

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

TITLE IX BREAKFAST BRIEFING: FERPA 101

Kirsten Small, CIPP/US

MARCH 13, 2018  
[ksmall@nexsenpruet.com](mailto:ksmall@nexsenpruet.com)







# WHAT IS FERPA?

- ▶ The Family Educational Rights and Privacy Act of 1974, aka “FERPA,” is a Federal law that protects the privacy of student education records.
- ▶ Applies to any public or private school that receives federal funds.
- ▶ Obligations under FERPA spelled out by statute, 20 U.S.C. § 1232g, and regulations, 34 C.F.R. §§ 99.1 – 99.67.
- ▶ Especially important:
  - ▶ § 99.3 (definitions);
  - ▶ § 99.30 (when consent is required for disclosure);
  - ▶ § 99.31 (when consent is not required for disclosure).

# FERPA'S TWO GOALS

- ▶ Ensure that students\* can review their own educational records and request corrections;
- ▶ Protect students' right to privacy in their educational records by conditioning disclosure on affirmative consent, with certain exceptions.

# TEXT OF FERPA:

“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information,” unless

- ▶ The student consents to the disclosure, or
- ▶ The disclosure is exempt from the consent requirement.

# TEXT OF FERPA:

“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any **personally identifiable information** in **education records** other than **directory information**,” unless

- ▶ The **student** consents to the disclosure, or
- ▶ The disclosure is exempt from the consent requirement.

# “EDUCATION RECORDS”

- ▶ “Education records” are 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.



# “EDUCATION RECORDS”

- ▶ “Education records” include ...
  - ▶ Grades
  - ▶ Attendance
  - ▶ Disciplinary actions
  - ▶ Etc., etc.
- ▶ A “record” is any form of stored information.

## “EDUCATION RECORDS”

- ▶ “Education records” **do not** include ...
  - ▶ Records in the possession of the maker;
  - ▶ Records of a law enforcement unit;
  - ▶ Records related to employees;
  - ▶ Health records;
  - ▶ Post-attendance records, if not directly related to the student’s attendance;
  - ▶ Grades on peer-graded assignments.

# “EDUCATION RECORDS”

- ▶ A “law enforcement unit” is any individual, department, or division that is officially authorized by the educational institution to:
  - ▶ Enforce any local, State, or Federal law, or refer to appropriate authorities; or
  - ▶ Maintain the physical security and safety of the educational institution.
- ▶ “Records of a law enforcement unit” are materials that are:
  - ▶ Created by a law enforcement unit;
  - ▶ Created for a law enforcement purpose; and
  - ▶ Maintained by the law enforcement unit.

# “EDUCATION RECORDS”

- ▶ “Records of a law enforcement unit” does not include:
  - ▶ Records created by the law enforcement unit but maintained by another part of the educational institution; or
  - ▶ Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary proceeding.
- ▶ Education records don’t stop being education records when they are given to a law enforcement unit.

# “PERSONALLY IDENTIFIABLE INFORMATION”

- ▶ “Personally identifiable information” includes, but is not limited to:
  - ▶ The student’s name;
  - ▶ Name of the student’s parent or other family members;
  - ▶ Address of the student or student’s family;
  - ▶ A personal identifier, such as a social security number, student number, or biometric record;
  - ▶ Other direct identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;

# “PERSONALLY IDENTIFIABLE INFORMATION”

- ▶ PII, continued:
  - ▶ Other 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; or
  - ▶ 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.

# “PERSONALLY IDENTIFIABLE INFORMATION”

Information linkable to a specific student



# “PERSONALLY IDENTIFIABLE INFORMATION”

*Information linkable to a specific student, cont.*





# “PERSONALLY IDENTIFIABLE INFORMATION”

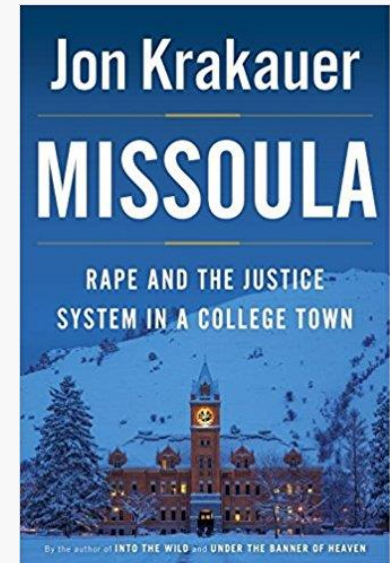
*Information linkable to a specific student, cont.*

July 2, 2015 letter providing technical assistance to  
the Attorney General of Virginia

# “PERSONALLY IDENTIFIABLE INFORMATION”

Information requested by a person who knows the identity of the student in question

- ▶ *Krakauer v. Montana*, 364 Mont. 527 (2016)
- ▶ Question: Does FERPA prohibit disclosure of student disciplinary record that would otherwise be subject to state public records law?



# “DIRECTORY INFORMATION”

- ▶ Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed, such as:
  - ▶ name, address, telephone listing, electronic mail address
  - ▶ date and place of birth
  - ▶ photographs
  - ▶ participation in officially recognized activities and sports
  - ▶ field of study
  - ▶ weight and height of athletes
  - ▶ enrollment status (full-, part-time, undergraduate, graduate)
  - ▶ degrees & awards received
  - ▶ dates of attendance
  - ▶ most recent previous school attended
  - ▶ grade level

# “DIRECTORY INFORMATION”

- ▶ “Directory information” generally cannot include a student’s social security number or student ID number, but ...
- ▶ A student’s ID number, user ID, or other unique personal identifier can be treated as “directory information” if:
  - ▶ It is used by the student for purposes of accessing or communicating in electronic systems;
  - ▶ It cannot be used to access education records, unless multi-factor identification is in place.

# “STUDENT”

- ▶ “Student” means any individual:
  - ▶ who is or has been in attendance at a school; and
  - ▶ regarding whom the school maintains education records.
- ▶ “Attendance” includes online learning
- ▶ “Student” does not include
  - ▶ Applicants/prospective students, whether or not accepted
  - ▶ Non-students auditing classes

# DISCLOSURE UNDER FERPA

Written consent to disclosure is required, unless disclosure is to:

- ▶ To specified persons or groups:
  - ▶ School & government officials;
  - ▶ Financial Aid;
  - ▶ Accrediting organizations; organizations conducting studies;
  - ▶ Parents of a dependent student, or to an “eligible student”;
- ▶ Or for specified purposes:
  - ▶ Directory information;
  - ▶ In connection with a health or safety emergency.

# DISCLOSURE UNDER FERPA

## FERPA Disclosure Provisions Related to Title IX

- ▶ Nonconsensual disclosure of records held by a postsecondary institution may be made:
  - ▶ To the victim of an alleged perpetrator of a crime of violence (including forcible sex offenses) or a non-forcible sex offense
    - ▶ Only of the “final results” of a disciplinary proceeding
      - ▶ limited to the name of the student, the violation committed, and the sanction imposed.
    - ▶ Disclosure permitted regardless of outcome.

# DISCLOSURE UNDER FERPA

## *FERPA Disclosure Provisions Related to Title IX, cont.*

- ▶ **To anyone** in connection with a disciplinary proceeding at a postsecondary institution, but
- ▶ The institution **must not** disclose the final results of a disciplinary proceeding unless it determines that:
  - ▶ The student is the alleged perpetrator of a crime of violence (incl. forcible sex offenses) or non-forcible sex offense, **and**
  - ▶ The student is found to have violated the schools rules or policies.
  - ▶ BUT, the school cannot disclose the name of any other student, including a victim or witness, without that person's written consent.



# DISCLOSURE UNDER FERPA

## What About Harassment?

- ▶ 2011 Guidance (rescinded 9/2017): In cases of harassment, FERPA permits disclosure of the sanction imposed when the sanction relates directly to the student receiving the information.
- ▶ Disclosure of other information, including sanctions not related to the receiving student, may violate FERPA.

# FERPA VS. TITLE IX

When there is a direct conflict between FERPA and Title IX, such that enforcement of FERPA would interfere with Title IX's purposes, the requirements of Title IX override any conflicting FERPA provisions.

# DISCLOSURE UNDER FERPA

## What About Clery Act Disclosures?

- ▶ Clery Act requires that both the accuser and the accused be informed of the outcome of any disciplinary proceeding involving a sex offense, regardless of whether a violation was found.
- ▶ Notice to accuser and accused under the Clery Act does not violate FERPA—the rules are essentially the same.
- ▶ FERPA regulations provide that limitations on re-disclosure don't apply to Clery Act disclosures.



Kirsten E. Small, CIPP/US  
Member

Greenville, SC  
864.370.2211  
[ksmall@nexsenpruet.com](mailto:ksmall@nexsenpruet.com)