shall comply with the requirements of Section 99.35 of Title 34 of the Code of Federal Regulations.”

In addition, Assembly Bill 733 amends Education Code section 49076(a)(1)(H) to state that records related to a parent or guardian’s failure to comply with the compulsory education law shall be released to the district attorney’s office (this section previously referred to a “prosecuting agency” rather than the “district attorney’s office”).

In 2014, the California Legislature enacted Assembly Bill 1442,⁸³ Assembly Bill 1544,⁸⁴ and Senate Bill 1177.⁸⁵ Each of these Bills addresses the confidentiality of student information and contracts with third party providers of online services.

Assembly Bill 1584 added Education Code Section 49073.1, effective January 1, 2015. Section 49073.1 states that a local educational agency may, pursuant to a policy adopted by its governing board, enter into a contract with a third party to provide services, including cloud based services, for the digital storage, management and retrieval of pupil records, or to provide digital educational software that authorizes a third party provider to access, store and use pupil records.⁸⁶ A local educational agency that enters into a contract with a third party must ensure that the contract contains all of the following:

1. A statement that pupil records⁸⁷ continue to be the property of and under the control of the local educational agency.
2. A description of the means by which pupils may retain possession and control of their own pupil-generated

⁸³ Stats. 2014, ch. 799.

⁸⁴ Stats. 2014, ch. 800.

⁸⁵ Stats. 2014, ch. 839.

⁸⁶ Education Code 49073.1(a).

⁸⁷ For purposes of Education Code section 49073.1(d)(5)(A), “pupil records” are defined as both of the following: (i) Any information directly related to a pupil that is maintained by the local educational agency and (ii) Any information acquired directly from the pupil through the use of instructional software or applications assigned to the pupil by a teacher or other local educational agency employee.

Under section 49073.1(d)(5)(B), “Pupil records” does not mean any of the following: (i) deidentified information, including aggregated deidentified information, used by the third party to improve educational products for adaptive learning purposes and for customizing pupil learning; (ii) deidentified information, including aggregated deidentified information, used to demonstrate the effectiveness of the operator’s products in the marketing of those products; (iii) deidentified information, including aggregated deidentified information, used for the development and improvement of educational sites, services, or applications.

content,⁸⁸ if applicable, including options by which a pupil may transfer pupil-generated content to a personal account.

3. A prohibition against the third party using any information in the pupil record for any purpose other than those required or specifically permitted by the contract. This particular provision may also meet similar FERPA requirements by referencing section 99.31 (a) (1) (i) (B) of Title 34 of the Code of Federal Regulations, which provides for an agency relationship with a contractor and limits access to meeting the terms of the agreement (not a “school official” relationship, which would provide for more discretion on the part of the third party).
4. A description of the procedures by which a parent, legal guardian, or eligible pupil⁸⁹ may review personally identifiable information in the pupil’s records and correct erroneous information.
5. A description of the actions the third party will take, including the designation and training of responsible individuals, to ensure the security and confidentiality of pupil records. Compliance with this requirement shall not, in itself, absolve the third party of liability in the event of an unauthorized disclosure of pupil records.
6. A description of the procedures for notifying the affected parent, legal guardian, or eligible pupil in the event of an unauthorized disclosure of the pupil’s records.
7. A certification that a pupil’s records shall not be retained or available to the third party upon completion of the terms of the contract and a description of how that certification will be enforced. The statute notes that this requirement shall not apply to pupil-generated content if the pupil chooses to establish or maintain an account with the third party for the purpose of storing that content.

⁸⁸ For purposes of Education Code section 49073.1(d)(4), “pupil generated content” means “materials created by a pupil, including, but not limited to, essays, research reports, portfolios, creative writing, music or other audio files, photographs, and account information that enables ongoing ownership of pupil content. “Pupil-generated content” does not include pupil responses to a standardized assessment where pupil possession and control would jeopardize the validity and reliability of that assessment.”

⁸⁹ Consistent with FERPA, this statute defines an eligible student as a student aged 18 or older (Education Code section 49073.1(d)(2)). However, a student who is 18 or over and is conserved or under a guardianship would not be an eligible student under FERPA.

8. A description of how the local educational agency and the third party will jointly ensure compliance with the federal Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g). Districts should carefully consider this provision, in terms of notice, access, and retention and destruction requirements, to ensure that the third party is not placing all responsibility on the district and that the district's specifications in these areas are met by the third party.
9. A prohibition against the third party using personally identifiable information in pupil records to engage in targeted advertising. Although Education Code section 49073.1(d)(1) defines "deidentified information" as "information that cannot be used to identify an individual pupil," districts may wish to also cite to the FERPA regulations which define "personally identifiable information" to ensure clarity and consistency in application of this provision.

Education Code section 49073.1(c) states that in addition to any other penalties, a contract that fails to comply with the requirements of Section 49073.1 shall be rendered void if, upon notice of any reasonable opportunity to cure, the noncompliant party fails to come into compliance and cure any defect. Written notice of noncompliance may be provided by any party to the contract. All parties subject to a contract voided under Section 49073.1(c) shall return all pupil records in their possession to the local educational agency.

Education Code section 49073.1(e) states that if the provisions of Section 49073.1 are in conflict with the terms of a contract in effect before January 1, 2015, the provisions of Section 49073.1 shall not apply to the local educational agency or the third party subject to that agreement until the expiration, amendment or renewal of the agreement.

Assembly Bill 1442 added Education Code section 49073.6. Section 49073.6(b) states that notwithstanding any other law or regulation, a school district, county office of education or charter school that considers a program to gather or maintain in its records any information obtained from social media of any enrolled pupil shall notify pupils and their parents or guardians about the proposed program and provide an opportunity for public comment at a regularly scheduled public meeting of the governing board of the school district or county office of education, or the governing body of the charter school, before adoption of the program. The notification required must be part of the annual notification pursuant to Education Code section 48980.

Education Code section 49073.6(c) states that a school district, county office of education or charter school that gathers or maintains in its records any information obtained from social media of an enrolled pupil shall do all of the following:

1. Gather or maintain only information that pertains directly to school safety or to pupil safety.
2. Provide a pupil with access to any information about the pupil gathered or maintained by the school district, county office of education, or charter school that was obtained from social media, and an opportunity to correct or delete such information.
3. Destroy information gathered from social media and maintained in its records within one year after a pupil turns 18 years of age or within one year after the pupil is no longer enrolled in the school district, county office of education, or charter school, whichever occurs first. Districts, county offices, and charter schools must also notify each parent or guardian of a pupil subject to the program that the pupil's information is being gathered from social media and that any information subject to this section maintained in the school district's, county office of education's, or charter school's records with regard to the pupil shall be destroyed as noted above.

The notification required by Section 49073.6 may be provided as part of the annual notification required by Section 48980. The notification shall include, but is not limited to, all of the following components:

1. An explanation of the process by which a pupil or a pupil's parent or guardian may access the pupil's records for examination of the information gathered or maintained pursuant to this section.
2. An explanation of the process by which a pupil or a pupil's parent or guardian may request the removal of information or make corrections to information gathered or maintained pursuant to this section.

Finally, Section 49073.6 will also require, if this program is provided through a contract with a third party, the following terms to be included in the contract:

1. Prohibit the third party from using the information for purposes other than to satisfy the terms of the contract. For compliance with the Family Educational Rights and Privacy Act ("FERPA"), this term may be achieved by referencing section 99.31(a)(1)(i)(B) of Title 34 of the Code of Federal Regulations, which provides for an agency relationship with a contractor and limits access to meeting

the terms of the agreement (not a “school official” relationship, which would provide for more discretion on the part of the third party).

2. Prohibit the third party from selling or sharing the information with any person or entity other than the school district, county office of education, charter school, or the pupil or his or her parent or guardian.
3. Require the third party to destroy the information immediately upon satisfying the terms of the contract. Districts should consider what specific steps to require to ensure destruction of pupil record information, and include those steps in the contract provision, such as acceptable methods of destruction (district Information Technology experts can assist with specifications) and written certification of destruction from the third party vendor.
4. Require the third party, upon notice and a reasonable opportunity to act, to destroy information pertaining to a pupil when the pupil turns 18 years of age or is no longer enrolled in the school district, county office of education, or charter school, whichever occurs first. The school district, county office of education, or charter school shall provide notice to the third party when a pupil turns 18 years of age or is no longer enrolled in the school district, county office of education, or charter school. Notice provided pursuant to this clause shall not be used for any other purpose.

Effective January 1, 2016, Senate Bill 1177 adds Business and Professions Code section 22584. Section 22584 applies to operators of an internet website, online service, online application or mobile application with actual knowledge that the site, service or application is used primarily for K-12 school purposes and was designed and marketed for K-12 school purposes. Section 22584(b) prohibits an operator from knowingly engaging in the following activities with their site, service or application:

1. Engaging in targeted advertising on the operator’s site, service, or application, or targeted advertising on any other site, service, or application when the targeting of the advertising is based upon any information, including covered information⁹⁰ and persistent unique identifiers, that

⁹⁰ “Covered information” is defined as “personally identifiable information or materials, in any media or format that meets any of the following:

the operator has acquired because of the use of that operator's site, service, or application.

2. Using information, including persistent unique identifiers, created or gathered by the operator's site, service, or application, to amass a profile about a K-12 student except in furtherance of K-12 school purposes.⁹¹
3. Selling a student's information, including covered information. This prohibition does not apply to the purchase, merger, or other type of acquisition of an operator by another entity, provided that the operator or successor entity continues to be subject to the provisions of this section with respect to previously acquired student information.
4. Disclosing covered information unless the disclosure is made:
 - a. In furtherance of the K-12 purpose of the site, service, or application, provided the recipient of the covered information disclosed pursuant to this subparagraph: (1) shall not further disclose the information unless done to allow or improve operability and functionality within that student's classroom or school; and (2) as legally required to comply with subdivision (d);
 - b. To ensure legal and regulatory compliance;
 - c. To respond to or participate in judicial process;

(1) Is created or provided by a student, or the student's parent or legal guardian, to an operator in the course of the student's, parent's, or legal guardian's use of the operator's site, service, or application for K-12 school purposes.

(2) Is created or provided by an employee or agent of the K-12 school, school district, local education agency, or county office of education, to an operator.

(3) Is gathered by an operator through the operation of a site, service, or application described in subdivision (a) and is descriptive of a student or otherwise identifies a student, including, but not limited to, information in the student's educational record or email, first and last name, home address, telephone number, email address, or other information that allows physical or online contact, discipline records, test results, special education data, juvenile dependency records, grades, evaluations, criminal records, medical records, health records, social security number, biometric information, disabilities, socioeconomic information, food purchases, political affiliations, religious information, text messages, documents, student identifiers, search activity, photos, voice recordings, or geolocation information." Business and Professions Code section 22584 (i).

⁹¹ "K-12 school purposes" is defined as "purposes that customarily take place at the direction of the K-12 school, teacher, or school district or aid in the administration of school activities, including, but not limited to, instruction in the classroom or at home, administrative activities, and collaboration between students, school personnel, or parents, or are for the use and benefit of the school." Business and Professions Code section 22584 (j).

- d. To protect the safety of users or others or security of the site; or
- e. To a service provider, provided the operator contractually prohibits the service provider from using any covered information for any purpose other than providing the contracted service to, or on behalf of, the operator; prohibits the service provider from disclosing any covered information provided by the operator with subsequent third parties; and requires the service provider to implement and maintain reasonable security procedures and practices as stated.

Business and Professions Code section 22584(d) requires an operator to perform the following:

1. Implement and maintain reasonable security procedures and practices appropriate to the nature of the covered information, and protect that information from unauthorized access, destruction, use, modification, or disclosure. Districts should consult with Information Technology staff to determine what specifications meet the district standards in these areas.
2. Delete a student's covered information if the school or district requests deletion of data under the control of the school or district. Districts should also consider, as part of this provision, including the steps and documentation the district requires to show compliance.

Business and Professions Code section 22584(e) grants limited disclosure of covered information of a student in specified situations, as long as subsection (b) (1) to (3) are not violated, under the following circumstances:

1. If other provisions of federal or state law require the operator to disclose the information, and the operator complies with the requirements of federal and state law in protecting and disclosing that information.
2. For legitimate research purposes, as required by state or federal law and subject to the restrictions under applicable state and federal law; or as allowed by state or federal law and under the direction of a school, school district, or state department of education, if no covered information is used

for any purpose in furtherance of advertising or to amass a profile on the student for purposes other than K–12 school purposes.

3. To a state or local educational agency, including schools and school districts, for K–12 school purposes, as permitted by state or federal law.

An operator may use deidentified student covered information as follows:

1. Within the operator’s site, service, or application or other sites, services, or applications owned by the operator to improve educational products.
2. To demonstrate the effectiveness of the operator’s products or services, including in their marketing.

U.S. DEPARTMENT OF EDUCATION GUIDANCE

The United States Department of Education published a brochure entitled, “Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools.” The brochure notes that school officials are regularly asked to balance the interest of safety and privacy for individual students and that while FERPA generally requires schools to ask for written consent before disclosing a student’s personally identifiable information to individuals other than his or her parents, FERPA also allows schools to take key steps to maintain school safety.

In an emergency, FERPA permits school officials to disclose, without consent, education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals. At such times, records and information may be released to appropriate parties, such as law enforcement officials, public health officials, and trained medical personnel.⁹² The period of disclosure is usually limited to the length of the emergency and generally does not allow for a blanket release of all personally identifiable information from the student’s education records.

Under FERPA, investigative reports and other records created by school security staff to monitor safety and security in and around schools are not considered education records subject to FERPA. Therefore, schools may disclose information from law enforcement unit records to anyone, including outside law enforcement authorities, without parental consent.⁹³

The U.S. Department of Education stated that law enforcement unit officials who are employed by the school district should be designated in the school district’s FERPA notification as “school officials” with a “legitimate educational interest.” As school officials, law enforcement unit officials may be given access to personally identifiable information from

⁹² See, 34 C.F.R. Sections 99.31(a)(10) and 99.36.

⁹³ See, 44 C.F.R. Section 99.8.

students' education records. The school's law enforcement unit officials must protect the privacy of educational records it receives and may disclose them only in compliance with FERPA. Therefore, law enforcement unit records should be maintained separately from education records.

The U.S. Department of Education also stated that images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA. As a result, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit may designate an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.

The U.S. Department of Education indicated that FERPA does not prohibit a school official from disclosing information about a student if the information is obtained through the school official's personal knowledge or observation, and not from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information, and the teacher may disclose what he or she overheard to appropriate authorities.