

## Legislative History of Major FERPA Provisions

The Family Educational Rights and Privacy Act of 1974 (“FERPA”), § 513 of P.L. 93-380 (The Education Amendments of 1974), was signed into law by President Ford on August 21, 1974, with an effective date of November 19, 1974, 90 days after enactment. FERPA was enacted as a new § 438<sup>1</sup> of the General Education Provisions Act (GEPA) called “Protection of the Rights and Privacy of Parents and Students,” and codified at 20 U.S.C. § 1232g.<sup>2</sup> It was also commonly referred to as the “Buckley Amendment” after its principal sponsor, Senator James Buckley of New York. FERPA was offered as an amendment on the Senate floor and was not the subject of Committee consideration. Accordingly, traditional legislative history for FERPA as first enacted is unavailable.

Senators Buckley and Pell sponsored major FERPA amendments that were enacted on December 31, 1974, just four months later, and made retroactive to its effective date of November 19, 1974. These amendments were intended to address a number of ambiguities and concerns identified by the educational community, including parents, students, and institutions. On December 13, 1974, these sponsors introduced the major source of legislative history for the amendment, which is known as the “Joint Statement in Explanation of Buckley/Pell Amendment” (“Joint Statement”). See Volume 120 of the Congressional Record, pages 39862-39866.

Congress has amended FERPA a total of nine times in the nearly 28 years since its enactment, as follows:

- P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974 (Buckley/Pell Amendment)
- P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978)
- P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education)
- P.L. 101-542, Nov. 8, 1990 (Campus Security Act)
- P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992)
- P.L. 103-382, Oct. 20, 1994 (Improving America’s Schools Act)
- P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998)
- P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act)
- P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)

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<sup>1</sup> The Improving America’s Schools Act (1994) renumbered GEPA so that FERPA is now § 444.

<sup>2</sup> Congress addressed two additional and related privacy concerns in P.L. 93-380 -- Protection of Pupil Rights, enacted as § 439 of GEPA (now §445) and codified at 20 U.S.C. § 1232h, and Limitation on Withholding of Federal Assistance, enacted as § 440 of GEPA (now §446) and codified at 20 U.S.C. § 1232i.

## Scope and Applicability

FERPA is a “Spending Clause” statute enacted under the authority of Congress in Art. I, § 8 of the U.S. Constitution to spend funds to provide for the general welfare. (“No funds shall be made available under any applicable program . . .” unless statutory requirements are met.)

### I. Covered institutions

Initially, FERPA applied to “any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution.” The 1974 amendments substituted the term “educational agency or institution,” defined as “any public or private agency or institution which is the recipient of funds under any applicable program.”

The 1994 IASA amendments extended the right to inspect and review to education records maintained by State educational agencies, whose records are not otherwise subject to FERPA. Modification of inaccurate records that SEAs receive from educational agencies and institutions still takes place at the local level.

### II. Covered records

As first enacted, FERPA provided parents with the right to inspect and review “any and all official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.” The 1974 amendments substituted the term “education records” for the “laundry list” of records subject to FERPA.

“Education records” was defined in the 1974 amendments as “those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution.”

Four categories of records were excluded:

- 1) records in the sole possession of instructional, supervisory, and administrative personnel;
- 2) records of a law enforcement unit which are kept apart from “education records,” are maintained solely for law enforcement purposes, and are not made available

to persons other than law enforcement officials of the same jurisdiction, provided that personnel of a law enforcement unit do not have access to “education records”;

3) records of employees who are not also in attendance; and

4) physician, psychiatrist, or psychologist treatment records for eligible students.

The conferees stated their intention that the Department interpret the term “treatment” narrowly to limit the exemption for such records to those similar to those enumerated, and not remedial educational records made or maintained by education professionals. They also stated they did not intend to disrupt existing parental and student rights to confidentiality. Conference Report No. 93-1409, Joint Explanatory Statement of the Committee of Conference, for P.L. 93-568.

At the request of the Secretary of Education, Congress amended the “law enforcement unit exception” in 1992 to eliminate the unworkable and unintended results of the prohibition on sharing education records with the law enforcement unit. The exclusion now applies to “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.”

As originally enacted, all FERPA rights transfer from parents to students who are 18 years old or attending postsecondary institutions. The term “eligible students” is regulatory.

### Rights of Parents and Eligible Students

#### I. Right to Inspect and Review/Right to Access Education Records

Parents have the right to inspect and review the education records of their children. In the 1974 amendments, Congress clarified that when a record or data pertains to more than one child, parents “have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.”

The 1974 amendments limited the right to inspect and review records so that postsecondary students do not have access to 1) financial records of their parents, and 2) confidential letters of recommendation placed in records before January 1, 1975, or if the student has voluntarily waived access to these letters, provided that the waiver cannot be required as a precondition of admission, employment, or receipt of awards. In order to ensure that a rejected applicant was not given the right to challenge letters of recommendation or the institution’s admission decision, “student” was defined as “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.”

## II. Right to Challenge the Content of Education Records

Parents originally had the right to a hearing to challenge the content of records to insure they are not “inaccurate, misleading, or otherwise in violation of the privacy or other rights of students” and to provide an opportunity for the “correction or deletion of any such inaccurate, misleading or otherwise inappropriate data.” The 1974 amendments strengthened this right by prohibiting the Department from making funds available to an agency or institution unless parents are provided an opportunity for a hearing. This amendment also gave parents the right to insert a written explanation regarding the contents of the records. The 1994 IASA amendments limited challenges to the violation of the “privacy rights of students,” deleting the reference to “other rights.” The purpose was to ensure that parents do not attempt to use FERPA to enforce rights under other laws, such as the Individuals with Disabilities Education Act (IDEA).

The 1994 IASA amendments also added a new subsection (h) regarding treatment of disciplinary records, which states that nothing in FERPA prohibits an agency or institution from including in a student’s records appropriate information regarding disciplinary actions taken against the student for “conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community,” or from disclosing that information to teachers and other school officials who have legitimate educational interest in the student’s behavior.

## III. Right to Consent to the Disclosure of Education Records

As originally enacted, covered institutions could not have a policy of permitting the release of personally identifiable records or files (or personal information contained therein)(§1232g(b)(1)), or a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records (§1232g(b)(2)), unless there is written consent from parents specifying records to be released, reasons for release, and parties to whom records may be released. The 1974 amendments clarified that agencies and institutions may not have “a policy or practice of permitting the release of [or providing access to] education records (or personally identifiable information contained therein other than directory information” without a parent’s prior written consent.

“Directory information” in the 1974 amendments was defined to include “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” Educational agencies and institutions were required to provide public notice of any designated categories of directory information and to allow a reasonable time for parents to refuse to allow release of directory information without prior consent.

The *No Child Left Behind Act of 2001*, P.L. 107-110 (Jan. 8, 2002), addresses the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. Congress included similar language in the *National Defense Authorization Act for Fiscal Year 2002*. Both laws, with some exceptions, require schools to provide directory-type information to military recruiters who request it. Typically, recruiters request information on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military.

### Exceptions to the "Prior Written Consent" Rule

As first enacted, FERPA contained five exceptions to the prior written consent rule for disclosures to:

1. Other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests. The 1974 amendments clarified that the agency or institution determines which school officials have "legitimate educational interests." The 1994 IASA amendments added a requirement that the specific educational interests of the child for whom consent would otherwise be required are included among legitimate educational interests of school officials.

The 1994 amendments also clarified that nothing in FERPA prohibited an agency or institution from disclosing information about disciplinary actions taken against students to teachers and school officials, including those in other schools, who have legitimate educational interests in the behavior of the student. The *No Child Left Behind Act* amended the Elementary and Secondary Education Act to require each State to provide an assurance to the Secretary that it has a procedure in place to facilitate the transfer of disciplinary records regarding a student's suspension or expulsion to any elementary or secondary school where the student is enrolled or intends to enroll.

2. Officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record. The 1974 amendments added "seeks or" before "intends to enroll."

3. Authorized representatives of (i) the Comptroller General of the U.S.; (ii) the Secretary; (iii) an administrative head of an education agency (as defined in section 409 of GEPA) (deleted after reorganization of the Department); or (iv) State educational authorities.

As first enacted, FERPA provided that these recipients may have access to records "which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs" provided that, except when collection of personally identifiable data is specifically authorized by Federal law, "data collected by such officials with respect to individual students shall not include information (including

social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected.”<sup>3</sup> The final clause was amended on December 31, 1974, to read: “any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.”

On August 6, 1979, Congress clarified that FERPA does not “prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program,” subject to the conditions on redisclosure set forth elsewhere in the statute. The legislative history explains that this amendment corrects an “anomaly” caused by the Department’s interpretation of FERPA as precluding State auditors from requesting student records in order to conduct State audits of local and State-supported programs.

The 1998 Higher Education Amendments added a provision that also allows disclosure to authorized representatives of “the Attorney General for law enforcement purposes” under the same conditions as apply to the Secretary under this provision, as described above.

4. Appropriate officials in connection with a student’s application for, or receipt of, financial aid. The conferees of the 1974 Amendments stated their intention that this exception should allow the use of social security numbers in connection with a student’s application for, or receipt of, financial aid.

5. Designees of a judicial order or any lawfully issued subpoena, upon condition that parents and students are notified in advance of compliance by the educational institution or agency. The 1994 IASA amendments added a new, related exception for law enforcement purposes that allows agencies and institutions to disclose information to designees of a Federal grand jury subpoena without first notifying parents or students, and to designees in any other subpoena issued for a law enforcement purpose with notice to parents or students at the discretion of the court or other issuing agency.

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<sup>3</sup> Conference Report No. 93-1026 of the Joint Explanatory Statement of the Committee of Conference adds that “nothing in these provisions ... shall preclude official audits of federally supported education programs, but that data so collected shall not be personally identifiable .... In approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out the evaluations .... The need to protect students’ rights must be balanced against legitimate Federal needs for information.”

The 1974 amendments added five additional exceptions to the prior written consent rule:

6. State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974 (“grandfather clause”). The Joint Statement explained that in establishing a minimum Federal standard for record confidentiality and access, FERPA was not intended to preempt the States’ authority in the field. Accordingly, States may further limit the number or type of State or local officials who will continue to have access or provide parents and students with greater access to records than under FERPA.

The 1994 IASA amendments eliminated the “grandfather clause” and substituted an exception for disclosure to State and local officials in connection with the State’s juvenile justice system under specified conditions.

7. Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted.

The Senate amendment permitted access for testing purposes if the “information will not permit the identification of any person by the organization receiving such information.” The House amendment, which was adopted, provides that this exemption for such agencies as the College Entrance Examination Board or the Educational Testing Service will allow representatives of those organizations to have access to personally identifiable information under the conditions stated. Conference Report No. 93-1409.

The 1994 IASA amendments added that if an organization conducting studies fails to destroy information in violation of the requirements, the educational agency or institution may not permit access to that organization for not less than five years.

8. Accrediting organizations in order to carry out their accrediting functions.

9. Parents of dependent students as defined in the Internal Revenue Code.

10. Appropriate persons in connection with an emergency, if the knowledge of such information is necessary to protect the health or safety of the student or other persons. The Joint Statement explains: “In order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.”

In 1990, Congress enacted the Campus Security Act, which added a new exception to the prior written consent rule:

11. Postsecondary institutions may disclose to an alleged victim of any crime of violence (as defined in U.S. Code Title 18, § 16) the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of the crime, regardless of the outcome of the proceeding. Congress amended this provision in the Higher Education Amendments of 1998 by including “nonforcible sex offenses” and clarifying that only “final results” may be disclosed (i.e., name of student perpetrator, violation committed, and sanction imposed. Written consent is still required to disclose the name of any other student).

The following new exception was also added in the 1998 HEA amendments.

12. Postsecondary institutions may disclose the final results of any disciplinary proceeding for a crime of violence (as defined above) or nonforcible sex offense to anyone, including members of the general public, if the institution determines that the student committed a violation of its rules or policies with respect to the crime.

13. The 1998 HEA amendments also added a new exception that allows institutions of higher education to disclose to a parent or legal guardian information regarding a student’s violation of any law or institutional rule or policy governing the use or possession of alcohol or a controlled substance if the student is under 21 and the institution determines that the student has committed a disciplinary violation with respect to the use or possession.

Since 1998 Congress has enacted two additional exceptions to the statutory prior consent rule:

14. The 2000 Campus Sex Crimes Prevention Act added a new subsection (b)(7) to the statute to ensure that an educational institution may disclose information concerning registered sex offenders provided to it under State sex offender registration and community notification programs.

15. The USA Patriot Act of 2001 added a new subsection (j) that allows the U.S. Attorney General to apply for an *ex parte* court order requiring an educational agency or institution to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism (domestic or international). The Attorney General must certify that there are specific facts giving reason to believe that the records are likely to contain the required information. An educational agency or institution that in good faith produces records in accordance with the court’s order is not liable to any person for that production.

## Administrative Requirements Applicable to Educational Agencies and Institutions

### I. Recordkeeping

As first enacted, FERPA required those desiring access to education records to sign a written form, kept permanently with the student's file, indicating specifically the "legitimate educational or other interest" the person had in seeking the information. The 1974 amendments modified this provision so that each educational agency or institution is required to maintain a record, kept with the education records of each student, indicating all individuals, agencies, or organizations that have requested or obtained access to a student's education records and indicating specifically the legitimate interest that each has in obtaining the information. School officials with legitimate educational interests were excluded. The record of access is available only to parents and school officials responsible for custody of records and auditing the system.

The 2001 USA Patriot Act excludes from the recordkeeping requirement disclosures in response to a court's *ex parte* order based upon the Attorney General's certification regarding terrorism investigations and prosecutions.

### II. Redisclosure of records

As first enacted, FERPA provided that personal information from covered records could only be transferred to a third party on the condition that the recipient would not permit any other party to have access without a parent's written consent. The 1994 IASA amendments added that if a third party recipient permits access to education records without prior written consent (except in compliance with a subpoena or court order), the educational agency or institution may not permit access to that party for not less than five years.

### III. Notification of rights

As first enacted, FERPA required the recipient of funds to inform parents and eligible students of their rights. The 1994 IASA amendments changed the term to "effectively informs" to ensure that agencies and institutions carry out this requirement in a way that ensures that parents and students actually receive notice.

## Administrative Requirements Applicable to the Department

As originally enacted, FERPA required the Department to issue regulations to protect privacy rights of students and families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Department. These activities must also be authorized by law. The 1994 IASA amendments directed the Department to adopt or identify appropriate regulations within 8 months.

Any action to terminate Federal financial assistance may be taken only if the Secretary finds that there has been a failure to comply, and compliance cannot be secured voluntarily.

In accordance with the statute, the Secretary has designated an office and review board within the Department to investigate, process, review and adjudicate FERPA violations and complaints of alleged FERPA violations.

The 1974 amendments prohibit the regionalization of the enforcement of FERPA by providing that, except for the conduct of hearings, none of the functions of the Secretary may be carried out in any regional offices of the Department.

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