



STATEMENT OF

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For a Hearing on

“Safeguarding Student Privacy and Parental Rights: A Review of FERPA and PPRA”

Before the

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Chairman Kiley, Ranking Member Bonamici, and members of the Subcommittee: Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union regarding student privacy, family rights, the Family Educational Rights and Privacy Act (FERPA), and the Protection of Pupil Rights Amendment (PPRA). These bedrock pieces of legislation reflect the congressional judgment that schools must be responsible stewards of student data.

This issue is a salient one for me professionally and personally. I began my professional life as a high school math teacher and spent three years of my legal career focused heavily on student privacy issues, including at the height of the pandemic and remote learning. I have since written a treatise for LexisNexis on these laws, focused not only on mere compliance but also on enabling schools to navigate increasing demands while protecting student data.¹ I have written numerous guides on a variety of topics under FERPA and the PPRA, including most recently on schools' privacy obligations given recent demands for student data.²

In this statement, I will focus on four topics: (1) underscoring the critical importance of student privacy in protecting students' and families' fundamental rights, (2) reviewing the basic requirements of FERPA and the PPRA, (3) evaluating their application to some recent events, and (4) suggesting next steps for Congress and the U.S. Department of Education in building robust protections for students and families.

Crucial among those next steps is for this Committee to elevate efforts by states and schools to address artificial intelligence in education and affirm long-standing federal policy against the creation of a centralized, national database of students.

Protecting Student Privacy Protects Fundamental Rights

Congress and state legislatures across the country have recognized that our fundamental human and civil rights and the right to privacy are deeply intertwined. Privacy is the foundation for the frank exchange of viewpoints, uninhibited research, the exploration of new ideas, and seeking help and advice without fear of retribution, judgment, or abuse. For this reason, lawmakers have extended robust privacy protections to our communications with counsel, our healthcare data, our financial records, our electronic communications, and — of course — our students' education records.

In passing FERPA and the PPRA in 1974, Congress recognized that privacy and family rights are essential to ensuring that students, parents, and families have robust protections and meaningful, free access to a public education. As the bills' drafter stated, codifying those

¹ Cody Venzke, *Data Privacy in Education: Complying with FERPA and State Laws* (Bender 2025 ed.).

² Cody Venzke, ACLU, *Reaffirming Privacy Obligations While Facing New Challenges: Guidance for States, Schools, and Universities* (2025), available at <https://www.aclu.org/documents/reaffirming-privacy-obligations-while-facing-new-challenges-guidance-for-states-schools-and-universities> (attached).

privacy rights “broadens the protection of civil rights to include the civil rights of parents and students vis-à-vis the schools.”³ Statutes and case law affirm that students enrolled in public schools are entitled to nondiscriminatory access to that education;⁴ FERPA and the PPRA complement those rights by ensuring that students and families can access educational services without sacrificing their privacy.

The Scope of Protections Established by FERPA and the PPRA

As applied to elementary and secondary education, FERPA and the PPRA are built around parents’ involvement with their students’ education, providing their panoply of rights primarily to parents. However, both laws recognize that students are entitled to rights as well. The privacy rights under both laws transfer to students when they turn eighteen, are emancipated, or (in the case of FERPA) enroll in postsecondary education — known under FERPA as “eligible students.”⁵ FERPA likewise permits schools to award rights to students above what is required by the statute,⁶ and neither FERPA nor the PPRA preempt stronger state student privacy laws.⁷ Although not an exhaustive enumeration of the rights and requirements under FERPA and the PPRA, the two laws roughly provide three sets of rights.

FERPA’s Core Right to Refuse to Consent to Disclosures

First, central to FERPA, and student privacy in general, is the prohibition on disclosures of students’ information without prior consent or under an applicable exception.

FERPA applies to the disclosure of “personally identifiable information” from a student’s “education record” by an “educational agency or institution.”⁸ While the traditional core of “education records” has been the “institutional records kept by a single central custodian” in “a filing cabinet in a records room at the school or on a permanent secure database,”⁹ it extends far more broadly. It encompasses any record that (1) directly relates to a student and (2) is maintained by the educational agency or institution.¹⁰ Those records can be maintained in any medium and could include discipline and medical records,¹¹ photos

³ 120 Cong. Rec. S14581 (May 14, 1974) (statement of Sen. Buckley).

⁴ *E.g.*, Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*; Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*; *Lau v. Nichols*, 414 U.S. 563 (1974).

⁵ 34 C.F.R. § 99.4(a); 20 U.S.C. § 1232h(c)(5)(B).

⁶ 34 C.F.R. § 99.5(b).

⁷ *Cf.* 34 C.F.R. § 99.61 (providing procedures for a school if it “determines that it cannot comply with the Act or this part due to a conflict with State or local law”); 34 C.F.R. §§ 99.31(a)(5)(ii) (permitting states to provide heightened protections in the juvenile justice system), 99.31(a)(15)(ii) (violations related to drugs and alcohol), 99.38 (juvenile justice); 20 U.S.C. § 1232h(c)(4)(B).

⁸ 34 C.F.R. § 99.30(a).

⁹ *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433, 435 (2002).

¹⁰ 34 C.F.R. § 99.3.

¹¹ Student Privacy Policy Office, *What Is an Education Record?*, U.S. Dep’t Ed., <https://studentprivacy.ed.gov/faq/what-education-record> (last visited Apr. 30, 2025).

posted on a school bulletin board or surveillance videos,¹² emails regarding students,¹³ and recommendations for membership in the National Honor Society.¹⁴

Generally, a K-12 educational institution must receive parental consent before disclosing student's personal information from education records,¹⁵ subject to 16 exceptions listed in the statute and regulations.¹⁶ Those 16 exceptions are narrow, and "schools [should] carefully limit the disclosure of students' personally identifiable information" even when an exception is applicable — FERPA does not permit broad, blanket disclosures.¹⁷

Key among those exceptions is the "school official" exception. Educational agencies and institutions may provide personal information from education records to "school officials," who are not just teachers and paid staff but also volunteers, contractors, attorneys, and technology platforms.¹⁸ Outside entities may qualify as a "school official" only if they meet three requirements. They must: (1) perform "an institutional service or function for which the agency or institution would otherwise use employees"; (2) be "under the direct control of the agency or institution with respect to the use and maintenance of education records"; and (3) not further disclose the information and use it only for its original purposes.¹⁹ Both employees and external "school officials" are limited to the personal information they need to carry out their duties — known as a "legitimate educational interest."²⁰

Rights for Parents or Students, as Applicable, to Request Access and Amendment

FERPA and the PPRA also establish scoped access rights for parents (or eligible students). Conservative Senator James Buckley, the bill's primary sponsor, described his concern with "secret school records" and their harm to students; he stated, "When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and

¹² Student Privacy Policy Office, *FAQs on Photos and Videos under FERPA*, U.S. Dep't Ed., <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa> (last visited Apr. 30, 2025).

¹³ Cf. 73 Fed. Reg. 74805, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-130>; Letter from Frank E. Miller Jr., Acting Director, Student Privacy Policy Office to Dr. Dana Monogue, Superintendent, Middleton Cross Plains Area School District (Apr. 15, 2025), *available at* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20of%20Finding%20Middleton%20Cross%20Plains%20April%202025_508_0.pdf.

¹⁴ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to Attorney for School District in Arizona Regarding Records Related to National Honor Society (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society>.

¹⁵ 34 C.F.R. § 99.30(a). As noted above, those rights transfer to the student when they turn 18 or enroll in postsecondary classes. 34 C.F.R. § 99.5(a)(1).

¹⁶ 20 U.S.C. § 1232g(b)(1)(A)–(L), (2), (3); 34 C.F.R. § 99.31(a)(1)–(16).

¹⁷ 73 Fed. Reg. 74805, 74827 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-252>.

¹⁸ 34 C.F.R. § 99.31(a)(1).

¹⁹ 34 C.F.R. § 99.31(a)(1)(i)(B)(1)–(3).

²⁰ 34 C.F.R. § 99.31(a)(1)(i)(A), (ii).

harmful material can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.”²¹

Of course, schools manage significant data about their students, and mandating proactive notice of every dimension of a student’s record would be unworkable and overwhelming for families and schools alike. Instead, FERPA awards parents the right to inspect their student’s education records and to request its correction²² — bedrock rights that remain fundamental in privacy laws to this day. Crucially, as the U.S. Department of Education recognized *just this year*, “FERPA does not provide an affirmative obligation for school officials to inform parents about any information, even if that information is contained in a student’s education records.”²³ Instead, FERPA only requires that education records be provided to parents and eligible students *upon request*.²⁴

The PPRA complements FERPA’s access provisions; schools must provide parents the right to inspect: “instructional materials,” surveys on a variety of sensitive topics, third-party surveys, and the instruments used for collecting student data for marketing or sale.²⁵

Additional PPRA Rights to Opt-Out or Grant Prior Consent

Third, the PPRA imposes additional proactive obligations on schools, but not related to the release of student data. Instead, it ensures that parents receive notice about certain surveys, medical procedures, or the sale of their students’ data. It also provides parents with the right to opt their students out of those surveys, procedures, or sales.²⁶ Likewise, when certain surveys are administered with Department of Education funding, they require parental consent *prior* to being administered.²⁷

The Laws’ Fundamental Provisions Continue to Apply, Even in New Contexts

The basic framework of FERPA and the PPRA continues to apply, even as the technological and political landscape evolves at a rapid pace. There is no exception in the laws for “new technological or political demands for new data.” And for good reason — the rights

²¹ 120 Cong. Rec. S14581 (May 14, 1974) (statement of Sen. Buckley).

²² 34 C.F.R. §§ 99.10, 99.20. As noted above, those rights transfer to the student when they turn 18 or enroll in postsecondary classes. 34 C.F.R. § 99.5(a)(1).

²³ Hon. Linda E. McMahon, Secretary of Education, & Frank E. Miller, Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education, *Cover Letters to the Department’s Annual Notices to SEAs and LEAs* at 3, U.S. Dep’t Ed. (Mar. 28, 2025), <https://studentprivacy.ed.gov/resources/cover-letters-departments-annual-notices-seas-and-leas>.

²⁴ 34 C.F.R. § 99.10.

²⁵ 20 U.S.C. § 1232h(c)(1)(A), (B), (C), (E)—(F).

²⁶ *Id.* § 1232h(c)(2).

²⁷ *Id.* § 1232h(b)

protected by FERPA and PPRA remain foundational, no matter the technological or political context.

Technology in the Classroom Must Comply with FERPA and the PPRA

Technology plays a crucial role in the classroom, bringing both benefits and risks. Video conferencing made remote learning possible during the height of the pandemic, and new technology can enable new pedagogical approaches.

However, the presence of technology — especially Big Tech — in the classroom has raised important questions about the use and monetization of children’s data. Likewise, the deployment of technology to monitor students’ communications, location, and web history has raised concerns about the government and industry surveilling children and families’ most private moments.²⁸ Similarly, accessing student data held by education technology (“edtech”) companies has resulted in frustration for parents, who are given the runaround as they simply seek to exercise their right to review students’ records.²⁹

Under FERPA’s “school official” exception — which often permits edtech platforms to receive student data as agents of schools — platforms must use student data only for the purposes for which it was provided and remain under the “direct control” of schools.³⁰ It remains crucial that the Department and schools ensure that FERPA’s protections are recognized, implemented, and supported.

States Play a Key Role in Protecting Student Privacy in an Age of Artificial Intelligence

AI of course is the latest example of the risks and benefits of technology in the classroom — and perhaps a historic one. On one hand, AI may enhance and streamline school operations, provide new tools for teaching, and become a key component in preparing students for the workforce — all priorities of this administration.³¹ On the other hand, AI systems used in

²⁸ See American Civil Liberties Union, *Digital Dystopia: The Danger in Buying What the EdTech Surveillance Industry is Selling* (2023), available at <https://www.aclu.org/publications/digital-dystopia-the-danger-in-buying-what-the-edtech-surveillance-industry-is-selling>.

²⁹ Complaints and School Responses, Student Data Privacy Project, <https://www.studentdataprivacyproject.com/sample-complaints-and-responses> (last visited Nov. 29, 2025); Caitlynn Peetz, *Parents Across the Country File Complaints on Friday with U.S. Department Of Education*, Bethesda Mag. (July 9, 2021), <https://bethesdamagazine.com/2021/07/09/mcps-parents-help-lead-push-for-better-federal-student-privacy-protections>.

³⁰ See 34 C.F.R. § 99.31(a)(1)(i)(B).

³¹ See, e.g., Executive Order 14277 of April 23, 2025, *Advancing Artificial Intelligence Education for American Youth*, 90 Fed. Reg. 17519 (Apr. 28, 2025), <https://www.federalregister.gov/documents/2025/04/28/2025-07368/advancing-artificial-intelligence-education-for-american-youth>; Proposed Priority and Definitions-Secretary’s Supplemental Priority and Definitions on Advancing Artificial Intelligence in Education, 90 Fed. Reg. 34203 (July 21, 2025); The White House, *Winning the Race: America’s AI Action Plan* (2025), available at <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf>; *Our Pledge to*

decision-making about students, such as course placement, may result in unfair, discriminatory, or hallucinatory outcomes, and data collected by AI systems may be misappropriated or misused.

Although FERPA and the PPRA are not a comprehensive framework for AI in education, they do provide an important foundation. As with remote learning tools and other edtech platforms, educational AI is subject to the safeguards established by those laws: student data may only be used for the purposes for which it was collected and must remain under the direct control of schools, not technology providers.

As AI continues to advance, including in the classroom, it is important that states retain substantial legislative and regulatory latitude to ensure that AI is safe, trustworthy, and nondiscriminatory. Nearly two dozen states have issued guidance on the use of AI in schools,³² and two require schools to develop AI policies,³³ touching on issues such as hallucinations, academic integrity, bias and ethical concerns, development of materials for educators' professional development, and review and procurement of AI tools. States and schools are often best positioned to address the specific needs of students, families, and educators and tailor curricula, after-school programs, and special services in response to the rapid emergence of AI.

Consequently, efforts at the federal level to broadly preempt state and local regulation of AI are misplaced and pernicious. Neither Congress nor federal agencies are positioned to address the myriad impacts of AI on education. No federal framework, no matter how robust, is likely to anticipate the unique impacts of AI in the classroom, professional development, or school administration, especially at this early date. State and local regulations are absolutely necessary to complement and inform federal law.

America's Youth, The White House (Sept. 8, 2025), <https://www.whitehouse.gov/edai>; *AI Education*, AI Gov, <https://www.ai.gov/initiatives/education> (last visited Nov. 22, 2025).

³² Kevin Bushweller, *Which States Require Schools to Have AI Policies?*, Educ. Week (Sept. 23, 2025), <https://www.edweek.org/technology/which-states-require-schools-to-have-ai-policies/2025/09>; *AI Guidance Issued by State Departments of Education*, Ballotpedia News (Aug. 2025), https://ballotpedia.org/AI_guidance_issued_by_state_departments_of_education; Jenny McCann, *Artificial Intelligence (AI) Education Task Forces*, Educ. Comm'n of the States (June 17, 2025), <https://www.ecs.org/artificial-intelligence-ai-education-task-forces>; Future of Privacy Forum, *State Guidance on the Use of Generative AI in K-12 Education*, Student Privacy Compass (Apr. 29, 2025), <https://studentprivacycompass.org/state-guidance-on-the-use-of-generative-ai-in-k-12-education/>; *Twenty States Have Released AI Guidance for Public Schools*, Ballotpedia News (Dec. 9, 2024), <https://news.ballotpedia.org/2024/12/09/twenty-states-have-released-ai-guidance-for-public-schools> (last visited Nov. 23, 2025).

³³ Ohio Rev. Code Ann. § 3301.24; Tenn. Code Ann. §§ 49-6-4603 to -4604.

Recent State-Level Policies Do Not Invalidate Parents' Rights Under FERPA

As noted above, rights under FERPA and the PPRA are built around parents and families. However, the exact scope of those rights has become the focus of debate, especially as the Department of Education has announced investigations into state laws and policies regulating how and when school staff may inform parents about a student's gender identity. The Department has announced at least five investigations premised at least in part on violations of FERPA or the PPRA.³⁴ Although FERPA requires schools to provide parents access to students' education records upon request — and schools should acknowledge the broad scope of "education records" — the Department's investigations are misplaced in several instances because the challenged policies do not appear to facially violate FERPA.

For example, the Department challenges California's Assembly Bill 1955,³⁵ arguing it interferes with parents' access rights under FERPA. That law, however, merely prohibits schools from imposing blanket requirements for employees "to disclose any information related to a pupil's sexual orientation, gender identity, or gender expression to any other person."³⁶ It prohibits districts from mandating *proactive* disclosure and does not affect schools' ability to respond to parents' requests under FERPA — a plain reading of the statute that California Department of Education has repeatedly affirmed.³⁷

³⁴ U.S. Department of Education Launches Investigation into California Department of Education for Alleged FERPA Violations, U.S. Dep't Ed. (Mar. 27, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-california-department-of-education-alleged-ferpa-violations>; Letter from Frank E. Miller Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education to Tony Thurmond, California Superintendent of Public Instructions (Mar. 27, 2025), <https://publicinterestprivacy.org/wp-content/uploads/2025/04/3.27.25-Letter-from-USDOE-FERPA-office.pdf>; Letter from Frank E. Miller Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education to Pender Makin, Commissioner, Maine Department of Education (Mar. 28, 2025), available at <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-maine-department-of-education-alleged-ferpa-violations>; Letter from Craig Trainor, Acting Assistant Secretary, Office for Civil Rights & Frank E. Miller Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education to Chris Reykdal, Superintendent, Washington Office of Superintendent of Public Instruction (Apr. 30, 2025), available at <https://www.ed.gov/about/news/press-release/title-ix-special-investigations-team-launches-directed-investigation-washington-state-superintendents-office-0>; U.S. Department of Education Launches Investigations into Four Kansas School Districts For Alleged Title IX, FERPA Violations, U.S. Dep't Ed. (Aug. 14, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigations-four-kansas-school-districts-alleged-title-ix-ferpa-violations>; U.S. Department of Education Initiates Investigation into Burlington Public Schools for Allegedly Violating Parental Rights, U.S. Dep't Ed. (Aug. 25, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-initiates-investigation-burlington-public-schools-allegedly-violating-parental-rights>.

³⁵ Cal. Educ. Code §§ 220.3, 220.5.

³⁶ *Id.*

³⁷ Letter from Len Garfinkel, General Counsel, California Department of Education to Frank E. Miller Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education (Apr. 11, 2025), available at <https://www.cde.ca.gov/nr/fa/yr25cosoltr0411b.asp>; Letter from Tony Thurmond, California Superintendent of

State policies challenged by the Department in Washington state and Maine similarly address proactive disclosures by school³⁸ or the use of names and pronouns “while at school” and do not limit access to student records upon a parent’s request.³⁹ Thus, so long as a challenged policy and its implementation⁴⁰ do not interfere with parents’ and eligible students’ ability to access their education records *upon request*, there is no direct conflict with FERPA.

These policies serve a sound purpose: *not* to cut parents out of decision-making about students, but to allow schools flexibility in responding to families’ unique circumstances. As the California law recognizes, “Parents and families have an important role to play in the lives of young people. Studies confirm that LGBTQ+ youth thrive when they have parental support and feel safe sharing their full identities with them, but it can be harmful to force young people to share their full identities before they are ready.”⁴¹ Consequently, “Policies that forcibly ‘out’ pupils without their consent remove opportunities for LGBTQ+ young people and their families to build trust and have these conversations when they are ready.”⁴² Similarly, both the Maine and Washington policies recognizes that different approaches are appropriate for different families.

However, it is worth emphasizing that educational agencies and institutions do *not* have the discretion to deem some records the “official” “education record” subject to FERPA while exempting others.⁴³ FERPA’s definition of “education record” is broad and encompasses any

Public Instruction to County and District Superintendents and Charter School Administrators (Apr. 1, 2025), available at <https://www.cde.ca.gov/nr/el/le/yr25ltr0401.asp>.

³⁸ Washington State School Directors’ Association, Procedure – Gender-Inclusive Schools at 2 (2022), available at <https://wssda.app.box.com/s/1c2bjp451nezhdjvvyxl2fqcwvuwdxaa> (“Parents have the right under FERPA to request their student’s records . . . To ensure the safety and well-being of the student, school employees should not disclose a student’s transgender or gender-expansive status to others . . .”).

³⁹ Barbara Archer Hirsch, Commission Counsel, Maine Human Rights Commission, Memo re: Interpretation of the Education Provisions of the MHRA 3-4 (2016), available at https://www.maine.gov/mhrc/sites/maine.gov/mhrc/files/inline-files/20160113_g.pdf.

⁴⁰ FERPA may be violated by not just official policies but also unofficial practices. 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.64(a).

⁴¹ Cal. AB 1955, ch. 95, sec. 2(d) (2024).

⁴² *Id.*, sec. 2(e).

⁴³ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to Attorney for School District in Arizona Regarding Records Related to National Honor Society (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society> (stating that application of FERPA “do[es] not depend on whether the educational institution decides to maintain records informally or make them part of the student’s permanent record”); accord *Easton Area Sch. Dist. v. Miller*, 659 Pa. 606, 627, 232 A.3d 716, 728 (2020) (bus surveillance video constituted education record); *President of Bates Coll. v. Congregation Beth Abraham*, No. CIV. A. CV-01-21, 2001 WL 1671588, at *4 (Me. Super. Feb. 13, 2001) (“[T]he statute, § 1232g(a)(4)(A) does not limit the definition of ‘other materials.’ As such that term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of the students.”); National Association of

record directly related to a student if it is maintained by the educational institution or agency,⁴⁴ with some exceptions. Similarly, FERPA prohibits a “policy or practice” of withholding records despite a parent’s request;⁴⁵ even if state or district policies are consistent with FERPA, individual schools’ practices may not.

Some of The Department’s Investigations Seemingly Exceed Its Authority

The focus of three of the Department’s investigations on state education agencies (SEAs) and, in the case of Maine, a state department of human rights suggests it is operating beyond the bounds set by FERPA. As described above, FERPA only applies to “educational agencies or institutions,” and the Department has steadfastly maintained that “we do not generally view SEAs as being ‘educational agencies’ under [FERPA] because we interpret the statutory definition of the term ‘student’ to mean that an educational agency is an agency attended by students.”⁴⁶ Because SEAs and state departments of education do not have students directly attending them, they are not an “educational agency” directly subject to FERPA.

Consequently, the Department has long maintained it “would only take actions against ‘non-school entities’” such as state departments of education if they “have not complied with FERPA requirements that relate to PII from education records they received under one of the exceptions to FERPA’s general consent requirement.”⁴⁷ Beyond that limited scenario, “[t]he Department has no authority under FERPA to take actions for other PII these entities may possess.”⁴⁸ When state departments of education *do* possess PII from education records, such as during an audit or in maintaining a statewide data system, that PII is subject to FERPA’s requirements regarding access, record-keeping, and re-disclosure.⁴⁹

College and University Attorneys, FERPA: THE BASICS AND BEYOND at (2014) (“[T]he definition [sic] of ‘education records’ does not give institutions any discretion to determine for themselves what is or isn’t an ‘education record’ or to ‘treat’ certain records as non-education records, even though they meet the statutory definition.”), <https://oeo.utah.edu/resources/2020.04.21%20NACUA%20FERPA.pdf>.

⁴⁴ 34 C.F.R. § 99.3 (defining “education record” as “those records” that are “directly related to a student” and “maintained” by the education agency or institution).

⁴⁵ 20 U.S.C. § 1232g(a) (prohibiting a “policy of denying, or which effectively prevents” parents from accessing records upon request); 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.64(a).

⁴⁶ 76 Fed. Reg. 75603, 75606 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-49>.

⁴⁷ 76 Fed. Reg. 75603, 75632 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-345>.

⁴⁸ 76 Fed. Reg. at 75632.

⁴⁹ 34 C.F.R. § 99.10(a)(2), 99.32, 99.33; Dale King, Directory, Family Policy Compliance Office, Letter to Nevada Department of Education about The Applicability of FERPA to Providing Parents With Access to Their Children’s Education Records at the State Level (2014), <https://studentprivacy.ed.gov/resources/letter-nevada-department-education-about-applicability-ferpa-providing-parents-access>.

The U.S. Department of Education's investigations into state departments of education do not allege that the departments themselves mishandled PII from education records, and FERPA is likely not applicable to the alleged misconduct.

Protection Against Incursion by Federal Agents

Finally, FERPA serves as a bulwark against federal collection of student data. FERPA has no general exception for disclosing information from students' education records to government agencies, including federal agencies and federal law enforcement.⁵⁰

Consequently, such disclosures can only be made with parental consent or pursuant to an exception.⁵¹ Moreover, FERPA's exceptions are permissive and FERPA alone does not ever require schools to disclose records, except upon request to a parent or eligible student.⁵²

Access by federal law enforcement was a central concern to the laws' drafters. Sen. Buckley expressed concern about one school's implementation of a survey "for the purpose of identifying potential drug users among its eighth-grade students,"⁵³ which was enjoined by a court for violating students' due process and privacy rights.⁵⁴ According to Sen. Buckley, "probation reports" and "other files" containing student data of "extreme sensitivity" "have also been leaked to the FBI" and "that, absent appropriate court orders, this information should [not] be made available."⁵⁵

Additional provisions regarding K-12 and postsecondary education similarly prohibit the creation of national databases of students and certainly prohibit the creation of a federal database of information considered by parents to be among the most sensitive and private information about their children.⁵⁶

Both FERPA and the PPRA and Their Regulations Can and Should Be Updated to Reflect New Technological Structures

Although FERPA and the PPRA are foundational statutes regulating the maintenance and collection of student data, they merit attention from Congress and the U.S. Department of

⁵⁰ Cf. 73 Fed. Reg. 74805, 74828 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-264> ("There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students' education records to non-educational State agencies.").

⁵¹ 34 C.F.R. § 99.31(a).

⁵² 73 Fed. Reg. 74806, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-124> ("The disclosure of education records under any of the conditions listed in § 99.31, including the 'school officials' exception, is permissive and not required.").

⁵³ 120 Cong. Rec. S14581 (May 14, 1974) (statement of Sen. Buckley).

⁵⁴ *Merriken v. Cressman*, 364 F. Supp. 913, 918–19 (E.D. Pa. 1973).

⁵⁵ 120 Cong. Rec. S14594 (May 14, 1974) (statement of Sen. Buckley).

⁵⁶ 20 U.S.C. §§ 1015c, 7911.

Education to ensure those protections keep pace with new challenges. Several priorities stand out:

Highlight State and Local Efforts to Manage AI in Education and Reiterate Longstanding Protections Against Federal Databases of Students

As noted above, FERPA and the PPRA are foundational statutes as schools grapple with the challenges — and benefits — presented by AI in education. Yet, those laws do not address the myriad implications of AI use in school administration and in the classroom. States and schools are actively seeking to address those challenges, and either this Committee or the Department should highlight best practices adopted at the state and local level, in addition to its earlier hearing on AI in education.⁵⁷

Similarly, some corners have called for increasing federal access to state data. Federal consolidation of student data, however, would not only increase the risk of federal surveillance but would violate longstanding prohibitions on federal databases of students.⁵⁸ This Committee and the Department should reiterate their commitment to that longstanding principle.

Ensure the Department Provides Robust Guidance and Employs a Variety of Enforcement Measures

FERPA's primary enforcement mechanism is that schools may lose federal funding for a "policy or practice" of violating FERPA's access requirements or disclosure prohibitions.⁵⁹ However, that mechanism has been rarely — if ever — used,⁶⁰ and for good reason: to avoid

⁵⁷ From Chalkboards to Chatbots: The Impact of AI on K-12 Education: Hearing Before the H. Comm. On Educ. & Workforce, 119th Cong. (2025), <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=412272>.

⁵⁸ 20 U.S.C. §§ 1015c, 7911.

⁵⁹ 20 U.S.C. § 1232g(a)(1)(A)-(B), (b)(1); *C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528, 538 (D.N.J.), *aff'd in part, rev'd in part*, 281 F.3d 219 (3d Cir. 2001) ("Here, there is no 'policy or practice' of the Board which prevents the inspection and review of a student's education records or which allows student education information to be disclosed without parental or student authorization."); *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999), *aff'd*, 3 F. App'x 905 (10th Cir. 2001) ("FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records."); *Schuler v. Bd. of Educ. of Cent. Islip Union Free Sch. Dist.*, No. 96-CV-4702, 2000 U.S. Dist. LEXIS 1006, at *35 (E.D.N.Y. Feb. 1, 2000); *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997) ("[T]he requirement placed on the participating institution is not that it must prevent the unauthorized release of education records . . . but that it cannot improperly release such records as a matter of policy or practice."); *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986) ("[I]t is clear that FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records."). Each of these decisions were based on individual suits under FERPA, a possibility that has been foreclosed by the Supreme Court based on the same "policy or practice" language in the statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002).

⁶⁰ Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. Legis. 22, 31-32 n.57 (2017); Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to*

stripping schools of critical federal funds. Instead, the Department should prioritize other enforcement actions made available by statute: providing guidance, seeking cease and desist orders, and entering into compliance agreements, none of which are limited to responding to a “policy or practice” of FERPA violations.⁶¹ Crucially, robust guidance and enforcement require staffing capacity and adequate appropriation levels — limitations that have long hindered FERPA enforcement.⁶²

Closing Loopholes that Permit Monetization of Student Data

As described above, FERPA and the PPRA emphatically apply to new technology and new contexts. However, current protections leave gaps, namely in the metadata and usage data that edtech platforms collect as students use their services. Because this data is not drawn “from” an education record, later integrated into one, or maintained as one on behalf of an educational institution,⁶³ it falls into a space unregulated by FERPA or the PPRA. Congress may close this loophole through a number of paths. Two merit discussion here:

- First, Congress might pass a federal version of “SOPIPA,” a law passed in nearly 30 states that prohibits the sale or use of student data by online services used primarily for “K-12 school purposes.”⁶⁴ SOPIPA-style protections could be incorporated directly into FERPA, or in conjunction with a requirement for schools to enter into written agreements with edtech platforms.
- Second, the Children’s Online Privacy Protection Act (COPPA) applies to many edtech platforms, and schools play a crucial role in ensuring that its requirements are fulfilled. Updating COPPA with more robust data minimization protections and extending its protections to teenagers would substantially fill this gap, although that

Suppress Open Records Requests, 101 Geo. L.J. 493, 498 (2013).

⁶¹ 20 U.S.C. §§ 1234e, 1234f; 73 Fed. Reg. 74805, 74843 (Dec. 9, 2008).

⁶² Office of the General Counsel of the Department of Education, Office of the Chief Privacy Officer’s Processing of Family Educational Rights and Privacy Act Complaints (ED-OIG/A09R0008) (2018), <https://www.oversight.gov/sites/default/files/documents/reports/2024-03/FY19A09R0008031224v100SECURED.pdf>

⁶³ U.S. Department of Education, Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices 2-3 (2014), available at <https://studentprivacy.ed.gov/resources/protecting-student-privacy-while-using-online-educational-services-requirements-and-best> (discussing “metadata”); Cody Venzke, Data Privacy in Education: Complying with FERPA and State Laws § 10.02[4] (Bender 2025 ed.).

⁶⁴ Student Online Personal Information Protection Act, Cal. Bus. & Prof. Code § 22584; accord Ariz. Rev. Stat. Ann. § 15-1046; Ark Code Ann. § 6-18-109; Cal. Bus. & Prof. Code § 22584; Conn. Gen. Stat. § 10-234cc; Del. Code Ann. tit. 14, §§ 8101A-8106A; D.C. Code § 38-831-02; Fla. Stat. Ann. 1002.22; Ga. Code Ann. § 20-2-666; Haw. Rev. Stat. § 302A-500; 105 Ill. Comp. Stat. 85/1 – 85/99; Iowa Code § 279.71; Kansas Stat. Ann. § 72-6331 – 72-6334; Me. Rev. Stat. tit. 20-A, § 953; Md. Code Ann., Educ., § 4-131; Mich. Comp. Laws § 388.1293-94; Mont. Code Ann. § 20-7-1324-25; Neb. Rev. Stat. § 79-2, 154 – 55; Nev. Rev. Stat. § 388.292(5); N.H. Rev. Stat. Ann. § 189:68-a; N.J. Stat. Ann. § 56:8-216; N.C. Gen. Stat. §§ 115C-401.2; Or. Rev. Stat. § 326.184; Tenn. Code Ann. § 49-1-708; Tex. Educ. Code Ann. § 32.151-57; Utah Code Ann. § 53E-9-309; Vt. Stat. Ann., tit 9, § 2443-2443f; Va. Code Ann. § 22.1-289.01; Wash. Rev. Code § 28A.604.030(2)-(4).

effort likely falls within jurisdiction of the Committee on Energy and Commerce. Within this Committee's jurisdiction, consideration should be given to aligning FERPA, the PPRA, and COPPA where possible. This may include ensuring that FERPA's "school official" exception — under which edtech platforms generally receive student data — incorporates COPPA's protections when applicable. The alignment may also entail aligning definitions of "personally identifiable information" and "education records" to include identifiers used in targeted advertising, which are clearly covered by COPPA, but not necessarily by FERPA.⁶⁵

Updating the Application of FERPA to Modern Electronic "Education Records"

Despite the broad sweep of the term "education records," courts and regulators have reached differing conclusions as to its application to digital records, driven in part by Supreme Court dicta from 2002 describing "FERPA records" as records "kept in a filing cabinet in a records room at the school or on a permanent secure database"⁶⁶ — an assessment that would freeze FERPA's protections in a pre-digital world if read as binding. This split is particularly pronounced in analyzing FERPA's application to emails sent by school employees regarding students.⁶⁷ The Department recently acknowledged this decisional split, but declined to definitively resolve it, promising to do so in future rulemaking.⁶⁸ Similarly, some schools have deemed metadata and usage data held by edtech

⁶⁵ Compare 16 C.F.R. 312.2 (covering "persistent identifiers"), with 34 C.F.R. § 99.3. PII under FERPA is limited to information that "would allow a reasonable person in the school community . . . to identify the student with reasonable certainty." 34 C.F.R. § 99.3. The U.S. Department of Education has stated that this standard does not "describe the technological or scientific skill level of a person who would be capable of re-identifying statistical information or redacted records." 73 Fed. Reg. 74806, 74831 (Dec. 9, 2008), available at <https://www.federalregister.gov/d/E8-28864/p-298>. This language might be read to exclude sophisticated actors such as online advertising platforms or data brokers, which have unique technical and data science capabilities, or the use of device identifiers, advertising identifiers, and device fingerprinting.

⁶⁶ *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002).

⁶⁷ Compare 73 Fed. Reg. 74805, 74814, 74816 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-120> (describing email providers as "maintaining" a record on behalf of schools); *State ex rel. ESPN, Inc.*, 132 Ohio St.3d 212 (2012) (concluding that emails were an "education record" because Ohio State's athletics department "retain[ed] copies of all e-mails and attachments sent to or by any person in the department" and that "the emails cannot be deleted"), with *S.A. ex rel. L.A. v. Tulare County Office of Education*, Civ. A. 08-1215, 2009 WL 3126322, *5 (E.D. Cal. Sept. 24, 2009) (concluding, pursuant to *Owasso*, an email is not an education record); *Phoenix Newspapers, Inc. v. Pima Community Coll.*, No. C20111954 (Ariz. Super. Ct. May 17, 2011) (emails were not an education record because the institution did not have control over "access and retention of the record" and users could delete them at any time); cf. *Colorado Attorney General, Formal Opinion No. 18-01* at 5 (2018), available at <https://coag.gov/attorney-general-opinions/2018-formal-ag-opinions-2>.

⁶⁸ Letter from Frank E. Miller Jr., Acting Director, Student Privacy Policy Office to Dr. Dana Monogue, Superintendent, Middleton Cross Plains Area School District (Apr. 15, 2025), available at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20of%20Finding%20Middleton%20Cross%20Plains%20April%202025_508_0.pdf.

platforms to *not* constitute an education record, blocking parents’ access to that data.⁶⁹ The Department should undertake rulemaking to ensure that “education records” is construed broadly; if necessary, Congress should amend FERPA to support that reading.

Conduct a Hearing to Assess Expanding Requirements for Written Agreements for Edtech Platforms and Imposing Data Minimization Requirements on Schools

Edtech platforms often — but not always — receive student data from schools through the “school official” exception, which permits teachers, school staff, volunteers, and contractors to receive student data to carry out their duties,⁷⁰ subject to certain requirements. Key among those requirements is that schools retain “direct control” over outside parties⁷¹ and that the data be used “only for the purposes for which the disclosure was made.”⁷² The Department has recognized that, although not mandated, a written agreement between schools and technology providers can help schools meet the “direct control” requirement.⁷³ Congress should hold a hearing to examine the benefits and challenges in requiring written agreements, and if it should be imposed on all disclosures under the “school official” exception, or just a subset.

Similarly, FERPA and the PPRA impose few strictures on what data schools may collect in the first place. Consequently, schools may collect and surveil information such as students’ diaries stored in school cloud accounts, the geolocation of school devices, and students’ health histories. On one hand, schools may be collecting information without a clear statutory purpose; on the other, schools have been charged to carry out numerous local, state, and federal initiatives. Although a data minimization requirement — one permitting schools to collect only what they need to carry out their authorized duties — may help protect privacy, it could hinder student support. A congressional hearing should examine whether a data minimization requirement for schools could be successfully implemented.

Protecting Sensitive Student Information from Disclosure without Consent

One of FERPA’s 16 exceptions is for the disclosure of “directory information,”⁷⁴ and the Department should ensure that that exception is not abused. Directory information is “information contained in an education record of a student that would not generally be

⁶⁹ *Complaints and School Responses*, Student Data Privacy Project, <https://www.studentdataprivacyproject.com/sample-complaints-and-responses> (last visited Nov. 29, 2025); Caitlynn Peetz, *Parents Across the Country File Complaints on Friday with U.S. Department Of Education*, *Bethesda Mag.* (July 9, 2021), <https://bethesdamagazine.com/2021/07/09/mcps-parents-help-lead-push-for-better-federal-student-privacy-protections>.

⁷⁰ 34 C.F.R. § 99.31(a)(1)

⁷¹ *Id.* § 99.31(a)(1)(i)(B)(2).

⁷² *Id.* §§ 99.31(a)(1)(i)(B)(3), 99.33(a)(2).

⁷³ 73 Fed. Reg. 74805, 74816 (Dec. 9, 2008).

⁷⁴ 34 C.F.R. §§ 99.31(a)(11), 99.37.

considered harmful or an invasion of privacy if disclosed,” such as the student’s name, address, photograph, date and place of birth, and field of study.⁷⁵ Such information “is intended to be publicly shared” and “would normally be found in a school yearbook or directory”⁷⁶ and may be disclosed without consent if parents are given notice and an opportunity to opt out.⁷⁷

However, the Department has also provided guidance that the disclosure of some information *would* “be considered harmful” and consequently does not qualify as directory information: class rosters,⁷⁸ sex, ethnicity, race, and Hispanic origin.⁷⁹ The Department should expressly exclude those categories from the definition of “directory information” in the regulations,⁸⁰ and add others already protected by federal law: immigration status,⁸¹ language status,⁸² housing status,⁸³ and gender identity and gender expression.⁸⁴ In addition, the statutory and regulatory definition of “directory information” includes identifiers such as physical addresses, phone numbers, and email addresses; in contrast with 1974, these types of data are now considered relatively sensitive⁸⁵ — and more recent statutes such as COPPA expressly prevent their collection and disclosure.⁸⁶ Congress and the Department should consider whether the inclusion of those pieces of information still truly qualify as “directory information.”

⁷⁵ *Id.* § 99.3.

⁷⁶ 76 Fed. Reg. 75604, 75631 (Dec. 2, 2011).

⁷⁷ 34 C.F.R. § 99.37.

⁷⁸ 65 Fed. Reg. 41852, 41855 (July 6, 2000).

⁷⁹ Paul Gammill, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to Postsecondary Institutions about the American Community Survey (ACS) 3 (2009), <https://studentprivacy.ed.gov/resources/letter-postsecondary-institutions-about-american-community-survey-acs>.

⁸⁰ Social security numbers and, with exceptions, student ID numbers are already excluded. 34 C.F.R. § 99.3.

⁸¹ *Lau v. Nichols*, 414 U.S. 563 (1974).

⁸² Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f).

⁸³ McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11432(g)(3)(G).

⁸⁴ *Cf. Bostock v. Clayton County*, 590 U.S. 644 (2020).

⁸⁵ See Elizabeth Laird, Center for Democracy & Technology, Protecting Students’ Privacy and Advancing Digital Equity at 5 (2020), <https://cdt.org/wp-content/uploads/2020/10/CDT-student-privacy-parents-teachers-students-research-report.pdf> (reporting a high school student stating in a focus group: “[T]he school having my address is concerning. Even though they probably need that, it’s concerning. Just having adults knowing where I live is creepy.”); Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, Letter of Finding Regarding Disclosing Contact Information to Parent (1994), *available at* <https://studentprivacy.ed.gov/resources/letter-finding-regarding-disclosing-contact-information-parent-march-1994> (permitting withholding of address information in an education record from estranged parents).

⁸⁶ 16 C.F.R. § 312.2 (requiring verifiable parental consent to collect or disclose “physical address,” “telephone number” and “online contact information,” including email addresses)

Additional areas that may merit attention include clarifying the relationship between FERPA and state open records laws,⁸⁷ and the relationship between FERPA and state laws mandating sharing with other governmental agencies.⁸⁸ These reforms by Congress and the U.S. Department of Education will help ensure that FERPA and the PPRA can serve as a foundation for students and families to exercise their right to a public education.

Conclusion

Student privacy laws are essential for students and families of all political views and identities to access a public education without surrendering their privacy. Nonetheless, privacy and data are evolving areas and merit updates from Congress and the U.S. Department of Education to ensure that these protections remain robust.

⁸⁷ *E.g.*, *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 730 (2020) (concluding that school bus video of child being physically disciplined by teacher was an education record under FERPA, but ordering its disclosure under Pennsylvania's Right to Know Law with the student faces blurred); Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. Legis. 22, 39 (2017) ("In its current incarnation, the ED simply denies the relationship between FERPA and state open records statutes.").

⁸⁸ *Compare* 603 Mass. Code Regs. § 23.07(h) (mandating disclosure of student health records); Minn. Stat. § 13.32(3)(f); Mo. Rev. Stat. § 167.183(1); Wisc. Stat. § 18.125(2)(h), *with* LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to School & College Legal Services of California 3 (2018), *available at* <https://studentprivacy.ed.gov/resources/letter-school-college-legal-services-california>; LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to Vermont Department of Health Regarding FERPA 5 (2005), *available at* <https://studentprivacy.ed.gov/resources/letter-vermont-department-health-regarding-ferpa-march-2005>; LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter to Alabama Department of Education re: Disclosure of Immunization Records 2 (2004), *available at* <https://studentprivacy.ed.gov/resources/letter-alabama-department-education-re-disclosure-immunization-records>.



STATEMENT OF

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For a Hearing on

“Safeguarding Student Privacy and Parental Rights: A Review of FERPA and PPRA”

ATTACHMENT

Reaffirming Privacy Obligations While Facing New Challenges: Guidance for States, Schools,
and Universities



Reaffirming Privacy Obligations While Facing New Challenges:

Guidance for States, Schools, and Universities

In its first 100 days, various Trump Administration efforts have focused predominantly on students, families, and educational institutions. Those efforts have included requests for student records by Immigration and Customs Enforcement (ICE), the U.S. Department of Education (USED), and Congressional committees; data sharing with ICE by campus law enforcement; and efforts by USED to use student privacy law to displace state and local policies protecting transgender students. Those efforts to obtain student records raise concerns that they conflict with schools' obligations under existing student privacy laws, especially the federal Family Educational Rights and Privacy Act (FERPA). This guidance outlines educational institutions' responsibilities under FERPA and how FERPA may apply to various Administration and Congressional efforts.

Summary: Key Provisions and Procedures

FERPA limits the ability of educational institutions to disclose student records, including to government agencies like ICE and USED. At its foundation, FERPA requires parental consent — or consent from the student if they are over 18 years old or enrolled in a postsecondary institution — before disclosing student records. FERPA includes 16 exceptions to that rule, including for responding to lawfully issued subpoenas, health and safety emergencies, and audits of educational programs. FERPA, however, does not permit broad, blanket releases, and no exception permits educational institutions to provide student records in response to informal governmental requests. Each of the 16 exceptions includes prerequisites that must be met before records are disclosed. For example, under the exception for subpoenas, the subpoena must be lawfully issued, and notice must generally be provided to the parent or student before disclosure. Likewise, these exceptions merely permit a school to disclose information — they do not require it.

In addition to adhering to FERPA's requirements, educational institutions should establish procedures for responding to ICE's presence on campus, informal requests (such as asking for documents or seeking information through social relationships), and formal demands for student records (such as presenting a subpoena). Those policies should identify a point person, provide training to institutional staff, and incorporate review by counsel.

This guidance details FERPA's requirements and analyzes its potential application to various scenarios that have arisen under the current Administration.¹

¹ Lead drafter, Cody Venzke, Senior Policy Counsel, ACLU. This document merely summarizes existing law and does not constitute legal advice. Educational agencies and institutions should consult with counsel to determine how the law described here applies to their exact circumstances and to assess what other laws may apply.

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FERPA Basics: Educational Institutions Must Protect Student Data, Even from Governmental Agencies

FERPA Precludes Disclosure of Students' Personal Information Without Consent Unless an Exception Applies

The federal Family Educational Rights and Privacy Act (FERPA)² is the primary student privacy law in the United States. FERPA applies to the use of “personally identifiable information” from a student’s “education record” by an “educational agency or institution” — meaning all three of the following must be true for FERPA to apply:

- The information is collected, used, or shared by an “**educational agency or institution**” that receives funds from the U.S. Department of Education and enrolls students. “Educational agencies and institutions” include public K-12 schools districts, public K-12 schools, charter schools, and public and private universities and colleges that accept students who receive federal financial aid.³ State departments of education are not considered “educational agencies or institutions” subject to FERPA because they do not directly enroll students, despite receiving USED funds.⁴
- The information comes from a student’s “**education record.**” While the traditional core of “education records” has been the “institutional records kept by a single central custodian” in “a filing cabinet in a records room at the school or on a permanent secure database,”⁵ it extends far more broadly. It encompasses any record that (1) directly relates to a student and (2) is maintained by the educational agency or institution.⁶ Those records can be maintained in any medium and include discipline and medical records,⁷ photos posted on a school bulletin board, surveillance videos,⁸ emails regarding students,⁹ and recommendations for

² 20 U.S.C. § 1232g.

³ 76 Fed. Reg. 75603, 75606 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-47>.

⁴ *Id.* (“[W]e have not generally viewed an SEA as being an educational agency under § 99.1(a)(2) . . .”).

⁵ *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433, 435 (2002)

⁶ 34 C.F.R. § 99.3.

⁷ Student Privacy Policy Office, *What Is an Education Record?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-education-record> (last visited Apr. 30, 2025).

⁸ Student Privacy Policy Office, *FAQs on Photos and Videos under FERPA*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa> (last visited Apr. 30, 2025).

⁹ *Cf.* 73 Fed. Reg. 74805, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-130>.

membership in the National Honor Society.¹⁰ The regulations also exempt certain types of records from the definition of “education record” such as staff members’ personal notes or “law enforcement unit” records, described below.¹¹

- The information coming from the education record is **personally identifiable information (PII)**.¹² PII is any information that “is linked or linkable to a specific student that would allow a reasonable person in the school community” to identify the student.¹³ This could include the student’s name, family members’ names, the student’s address, or descriptions of the student that would be identifiable by the wider school community,¹⁴ such as a widely known scandal about a school’s basketball players.¹⁵

FERPA provides parents and “eligible students” with three key rights: (1) the right to access their education records upon request, (2) the right to request amendment of those records, and (3) the right to consent before personally identifiable information is disclosed from those records.¹⁶ (An “eligible student” is a student who has turned 18 or enrolled in a college or university; once either of those requirements are met, rights under FERPA transfer to the student.¹⁷) Beyond a few notices that must be provided annually regarding school policies,¹⁸ FERPA does not impose proactive obligations to inform parents or eligible students about changes to the student’s education record. Instead, its right to access records requires access to be granted “within a reasonable period of time” upon request.¹⁹

FERPA, however, only provides a “floor” for protecting students’ information; states, educational institutions, and educational agencies have significant latitude to provide additional protections to student’s PII, so long as the state requirements do not “conflict” with FERPA.²⁰

¹⁰ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO ATTORNEY FOR SCHOOL DISTRICT IN ARIZONA REGARDING RECORDS RELATED TO NATIONAL HONOR SOCIETY (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society>.

¹¹ 34 C.F.R. § 99.3.

¹² See 34 C.F.R. § 99.30.

¹³ 34 C.F.R. § 99.3.

¹⁴ Id.

¹⁵ 73 Fed. Reg. 74806, 74833 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-304>.

¹⁶ 34 C.F.R. §§ 99.10, 99.20, 99.30.

¹⁷ 34 C.F.R. §§ 99.3, 99.5

¹⁸ 34 C.F.R. §§ 99.7, 99.34(a), 99.37(a).

¹⁹ 34 C.F.R. § 99.10. In contrast, the Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h, requires proactive notice to parents for certain surveys or medical examinations. For more information, see Student Privacy Policy Office, *What is the Protection of Pupil Rights Amendment (PPRA)?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-protection-pupil-rights-amendment-ppra> (last visited Apr. 30, 2025).

²⁰ See 34 C.F.R. § 99.5(b) (allowing educational agencies and institutions to grant students additional rights); *id.* § 99.61 (establishing procedures for addressing only state laws that prevent compliance with FERPA).

There Is No Exception for Disclosing to Governmental Agencies Generally or for Responding to Informal Governmental Requests

The right for parents and eligible students to provide consent before PII is disclosed is subject to 16 exceptions listed in the statute and regulations.²¹ None of those exceptions, however, permit disclosures to governmental agencies in general or for responding to informal requests from other governmental agencies.²² Consequently, disclosures to governmental agencies such as ICE or USED²³ must be made with parental consent or pursuant to one of FERPA's 16 exceptions.²⁴

Relevant Exceptions Are Narrow

Those 16 exceptions are narrow, and “schools [should] carefully limit the disclosure of students’ personally identifiable information” even when an exception is applicable²⁵ — FERPA does not permit broad, blanket disclosures. Five exceptions are particularly relevant to disclosures to law enforcement, ICE, and USED, but none of them provide open-ended permission to widely share students’ PII:

- **School official exception:** Educational agencies and institutions may provide PII from education records to “school officials,” who are not just teachers and paid staff but also volunteers, contractors, attorneys, technology platforms, and — occasionally — law enforcement.²⁶ Outside entities may qualify as a “school official” only if meet three requirements. They must: (1) perform “an institutional service or function for which the agency or institution would otherwise use employees”; (2) be “under the direct control of the agency or institution with respect to the use and maintenance of education records”; and (3) not further disclose the information and use it only for its original purposes.²⁷ Both employees and external “school officials” are limited to the PII they need to carry out their duties — known as a “legitimate

²¹ 20 U.S.C. § 1232g(b)(1)(A)–(L), (2), (3); 34 C.F.R. § 99.31(a)(1)–(16).

²² Cf. 73 Fed. Reg. 74805, 74828 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-264> (“There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students’ education records to non-educational State agencies.”).

²³ Cf. 34 C.F.R. § 99.31(a)(3)(iii) (FERPA exception permitting disclosures to USED for audits or evaluations of education programs).

²⁴ One of those exception permits disclosure of a type of information known as “directory information,” such as students’ names, grade levels, and activities, which may be disclosed without parental consent — *if* parents and eligible students have been provided notice and an opportunity to opt-out and have not exercised the opt-out. 34 C.F.R. §§ 99.3, 99.37. If the parent has not opted out, directory information may be provided to law enforcement, and secondary students’ names, addresses, and telephone listings *must* be provided to military recruiters. See 20 U.S.C. § 7908; 10 U.S.C. § 503(c).

²⁵ 73 Fed. Reg. 74805, 74827 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-252>.

²⁶ 34 C.F.R. § 99.31(a)(1).

²⁷ 34 C.F.R. § 99.31(a)(1)(i)(B)(1)–(3).

educational interest.”²⁸ The “legitimate educational interest” requirement would generally preclude law enforcement functioning as a school official from re-purposing student PII for general law enforcement activities.²⁹

- **Audit or evaluations:** The U.S. Secretary of Education — or her “authorized representative” — may receive PII from an education record to audit or evaluate an “education program” and its compliance with legal requirements for the program.³⁰ Use of the PII, however, is limited: the PII must be protected from further disclosure, may not be used for “other uses,” and must be destroyed when it is no longer needed.³¹
- **Lawfully issued subpoenas:** As described in more detail below, FERPA permits educational agencies and institutions to respond to “lawfully issued” subpoenas.³² A subpoena is “lawfully” issued if it is properly issued under state, federal, or administrative law.³³ However, parents and eligible students must be given notice of the subpoena “so that the parent or eligible student may seek protective action.”³⁴
- **Crimes of violence:** Finally, educational agencies and institutions may disclose “the final results of the disciplinary proceeding” if the institution has determined in the proceeding that the student has committed “a crime of violence or non-forcible sex offense,”³⁵ such as arson, assault, vandalism, or destruction of property.³⁶

²⁸ 34 C.F.R. § 99.31(a)(1)(i)(A), (ii).

²⁹ Privacy Technical Assistance Center, U.S. Department of Education, SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) at 12 (2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs.pdf (“This means that an off-duty police officer or SRO who is acting as a ‘school official’ under FERPA may not re-disclose, without appropriate consent, PII from education records to outside parties, including other employees of his or her police department who are not acting as school officials.”).

³⁰ 34 C.F.R. §§ 99.31(a)(3), 99.35.

³¹ 34 CFR 99.35(a)(2)(i)–(iii); 73 Fed. Reg. 74806, 74821 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-195> (“The statutory prohibitions on the redisclosure of education records apply to education records that SEAs, State higher educational authorities, the Department, and other Federal officials receive under an exception to the written consent requirement in FERPA, such as §§ 99.31(a)(3) and 99.35 (for audit, evaluation, compliance and enforcement purposes) . . .”).

³² 34 C.F.R. § 99.31(a)(9)(i).

³³ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>; LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER OF TECHNICAL ASSISTANCE TO THE REGENTS OF THE UNIVERSITY OF CALIFORNIA RE: DISCLOSURES TO EMPLOYMENT RELATIONS BOARD at 3 (1999), <https://studentprivacy.ed.gov/resources/letter-technical-assistance-regents-university-california-re-disclosures-employment>.

³⁴ 34 C.F.R. § 99.31(a)(9)(ii).

³⁵ 34 C.F.R. § 99.31(a)(14).

³⁶ 34 C.F.R. § 99.39.

However, that determination must be made pursuant to institutional procedures before “an honor court or council, committee, commission” or similar body.³⁷

- **Law enforcement unit:** As described below, FERPA permits an educational agency or institution’s “law enforcement unit” to create and maintain its own records, generally outside of FERPA’s requirements.³⁸ However, those records cannot include PII from students’ education records, nor can they be used for non-law enforcement purposes,³⁹ meaning FERPA’s protections will apply if the law enforcement unit obtains education records from other components of the educational agency or institution and mixes that information with their own records.

Crucially, each of these exceptions is permissive, not mandatory — educational agencies or institutions may disclose PII if an exception applies but are not required by FERPA to do so.⁴⁰ Thus, even if an educational agency or institution receives a subpoena or determine that a student has committed vandalism, they are not *required by FERPA* to disclose the information.

FERPA Protects Students with Respect to ICE and External Law Enforcement

Information May Be Disclosed in Response to a Valid Immigration Subpoena, but Disclosure Is Not Required

One of FERPA’s exceptions permits — but does not require — educational institutions or agencies to disclose PII from education records to “comply with a judicial order or lawfully issued subpoena.”⁴¹ Prior to responding to the subpoena, however, the educational agency or institution must make a “reasonable effort to notify the parent or eligible student” so that they “may seek protective action.”⁴² Notice is excused if the “issuing agency has ordered the existence or the contents of the subpoena. . . not be disclosed.”⁴³

Subpoenas issued by ICE likely will permit educational institutions or agencies to disclose students’ records in response to the subpoena, so long as the proper notice is first given. Although USED⁴⁴ has not directly addressed subpoenas issued by ICE, it has concluded that subpoenas and summons issued by agencies like the Internal Revenue Service are

³⁷ Id.

³⁸ 34 C.F.R. § 99.8.

³⁹ 34 C.F.R. § 99.8(b)(2).

⁴⁰ 73 Fed. Reg. 74806, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-124> (“The disclosure of education records under any of the conditions listed in § 99.31, including the ‘school officials’ exception, is permissive and not required.”).

⁴¹ 34 C.F.R. § 99.31(a)(9)(i).

⁴² 34 C.F.R. § 99.31(a)(9)(ii).

⁴³ 34 C.F.R. § 99.31(a)(9)(ii)(B).

⁴⁴ The component of the U.S. Department of Education responsible for interpreting and enforcing FERPA is the Student Privacy Policy Office or its predecessor, the Family Policy Compliance Office.

valid.⁴⁵ Moreover, both the FERPA statute and its regulations reference the “issuing agency,” suggesting the exception is not limited to judicial subpoenas.⁴⁶ Thus, subpoenas issued by administrative agencies such as ICE likely qualify for the exception.

Although the issuance of an administrative subpoena by ICE will *permit* educational institutions or agencies to disclose to PII from education records, a response is not *required*, for two reasons:

- First, all but one of FERPA’s exceptions are *permissive*, meaning that they allow but do not require disclosures — even if an exception applies, educational agencies and institutions are still free under FERPA to refuse to disclose the PII.⁴⁷
- Second, while longstanding law requires educational agencies and institutions to comply with valid *judicial* warrants and subpoenas, immigration agents often serve what are known as *administrative* subpoenas, which do not have the same legal force. The administrative subpoenas issued by ICE are not self-executing, meaning that to enforce them, ICE must first seek a court to compel compliance,⁴⁸ after which the recipient will have an opportunity to oppose compliance with the subpoena.⁴⁹

An administrative subpoena will be signed by an immigration officer or immigration judge within the Department of Homeland Security and bear the Department’s seal; in contrast, a valid court order or judicial subpoena will be issued by a state or federal court and signed by a state or federal judge or magistrate.

Unlike judicial warrants, administrative warrants *do not* give ICE agents authority to enter areas of school property that are not otherwise open to the public.⁵⁰ To enter those

⁴⁵ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>.

⁴⁶ 20 U.S.C. § 1232g(b)(1)(J)(ii); 34 C.F.R. § 99.31(a)(9)(ii)(B).

⁴⁷ 73 Fed. Reg. 74806, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-124>.

⁴⁸ See 8 U.S.C. § 1225(d)(4)(B) (providing authority for district court to issue order requiring compliance with subpoena, and providing that “failure to obey such order of the court may be punished by the court as a contempt thereof” (emphasis added)); *In re Nat’l Sec. Letter*, 33 F.4th 1058, 1063 (9th Cir. 2022) (“[W]hile an agency may issue a subpoena without prior judicial approval, it must invoke the aid of a federal court to enforce it. The power to punish is not generally available to federal administrative agencies, and so enforcement must be sought by way of a separate judicial proceeding.” (citations and internal quotation marks omitted)); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996).

⁴⁹ *United States v. Security State Bank and Trust*, 473 F.2d 638, 642 (5th Cir. 1973) (“The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.”); *U.S. Immigr. & Customs Enf’t v. Gomez*, 445 F. Supp. 3d 1213, 1214 (D. Colo. 2020) (discussing grounds upon which an administrative subpoena may be opposed).

⁵⁰ *Coolidge v. New Hampshire*, 403 U.S. 10, 14 (1948) (Fourth Amendment “neutral and detached magistrate” requirement not satisfied if person issuing warrant belongs to executive branch rather

places (absent a judicial warrant), ICE would need the school's consent, which school officials have no legal obligation to give.

When presented with a subpoena, educational agencies and institutions should consult with counsel to determine the type of subpoena and assess how both FERPA and other laws may apply. For more on educational institutions' rights when presented with administrative subpoenas by ICE, see the ACLU's April 2025 *Open Letter to College and University General Counsels*⁵¹ and *Know Your Rights: ICE Administrative Subpoenas*.⁵²

Failure to Provide Notice to Parents or Eligible Students May Result in a Court Order Against ICE

As noted above, prior to responding to a subpoena under FERPA's subpoena exception, notice must be provided to parents and eligible students so that they "may seek protective action."⁵³ However, if the "issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed,"⁵⁴ the advance notice requirement is "waive[d]."⁵⁵ Such orders are often known as a "non-disclosure order" or a "gag order." Presumably, only a *valid* nondisclosure order would

than member of judiciary); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Fourth Amendment protections apply to interactions between immigration officials and people they suspect to be undocumented); *Santos v. Frederick Co. Bd. of Comm'rs*, 725 F.3d 451, 468 (4th Cir. 2013) (deputies conducting arrest based on ICE civil arrest warrant violated noncitizen's Fourth Amendment rights); *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 979–80 (C.D. Cal. 2024) ("[A]n [ICE] administrative warrant is insufficient to enter the constitutionally protected areas of a home."). See also, *ICE Administrative Removal Warrants*, FED. L. ENF'T TRAINING CTRS., <https://www.fletc.gov/ice-administrative-removal-warrants-mp3> ("The primary difference [between an ICE warrant and a criminal warrant] is that, unlike a criminal warrant issued by the federal court, a removal warrant does not authorize the ICE officer to enter into an REP [Reasonable Expectation of Privacy] area to execute the warrant.").

⁵¹ American Civil Liberties Union Foundation, OPEN LETTER TO COLLEGE AND UNIVERSITY GENERAL COUNSELS (Apr. 17, 2025), <https://www.aclu.org/documents/open-letter-to-college-and-university-general-counsels-on-1-8-u-s-c-%C2%A7-1324-harboring-liability-and-2-ice-administrative-subpoenas>.

⁵² American Civil Liberties Union Foundation, KNOW YOUR RIGHTS: IMMIGRATION ADMINISTRATIVE SUBPOENAS (Apr. 17, 2024), <https://www.aclu.org/documents/know-your-rights-ice-administrative-subpoenas>.

⁵³ 34 C.F.R. § 99.31(a)(9)(ii).

⁵⁴ 34 C.F.R. § 99.31(a)(9)(ii)(B). In addition to nondisclosure orders issued by agencies, educational agencies or institutions may be alleviated of their notice responsibilities *also* in response to non-disclosure orders included in a federal grand jury subpoena or an "*ex parte* court order obtained by the United States Attorney General . . . concerning investigations or prosecutions of" certain terrorism-related offenses. *Id.* § 99.31(a)(9)(ii)(A), (C).

⁵⁵ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS at 2 (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>.

waive the advance notice requirement,⁵⁶ although USED has never directly addressed the issue.

ICE subpoenas typically include language purporting to order the recipient not to disclose the existence or details of the subpoena to the target of the investigation or to the public. However, these nondisclosure orders are unenforceable, as ICE officials do not have the legal authority to command nondisclosure.⁵⁷ This leaves the subpoena recipient free to communicate with the public, or even the person whose information was subpoenaed. USED has never addressed whether invalid or unenforceable nondisclosure orders may validly waive the advance notice requirement, and educational agencies and institutions should consult with counsel to determine the validity of the gag order and — if possible — provide notice of the ICE subpoena to parents and eligible students as a best practice.

In addition, to avoid accusations that advance notice was intended to obstruct the investigation⁵⁸ and to deter unjustified secrecy demands in issuance of subpoenas, educational agencies and institutions should establish policies and procedures for notifying parents and eligible students when they are the subject of a subpoena issued to the educational agency or institution, as is required by FERPA's subpoena exception.

Failure to provide that notice may result in courts delaying the disclosure of students' PII so that parents and eligible students can be notified. In one case in 2010, a federal judge issued a temporary restraining order enjoining disclosure by a school district in response to an ICE subpoena for failure to provide the required notice.⁵⁹ Other courts have declined to quash subpoenas for failure to provide the notice required by FERPA but instead issued protective orders requiring the notice to be provided.⁶⁰

⁵⁶ Cf. 34 CFR 99.31(a)(9)(i) (requiring that subpoenas be “lawful”).

⁵⁷ ICE's legal authority for the issuance of subpoenas, summonses, and Form I-9 notices are 8 U.S.C. § 1225(d)(4)(A) for general immigration enforcement; 8 U.S.C. § 1324a(e)(2)(C) for I-9 audits; 50 U.S.C. App. § 2411(a) for the Export Subpoena; 21 U.S.C. § 967 for the Controlled Substance Enforcement Subpoena; and 19 U.S.C. § 1509 for the Customs Summons, all of which lack secrecy or nondisclosure provisions. *See also* Doe v. Ashcroft, 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that “most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases,” for example, when a court so orders), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

⁵⁸ 18 U.S.C. § 1505 (“Whoever *corruptly*, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . commits an offense” (emphasis added)). We are unaware of any case in which providing notice to the subject of a subpoena was the basis of an obstruction charge.

⁵⁹ Order, Coulibaly v. N.Y. City Dep't Ed., No. 10-cv-5658, Doc. No. 10 (Sept. 16, 2010); Am. Compl. ¶¶ 27, 38, Coulibaly v. N.Y. City Dep't Ed., No. 10-cv-5658, Doc. No. 7 (Sept. 8, 2010).

⁶⁰ Jackson v. Willoughby Eastlake Sch. Dist., No. 16-cv-3100, 2018 WL 1468666, at *4 (N.D. Ohio Mar. 23, 2018); Rios v. Read, 73 F.R.D. 589, 600 (E.D.N.Y. 1977).

Schools Should Establish Policies and Procedures to Protect Students

In addition to adhering to FERPA, educational institutions and agencies should undertake other steps to protect students, including:

- Clearly demarcate the public and non-public areas in your schools. If school playgrounds, sports fields, etc., are not open to the public during certain hours, you can also post signage setting out those limits. Train staff that ICE is not permitted to enter any non-public areas without a judicial warrant.
- Establish protocols for exactly what school staff should do if immigration agents come to a school, including providing notification to institutional leadership and seeking advice of counsel. The following school districts and universities provide examples: Norristown Area School District,⁶¹ Wilkinsburg School District,⁶² Pittsburgh Public Schools,⁶³ and John Hopkins University.⁶⁴
- Train all school staff, based on your protocols, that if immigration agents come to a school, staff should immediately inform a designated, trained contact person (for example, the principal), who should then consult the superintendent and school's attorney. School staff should be instructed not to consent to immigration enforcement officers entering non-public areas, should not allow immigration enforcement officers to interview students, and not answer questions or otherwise assist the agents.
- Instruct school staff that immigration agents sometimes wear clothing intended to suggest they are police. Regardless of how they dress, federal immigration enforcement officials should not be allowed entry to a school and non-public areas on school grounds absent a valid judicial warrant.
- Have an attorney review any requests from immigration enforcement, including any warrant or subpoena presented. Schools may face legal repercussions under FERPA if staff provide student PII to immigration agents, which is why legal review of all requests is critical. The attorney can ensure that schools are acting consistent with

⁶¹ See, e.g., Norristown Sch. Distr., WELCOMING SCHOOL RESOLUTION (2024), https://core-docs.s3.us-east-1.amazonaws.com/documents/asset/uploaded_file/3691/NASD/5063250/Welcoming_Schools_Resolution.pdf; *Federal Procedure Change*, NORRISTOWN SCH. DISTR. (Jan. 28, 2025), <https://www.nasd.k12.pa.us/page/federal-procedure-change>.

⁶² Wilkinsburg Sch. Dist., A Resolution of the Board of School Directors of the Wilkinsburg School District Affirming its Commitment to a Safe and Supportive School Environment for all Students, Regardless of Immigration Status, [https://go.boarddocs.com/pa/wlkn/Board.nsf/files/DBWREW6DB232/\\$file/WSD%20Sanctuary%20Resolution\(20654320.1\).pdf](https://go.boarddocs.com/pa/wlkn/Board.nsf/files/DBWREW6DB232/$file/WSD%20Sanctuary%20Resolution(20654320.1).pdf).

⁶³ *Immigrant Families*, PITTSBURGH SCH. DISTR., <https://www.pghschools.org/community/immigrant-families>.

⁶⁴ Office of the General Counsel, John Hopkins University, GUIDANCE IN RESPONSE TO QUESTIONS ABOUT FEDERAL IMMIGRATION ENFORCEMENT (2025), <https://publicsafety.jhu.edu/assets/uploads/sites/9/2025/03/Revised-Immigration-Guidance.pdf>.

their legal responsibilities to students and that legal process presented by ICE is valid and can provide advice to school decision-makers about how to proceed.

- The school's attorney and decision-makers should hold immigration agents to the limits in the warrant or subpoena. Note that judicial warrants and subpoenas are often limited to particular spaces within an address or certain identified people.
- Create a policy under which you will disclose the existence and contents of an administrative subpoena to the parties whose records have been requested. An attorney can help you craft a disclosure policy that works for your specific situation. Announcing a policy of notice to parents and students on your webpage, law enforcement contact page, or other publicly accessible place can dissuade casual or frivolous subpoenas.
- Have a policy for responding to ICE subpoenas and related communications, including seeking review by counsel. You can safely ignore administrative subpoenas absent a court order, but you may prefer to provide a written response that explains your grounds for objecting to the subpoena, and state that you will notify the person whose records were sought.
- Prepare your legal counsel to oppose any court motion to compel compliance. Whether you actively contest the motion to compel or simply wait for a court order enforcing the subpoena, this may deter ICE from sending you frivolous subpoenas
- Observe and document any actions by immigration agents on school property. Schools should make copies of officers' identification documents, as well as any warrants or subpoenas.

K-12 School Districts Should Not Require Students or Families to Provide Immigration Status and Should Limit the Other Information They Collect

Requiring students, parents, or guardians to provide schools with information regarding their immigration status or taking other actions that significantly interfere with the right to a basic public education violates the constitutional guarantees that all children — regardless of immigration status — may access a K-12 education, as held in *Plyler v. Doe*.⁶⁵

Further, the information required to enroll in a K-12 school is often limited under state law to a handful of key documents, typically proof of residency, proof of age, and immunization records.⁶⁶ Some states have specifically prohibited schools from inquiring about or requiring students to provide any information relating to immigration status.⁶⁷ In addition:

⁶⁵ 457 U.S. 202 (1982); *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1245 (11th Cir. 2012); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995), on reconsideration in part, 997 F. Supp. 1244 (C.D. Cal. 1997); *accord* 22 Pa. Code § 11.11(d) (“A school may not inquire regarding the immigration status of a student as part of the admission process”).

⁶⁶ *E.g.*, 22 Pa. Code § 11.11(b); 24 Pa. Code § 13-1317.2; 24 Pa. Code § 13-1318.1(g).

⁶⁷ Cal. Educ. Code § 234.7; 22 Pa. Code § 11.11(d) (“A school may not inquire regarding the immigration status of a student as part of the admission process”). *See also*, *Plyler*, 457 U.S. at 223.

- Schools should not — and in many cases, may not — ask students for information such as a social security number⁶⁸ or place of birth that may indicate a student’s immigration status, with the limited exception that schools are required to identify those students born outside the United States who are eligible to participate in Title III federal education programs.⁶⁹
- Schools should not require documents for determining residency or age that only people with U.S. citizenship or current immigration status can have (*e.g.* U.S. passport, driver’s license, etc.). Instead, schools should provide a variety of means for establishing information necessary for enrollment. For example, the Pennsylvania Department of Education’s guidance explains that “schools should be flexible in consideration of the child’s circumstances” and provides a “non-exhaustive” list including baptismal certificate or record of baptism; notarized statement from the parents or another relative indicating the date of birth; prior school record indicating the date of birth.⁷⁰
- School administrators should limit the information collected from students, parents, and guardians. Student education records should be limited, consistent with state and federal law, to basic student information, such as grades, transcripts, course schedules, health records, directory information, enrollment dates, special education records, and disciplinary records. Beyond that, consider the general rule of thumb: *If there is no reason to collect it, then do not collect it.*

Schools should also review what information is contained in school directories, and remind parents, guardians, and adult students that *they have a right under FERPA to opt out* of having their “directory information” shared.⁷¹ While directory information is often released under FERPA, it requires notice to parents regarding their right to opt-out of disclosure of directory information, a request they may make at any time.⁷²

⁶⁸ See 5 U.S.C. 552a note (“It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”).

⁶⁹ See 20 U.S.C. § 7011(5) (defining “immigrant children” eligible to receive federal funding for language instruction as students who were not born in any State and have not been attending one or more schools in any one or more States for more than three full academic years).

⁷⁰ *Student Enrollment FAQ*, PA. DEPT EDUC., <https://www.pa.gov/agencies/education/resources/policies-acts-and-laws/basic-education-circulars-becs/purdons-statutes/enrollment-of-students/student-enrollment-faq.html>.

⁷¹ 34 C.F.R. § 99.37.

⁷² 20 U.S.C. § 1232g(a)(5)(B).

FERPA and School Law Enforcement Units

Law Enforcement Units Are Subject to Restrictions in Their Use of Education Records

Law enforcement operating at several universities have entered into agreements with ICE to assist in immigration enforcement.⁷³ FERPA provides a different standard of protection for the components of an educational agency or institution that are responsible for law enforcement or security duties, known as “law enforcement units.” If certain requirements are met, the records of a law enforcement unit are entirely exempt from the protections provided by FERPA.⁷⁴ However, records that do not meet those requirements, even those handled by law enforcement units, remain subject to FERPA’s protections.

To qualify as a “law enforcement unit,” personnel or components within the educational agency or institution must be “officially authorized or designated” to conduct one of two sets of activities:⁷⁵

- “Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself”; or,
- “Maintain the physical security and safety of the agency or institution.”

Any “individual, office, department, division, or other component of an educational agency or institution” can qualify.⁷⁶ Law enforcement units may be “a unit of commissioned police officers or non-commissioned security guards,”⁷⁷ or even a “vice principal” officially assigned security duties.⁷⁸ A law enforcement unit can also conduct other duties without losing its status as a law enforcement unit.⁷⁹ However, not all school security or police have been designated as a law enforcement unit, and consequently may not meet FERPA’s requirements as a law enforcement unit.

Only certain records held by law enforcement units are exempt from FERPA. Those records must meet all three of the following requirements; the record must be:⁸⁰

- Created by the law enforcement unit;
- Created for a law enforcement purpose; and,

⁷³ Josh Moody, *More Florida Colleges Sign ICE Agreements*, INSIDER HIGHER EDUCATION (Apr. 29, 2025), <https://www.insidehighered.com/news/government/politics-elections/2025/04/29/least-15-florida-institutions-have-ice-agreements>.

⁷⁴ 34 C.F.R. § 99.3 (definition of “education record”).

⁷⁵ 34 C.F.R. § 99.8(a)(1)(i)–(ii).

⁷⁶ 34 C.F.R. § 99.8(a)(1).

⁷⁷ 34 C.F.R. § 99.8(a)(1).

⁷⁸ Privacy Technical Assistance Center, U.S. Department of Education, SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) at 14 (2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs.pdf

⁷⁹ 34 C.F.R. § 99.8(a)(2).

⁸⁰ 34 C.F.R. § 99.8(b)(1).

- Maintained by the law enforcement unit.

Thus, neither law enforcement units nor every record they have access to are exempt from FERPA. For example, education records transferred from other components of the institution remain protected and *cannot* be used in immigration enforcement unless another FERPA exception applies. Likewise, records maintained by the law enforcement unit for a *non*-law enforcement purpose “such as a disciplinary action or proceeding” initiated by school staff under a student code of conduct are not law enforcement records.⁸¹

Educational Institutions and Agencies Should Establish Additional Procedures Governing Their Law Enforcement Units

Although FERPA restricts law enforcement units’ use and disclosure of education records, schools can take additional steps to protect students’ information, even where FERPA would not provide protection. We recommend that educational agencies and institutions:

- Require law enforcement units to commit — through a signed agreement or official policy — not to inquire about immigration status, not to engage in immigration enforcement activities, and not to detain students and family members for purposes of immigration enforcement.
- Educate law enforcement units about the legal protections for immigrant students (including their right to an education) and inform them that if they engage in immigration enforcement activities, they run the risk of violating federal and state law.
- Ensure that such school security officers are trained on and properly follow Fourth and Fifth Amendment standards for detention, interrogation, search, and seizure, and are not arresting students for incidents that can be handled as matters of school discipline. These concerns carry extra weight for undocumented students, for whom school policing has the potential to undermine the education rights outlined in *Plyler*. Too often, police in schools arrest students for misdemeanor offenses like disorderly conduct when the school disciplinary process could better address such behaviors.⁸² Police in schools sometimes also collect intelligence on students, for

⁸¹ 34 C.F.R. § 99.8(b)(2)(ii).

⁸² See, e.g., Denise C. Gottfredson et al., Effects of School Resource Officers on School Crime and Responses To School Crime, 19 *Criminology & Pub. Policy* 905–40 (2020); Emily K. Weisburst, Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes, 38 *J. Policy Analysis & Mgmt.* 338–365 (2019); F. Chris Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement, 126 *American J. Educ.* 33-63 (2019); Emily G. Owens, Testing the School-to-Prison Pipeline, 36 *J. Policy Analysis & Mgmt.* 11-37 (2017); Chongmin Na & Denise Gottfredson, Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors, 30 *JUST. Q.* 619, 620 (2013); Steven C. Teske, A Study of Zero Tolerance Policies in Schools: A Multi-integrate System Approach to Improve Outcomes for Adolescents, *J. OF CHILD AND ADOLESCENT PSYCH. NURSING*; Matthew T. Theriot, School Resource Officers and the Criminalization of Student Behavior, 37 *J. OF CRIM. JUST.* (2009).

example, to enter them into a database of alleged gang associates. In addition to the detrimental impacts these forms of policing have on any student,⁸³ undocumented students risk having their application for citizenship or other immigration benefits placed in jeopardy or being prioritized for deportation.

- Review their policing practices to focus attention on protecting the school community from outside threats and limit law enforcement interactions with students to immediate threats to physical safety.

FERPA Is Applicable to Other Governmental Investigations

Congressional Letters May Not Qualify as a “Subpoena” and FERPA May Not Permit Disclosure of Student PII in Response to Them

Congressional leadership has recently sent letters to several universities requesting documents related to a broad range of campus activities and incidents.⁸⁴ Those letters request, for example, all documents related to disciplinary action related to protests, encampments, “alleged antisemitic events,” law school clinic representation of protestors, and hiring materials and performance reviews of specific faculty.

In many instances, these materials are likely to implicate students’ PII from education records; FERPA, however, is unlikely to permit disclosure of students’ PII. There is no general exception for providing students’ PII to governmental entities, and FERPA’s exemptions permit disclosure only to specific executive branch agencies⁸⁵ or pursuant to specific processes that must be followed, such as obtaining a subpoena.⁸⁶ None of those exceptions contemplate disclosures in response to a Congressional letter, and USED has

⁸³ See, e.g., Sarah E. Redfield & Jason P. Nance, American Bar Association, PRELIMINARY REPORT: SCHOOL-TO-PRISON PIPELINE (Feb. 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf; American Psychological Association Zero Tolerance Taskforce, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, AM. PSYCHOLOGIST (Dec. 2008), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>; Gary Sweeten, *Who Will Graduate?* “Disruption of High School Education by Arrest and Court Involvement,” 23 JUST. Q. 4 (2006) (a first-time arrest during high school almost doubles the odds of drop out); Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. OF EDUC. 4 (2009).

⁸⁴ Hon. Tim Walberg & Burgess Owens, *Walberg, Owens Demand Answers from Five Colleges Following Their Lackluster Response to Antisemitism*, HOUSE COMM. ED. & WORKFORCE (Mar. 27, 2025), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=412306>; Letter from Hon. Tim Walberg to Trustees of Columbia University (Feb. 13, 2025), https://edworkforce.house.gov/uploadedfiles/2.13.25_columbia_letter.pdf.

⁸⁵ 34 C.F.R. § 99.31(a)(2) (transfer to other educational institutions); *id.* § 99.31(a)(3) (U.S. Comptroller General, Attorney General, Secretary of education, or state or local “educational authorities”); *id.* § 99.31(a)(5) (juvenile justice programs); *id.* § 99.31(a)(7) (accrediting organizations); 20 U.S.C. § 1232g(b)(1)(L) (social work case workers)

⁸⁶ 34 C.F.R. § 99.31(a)(9); *id.* § 99.31(a)(6) (written agreements required for studies, limited to certain purposes); *id.* § 99.35 (procedures for disclosures under § 99.31(a)(3)).

previously rejected arguments that FERPA permits disclosures in response to informal legislative requests.⁸⁷

Moreover, such letters likely do not qualify for the subpoena exception under FERPA. USED has explained that “if a subpoena is issued in compliance with State law, it is ‘lawfully issued’” and that consequently, “institutions, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued.”⁸⁸ Congressional rules provide processes for the issuance of subpoenas,⁸⁹ which are issued on a specific form;⁹⁰ letters from Congresspeople requesting records are not issued under those processes, and consequently likely do not qualify as a subpoena under either congressional rules or FERPA.

Recent Civil Rights Demands Exceed Traditional Processes

USED has launched investigations of several postsecondary institutions⁹¹ and state departments of education,⁹² seeking information on alleged civil rights violations. These requests seek information about individual students, departing from USED’s ordinary

⁸⁷ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO UNIVERSITY OF ALASKA RE: DISCLOSURE OF EDUCATION RECORDS TO LEGISLATIVE AUDIT DIVISION (May 23, 2005), <https://studentprivacy.ed.gov/resources/letter-university-alaska-re-disclosure-education-records-legislative-audit-division>.

⁸⁸ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter of Technical Assistance to the Regents of the University of California Re: Disclosures to Employment Relations Board at 3 (1999), <https://studentprivacy.ed.gov/resources/letter-technical-assistance-regents-university-california-re-disclosures-employment>.

⁸⁹ *E.g.*, RULES OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE, Rule 10 (118th Cong.), https://edworkforce.house.gov/uploadedfiles/118th_ew_committee_rules.pdf.

⁹⁰ *E.g.*, Letter from Hon. Virginia Foxx to Hon. Julie Su, Acting Secretary, U.S. Department of Labor, att. (Sept. 23, 2024), https://edworkforce.house.gov/uploadedfiles/subpoena_dol_misclassification_package.pdf.

⁹¹ U.S. Department of Education’s Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment, U.S. DEP’T ED. (Mar. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment>; U.S. Department of Education Probes Cases of Antisemitism at Five Universities, U.S. DEP’T ED. (Feb. 3, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-probes-cases-of-antisemitism-five-universities>.

⁹² *Title IX Special Investigations Team Launches Directed Investigation into Washington State Superintendent’s Office*, U.S. DEP’T ED. (Apr. 30, 2025), <https://www.ed.gov/about/news/press-release/title-ix-special-investigations-team-launches-directed-investigation-washington-state-superintendents-office-0>; *U.S. Department of Education Launches Investigation into Maine Department of Education for Alleged FERPA Violations*, U.S. DEP’T ED. (Mar. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-maine-department-of-education-alleged-ferpa-violations> (noting referral to Office for Civil Rights for alleged Title IX violations).

investigatory procedure;⁹³ educational institutions receiving those requests should be sensitive to the potential conflicts with FERPA and work with USED to avoid disclosures of students' PII.

These requests seek a variety of information: names, nationalities, “national origin/ethnicity/shared ancestry,” “potential violations” of the universities’ codes of conduct, and final disciplinary actions.⁹⁴

USED has long sought to enforce civil rights laws consistent with FERPA. Although the administration of federal civil rights laws overrides FERPA in cases of “direct conflict,”⁹⁵ USED has often reiterated across administrations of both parties that universities “should interpret [civil rights laws] and FERPA in a manner to avoid any conflicts.”⁹⁶

Consistent with that longstanding position, educational agencies and institutions should work with USED to avoid disclosing PII. This includes information that may have direct identifiers like names removed but may nonetheless be identifiable to members of the community “because of a well-publicized incident or some other factor known in the community.”⁹⁷

Properly Tailored Policies to Protect Transgender Students Do Not Necessarily Violate FERPA

In launching investigations of several state departments of education, USED has stated that the departments’ policies may encourage or require school districts to “hide” students’ gender identity from parents and guardians.⁹⁸ Depending on their nature and implementation, however, these policies may not violate FERPA.

⁹³ Laura Meckler, *New Trump Demand to Colleges: Name Protesters — And Their Nationalities*, WASH. POST (Mar. 25, 2025), <https://www.washingtonpost.com/education/2025/03/25/trump-administration-campus-antisemitism-investigations>.

⁹⁴ *Id.*

⁹⁵ 89 Fed. Reg. 33474, 33536-37 (Apr. 29, 2024), <https://www.federalregister.gov/d/2024-07915/p-863>; accord 85 Fed. Reg. 30026, 30426, 30428, 30433–34 (May 19, 2020); 20 U.S.C. § 1221(d).

⁹⁶ 89 Fed. Reg. 33474, 33536 (Apr. 29, 2024) (quoting 85 Fed. Reg. 30026, 30424 (May 19, 2020)), <https://www.federalregister.gov/d/2024-07915/p-870>.

⁹⁷ 73 FR 74806, 74831–32 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-298>.

⁹⁸ *Title IX Special Investigations Team Launches Directed Investigation into Washington State Superintendent's Office*, U.S. DEP'T ED. (Apr. 30, 2025), <https://www.ed.gov/about/news/press-release/title-ix-special-investigations-team-launches-directed-investigation-washington-state-superintendents-office-0>; *U.S. Department of Education Launches Investigation into Maine Department of Education for Alleged FERPA Violations*, U.S. DEP'T ED. (Mar. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-maine-department-of-education-alleged-ferpa-violations> (noting referral to Office for Civil Rights for alleged Title IX violations); *U.S. Department of Education Launches Investigation into California Department of Education for Alleged FERPA Violations*, U.S. DEP'T ED. (Mar. 27, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-california-department-of-education-alleged-ferpa-violations>.

For example, USED’s investigation into the California Department of Education (CDE) specifically cites the implementation of Assembly Bill 1955.⁹⁹ AB 1955 provides that school employees “shall not be required to disclose any information related to a pupil’s sexual orientation, gender identity, or gender expression to any other person without the pupil’s consent unless otherwise required by state or federal law.”¹⁰⁰

CDE has responded, explaining, “AB 1955 does not mandate nondisclosure. AB 1955 prohibits LEAs from mandating that staff disclose a student’s sexual orientation, gender identity, or gender expression”¹⁰¹ According to CDE, “AB1955 does not contradict parents’ rights to request to inspect and review their students’ education records under FERPA, even if they contain information related to a student’s sexual orientation, gender identity, or gender expression.”¹⁰²

Crucially, as USED has recognized, “FERPA does not provide an affirmative obligation for school officials to inform parents about any information, even if that information is contained in a student’s education records.”¹⁰³ Instead, FERPA only requires that education records be provided to parents and eligible students *upon request*.¹⁰⁴ Likewise, with limited exceptions,¹⁰⁵ FERPA does not mandate what information educational agencies and institutions choose to maintain in their education records.¹⁰⁶ Thus, so long as a challenged policy and its implementation¹⁰⁷ do not interfere with parents’ and eligible students’ ability to access their education records *upon request*, there is no direct conflict with FERPA.

However, it is worth emphasizing that educational agencies and institutions do *not* have the discretion to deem some records as the “official” “education record” subject to FERPA

⁹⁹ AB 1955, 2024 Cal. Stat. ch. 95,
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1955.

¹⁰⁰ *Id.* sec. 5.

¹⁰¹ *Facts to Consider Regarding FERPA and AB 1955*, CAL. DEP’T ED. (Apr. 1, 2025),
<https://www.cde.ca.gov/nr/el/le/yr25ltr0401.asp>.

¹⁰² Letter from Len Garfinkel, General Counsel, California Department of Education to Frank E. Miller, Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education (Apr. 11, 2025), <https://www.cde.ca.gov/nr/fa/yr25cosoltr0411b.asp>.

¹⁰³ Hon. Linda E. McMahon, Secretary of Education, & Frank E. Miller, Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education, *Cover Letters to the Department’s Annual Notices to SEAs and LEAs* at 3, U.S. DEP’T ED. (Mar. 28, 2025),
<https://studentprivacy.ed.gov/resources/cover-letters-departments-annual-notices-seas-and-leas>.

¹⁰⁴ 34 C.F.R. § 99.10.

¹⁰⁵ 34 C.F.R. §§ 99.10(e) (prohibiting destruction of education records while there is a pending request to review them), 99.32(a)(2) (requiring keeping of record of requests and disclosures with students’ education records).

¹⁰⁶ *Does an Educational Agency or Institution Have Discretion Over What Education Records It Decides to Create and Keep?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/does-educational-agency-or-institution-have-discretion-over-what-education-records-it-decides> (last visited May 5, 2025).

¹⁰⁷ FERPA may be violated by not just official policies but also unofficial practices. 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.64(a).

while leaving others out.¹⁰⁸ FERPA’s definition of “education record” is broad and encompasses any record directly related to a student if it is maintained by the educational institution or agency.¹⁰⁹ Thus, education records include — as noted above — materials such as discipline and medical records,¹¹⁰ photos posted on a school bulletin board or surveillance videos,¹¹¹ emails regarding students,¹¹² and recommendations for membership in the National Honor Society.¹¹³

Educational agencies and institutions should consult with counsel to determine the scope of the education records they maintain and if their policies interfere with parents’ rights to request access to those records under FERPA.

FERPA Provides No Basis for Investigation of State Agencies

USED’s investigations of state departments of education may face a more significant hurdle: FERPA does not generally apply to those departments, also known as “SEAs.” As described above, FERPA only applies to “educational agencies or institutions,” and USED has steadfastly maintained that “we do not generally view SEAs as being ‘educational agencies’ under [FERPA] because we interpret the statutory definition of the term ‘student’ to mean that an educational agency is an agency attended by students.”¹¹⁴ Because SEAs and state departments of education do not have students directly attending them, they are not an “educational agency” subject to FERPA.

Consequently, USED “would only take actions against ‘non-school entities’” such as state departments of education if they “have not complied with FERPA requirements that relate to PII from education records they received under one of the exceptions to FERPA’s general

¹⁰⁸ *Easton Area Sch. Dist. v. Miller*, 659 Pa. 606, 627, 232 A.3d 716, 728 (2020) (bus surveillance video constituted education record); *President of Bates Coll. v. Congregation Beth Abraham*, No. CIV. A. CV-01-21, 2001 WL 1671588, at *4 (Me. Super. Feb. 13, 2001) (“[T]he statute, § 1232g(a)(4)(A) does not limit the definition of ‘other materials.’ As such that term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of the students.”); *accord* National Association of College and University Attorneys, *FERPA: THE BASICS AND BEYOND* at (2014) (“[T]he definition [sic] of ‘education records’ does not give institutions any discretion to determine for themselves what is or isn’t an ‘education record’ or to ‘treat’ certain records as non-education records, even though they meet the statutory definition.”), <https://oeo.utah.edu/resources/2020.04.21%20NACUA%20FERPA.pdf>.

¹⁰⁹ 34 C.F.R. § 99.3 (defining “education record” as “those records” that are “directly related to a student” and “maintained” by the education agency or institution).

¹¹⁰ Student Privacy Policy Office, *What Is an Education Record?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-education-record> (last visited Apr. 30, 2025).

¹¹¹ Student Privacy Policy Office, *FAQs on Photos and Videos under FERPA*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa> (last visited Apr. 30, 2025).

¹¹² *Cf.* 73 Fed. Reg. 74805, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-130>.

¹¹³ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, *LETTER TO ATTORNEY FOR SCHOOL DISTRICT IN ARIZONA REGARDING RECORDS RELATED TO NATIONAL HONOR SOCIETY* (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society>.

¹¹⁴ 76 Fed. Reg. 75603, 75606 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-49>.

consent requirement.”¹¹⁵ Beyond that limited scenario, “[t]he Department has no authority under FERPA to take actions for other PII these entities may possess.”¹¹⁶ When state departments of education *do* possess PII from education records, such as during an audit or in maintain a statewide data system, that PII will be subject to FERPA’s requirements regarding access, record-keeping, and re-disclosure.¹¹⁷

USED’s investigations into state departments of education do not allege that the departments themselves mishandled PII from education records, and FERPA is consequently not applicable to the alleged misconduct.

USED Must Follow Established Procedures to Enforce FERPA

In investigating state departments of education and other entities, USED must follow procedures established by law. Investigations may be initiated by a complaint by a parent or student, on USED’s own initiative, or based on information by a third party.¹¹⁸ Notice must be provided to the entity alleged to have violated FERPA with the “substance of the allegations.”¹¹⁹ The entity must be given an opportunity to respond, and oral argument may be permitted,¹²⁰ after which USED must provide the entity with “written notice of its findings and the basis for its findings.”¹²¹ If USED concludes that a violation has occurred, it must provide the educational agency or institution or “other recipient” of federal funds — such as a state department of education — with “a reasonable period of time” to voluntarily come into compliance with FERPA.¹²²

If a violation is found, several remedies are available to USED, including recouping funding from the educational agency or institution, withholding outstanding funds, seeking a cease-and-desist order before an administration law judge, and seeking an injunction in federal court.¹²³ Prior to withholding funds, however, USED must show that the violation was not a one-time incident, but based on a “policy or practice,” and that the entity failed to voluntarily comply with FERPA.¹²⁴

¹¹⁵ 76 Fed. Reg. 75603, 75632 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-345>.

¹¹⁶ 76 Fed. Reg. at 75632.

¹¹⁷ 34 C.F.R. § 99.10(a)(2), 99.32, 99.33; Dale King, Directory, Family Policy Compliance Office, LETTER TO NEVADA DEPARTMENT OF EDUCATION ABOUT THE APPLICABILITY OF FERPA TO PROVIDING PARENTS WITH ACCESS TO THEIR CHILDREN’S EDUCATION RECORDS AT THE STATE LEVEL (2014), <https://studentprivacy.ed.gov/resources/letter-nevada-department-education-about-applicability-ferpa-providing-parents-access>.

¹¹⁸ 34 C.F.R. § 99.64; 73 Fed. Reg. 74805, 74841 (Dec. 9, 2008).

¹¹⁹ 34 C.F.R. § 99.65.

¹²⁰ 34 C.F.R. §§ 99.65(a)(2), 99.66(a).

¹²¹ 34 C.F.R. § 99.66(b).

¹²² 34 C.F.R. § 99.66(c)(2).

¹²³ 73 Fed. Reg. 74805, 74842 (Dec. 9, 2008); 34 C.F.R. § 99.67(a)(1)–(3); 20 U.S.C. §§ 1234a, 1234d, 1234e, 1234f.

¹²⁴ 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67(a); 73 Fed. Reg. 74805, 74842–43 (Dec. 9, 2008).

Entities subject to recovery of funds, withholding of funds, or issuance of a cease-and-desist order must be given an opportunity for a hearing before an administrative law judge.¹²⁵ Following that hearing, entities that have been “adversely affected” by the results of an administrative process may appeal to federal court.¹²⁶

Limitations on FERPA

FERPA Likely Cannot Be Used to Quash Valid Subpoenas

Although, as described above, courts have issued protective orders directing schools to provide the notice required by FERPA’s subpoena exception, FERPA is unlikely to provide grounds to outright quash the subpoena.

Although it has been addressed only occasionally, the majority of courts to analyze the issue have concluded that FERPA does not serve as a basis for quashing subpoenas. They have done so on two bases:

- In one extreme, courts have concluded that FERPA creates requirements for educational institutions and does not create individual rights, including evidentiary privilege that might be exercised to quash a subpoena.¹²⁷
- Others have more narrowly concluded that disclosures properly made under one of FERPA’s exceptions, usually the subpoena exception, may not be quashed.¹²⁸

However, there may be independent grounds to contest enforcement of a subpoena, such as lack of relevance, overbreadth, burdensomeness, violation of Fourth Amendment reasonable expectations of privacy, and commandeering of state resources in violation of the Tenth Amendment.

¹²⁵ 20 U.S.C. §§ 1234a(b)(1), 1234d(b), 1234e(b). Although FERPA’s regulations dictate that withholding of funds may occur after an investigation, 34 C.F.R. § 99.67(a)(1), the enforcement provisions specifically permit withholding to occur during the pendency of a hearing, 20 U.S.C. 1234d(d). This suggests that USED must first investigate and find that the entity violated FERPA but may withhold funds while the entity seeks a hearing from an administrative law judge.

¹²⁶ 20 U.S.C. § 1234g.

¹²⁷ *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463, 2019 WL 3071851, at *4 (S.D. Ohio July 15, 2019); *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004) (“Thus, while FERPA was intended to prevent schools from adopting a policy or engaging in a practice of releasing educational records, it does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure.”); *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (“It is obvious, however, that the 1974 Act does not provide a privilege against disclosure of student records. The statute says nothing about the existence of a school-student privilege analogous to a doctor-patient or attorney-client privilege.”).

¹²⁸ *Jackson v. Willoughby Eastlake Sch. Dist.*, No. 1:16CV3100, 2018 WL 1468666, at *4 (N.D. Ohio Mar. 23, 2018) (issuing motion to compel for education records, but also issuing protective order requiring compliance with the notice requirements under (9)(i)); *Smith v. Sw. Licking Sch. Dist. Bd. of Educ.*, No. 209CV778, 2010 WL 3910487, at *2 (S.D. Ohio Oct. 1, 2010); *LaFace Recs., LLC v. Does 1-5*, No. 2:07-CV-187, 2008 WL 513508, at *3 (W.D. Mich. Feb. 22, 2008).

Institutions Cannot Deem Certain Records to be Outside the FERPA-Covered Education Record

As described above, any record directly related to a student and maintained by an educational agency or institution is likely an “education record” subject to FERPA. Educational agencies and institutions do not have discretion under the law to deem *some* records as part of the “official” education record while excluding others unless an exception to the definition of “education record” applies.¹²⁹ One such exception is the personal notes of staff members, which are *not* education records under FERPA, as long as they “are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”¹³⁰

Law Enforcement Units Have Significant Discretion in Disclosing Properly Created and Maintained Law Enforcement Unit Records

Finally, as discussed above, the “law enforcement unit” of an educational agency or institution has significant discretion in its use of “law enforcement unit records” if those records are (1) created by the law enforcement unit, (2) created for a law enforcement purpose, and (3) maintained by the law enforcement unit.¹³¹

Conclusion

FERPA is a complex law, with many winding conditions and exceptions. However, the purpose and overall impact of the law is to protect the privacy of students and families. As such, FERPA’s exceptions should be construed narrowly, and educational institutions and agencies should be mindful that, even when an exception applies, they generally retain discretion to withhold requested information. Consequently, FERPA imposes important obligations to protect students’ and families’ information, even as powerful actors seek to use it for other purposes.

¹²⁹ See Morgan Sexton & Amelia Vance, *Recapping USED’s Recent Surge in FERPA Enforcement Activities*, PUB. INTEREST PRIVACY CTR. (Apr. 17, 2025), <https://publicinterestprivacy.org/ferpa-enforcement-recap>.

¹³⁰ 34 C.F.R. § 99.3.

¹³¹ 34 C.F.R. § 99.8(b)(1)(i)–(ii).