

Understanding FERPA

Sharing Education Records to Improve Outcomes for Children in the Juvenile Justice System

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Table of Contents (Click a section title to jump to that section.)

Introduction	2
What is the Family Educational Rights and Privacy Act (FERPA), and to which educational entities does it apply?	2
How did the Uninterrupted Scholars Act (USA) amend FERPA?	4
Why was this exception in the USA needed?	5
How does the USA affect students involved with the juvenile justice system?	5
When can a case worker or other agency representative redisclose personally identifiable information from a child’s education record to individuals/entities within the juvenile justice system?	6
In addition to the USA, what other exceptions address the release of education records to the juvenile justice system?	7
(1) Enrollment in school	7
(2) Directory information	7
(3) Disclosure to the juvenile justice system prior to a child’s adjudication	8
(4) Health or safety emergency	8
(5) Judicial order or subpoena	9
How does state law affect the sharing of education records of children involved in the juvenile justice system?	9
Conclusion	9

Introduction

Children in the juvenile justice system have a high-risk of falling behind educationally and dropping out of school.¹ Responsible and efficient sharing of education records with juvenile justice stakeholders can help stop these negative outcomes.² If done with careful attention to children’s and parents’ rights, the sharing of personally identifiable education information can connect children with needed educational services, reduce duplication of effort, enhance the system’s understanding of the child’s needs, promote coordinated case planning, and, perhaps most importantly, prevent the child’s further involvement with the juvenile justice system.³ Balancing a child’s legally protected privacy rights with the need for effective communication among systems is a challenging task.

This publication discusses the challenging task of sharing education records with juvenile justice staff in compliance with federal law, the Family Educational Rights and Privacy Act (FERPA) and its recent amendment the Uninterrupted Scholars Act (USA).⁴ FERPA protects the privacy of students’ “education records” but permits the sharing of education records under certain circumstances.⁵ While this publication discusses the sharing of education records with juvenile justice agency stakeholders, it does not address sharing juvenile justice records with schools, which may trigger a different set of legal protections and distinct concerns related to youth confidentiality.

What is the Family Educational Rights and Privacy Act (FERPA), and to which educational entities does it apply?

FERPA gives “parents” or “eligible students” certain rights with respect to “education records” including the right to inspect and review those records, and the right to consent to their release.⁶ The regulations promulgated pursuant to FERPA define a parent as “a parent of

¹ LeBlanc, L., Pfannenstiel, J., & Tashjian, M. (1991). *Unlocking learning: Chapter 1 in correctional facilities—Final report: National Study of the Neglected or Delinquent Program*. Prepared for the U.S. Department of Education. Rockville, MD: Westat; R. Balfanz, K. Spiridakis, R. Neild, and N. Legters. (2003). High poverty secondary schools and the juvenile justice system: How neither helps the other and how that could change. *New Directions for Youth Development*, 99, pp. 71-89.

² See U.S. DEPT’S EDUC. & JUST., *Guiding Principles for Providing High-Quality Education in Juvenile Justice Secure Care Settings*, at 3-6; 20-23 (2014), www.ed.gov/correctionaled.

³ See generally MODELS FOR CHANGE *Information Sharing Toolkit, second edition*, Category One (Dec. 23, 2014) www.jlc.org/infosharetoolkit

⁴ 20 U.S.C. § 1232

⁵ *Id.*

⁶ For more information, see LEGAL CENTER FOR FOSTER CARE AND EDUCATION, *How The Uninterrupted Scholars Act Helps Child Welfare Staff Advocate For Youth In Care* available at

a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.”⁷ Jurisdictions may also consider a foster parent or other caretaker as the parent under FERPA and therefore grant each the right to access education records.⁸ An “eligible student” is a student 18 or older or engaged in post-secondary education.⁹

Generally, under FERPA, a parent or eligible student must provide a signed and dated written consent before a school can disclose personally identifiable information (PII) regarding a student.¹⁰ PII includes a student’s name, the names of the student’s parents, the student’s address, social security number or student ID number, and any of personal characteristics or other information that would make the student’s identity easily traceable.¹¹

FERPA applies to all educational agencies and institutions, including post-secondary institutions that receive funds under any program administered by the Secretary of Education (“Department”). This includes local education agencies (“LEAs”) that administer educational programs in juvenile justice facilities and facilities that receive Department funding to operate on-site schools. In this publication, the term “schools” refers to educational institutions that must abide by FERPA.

http://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=1833&Command=Core_Download, hereinafter “How the USA helps Child Welfare Staff.”

⁷ 34 CFR § 99.3 definition of “Parent.”

⁸ This interpretation is supported by the Department of Education’s comments in 61 Fed. Reg. 59291, 59294 (1996) (responding to concerns about the lack of a provision on the rights of foster parents to access education records, the Department stated: “The regulations already define the term parent in §99.3 to include ‘a parent of a student and includes a natural parent, a guardian, or an individual acting as the parent in the absence of a parent or a guardian.’ Thus, foster parents who are acting as a child’s parent would have the rights afforded parents under FERPA with respect to that child’s education records.”) For further explanation, see Kathleen McNaught, *Mythbusting, breaking Down Confidentiality and Decision-Making Barriers to Meet the Educational Needs of Children in Foster Care*, at 26 (2005),

http://www.fostercareandeducation.org/Database.aspx?EntryId=1434&Command=Core_Download&method=inline. A few jurisdictions codified FERPA’s regulations to establish that, in certain circumstances, the child welfare agency can be considered the “parent” under FERPA. NYC: New York City Board of Education, Regulations of the Chancellor, A-820 III (D)- (Student Records: Confidentiality, Access, Disclosure and Retention) (defining parent as “a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian, including the representative of a foster care agency, who provides ongoing custodial care (emphasis added)); Fla. Code Ch. 29 §1000.21(5) (defining parent as “either or both parents of a student, any guardian of a student, any person in a parental relationship, or any person exercising supervisory authority over a student in place of the parent).

⁹ See 34 C.F.R. § 99.3.

¹⁰ 34 C.F.R. §99.30.

¹¹ 20 U.S.C. 1232g

How did the Uninterrupted Scholars Act (USA) amend FERPA?

In January 2013, the USA amended FERPA to make it easier for caseworkers to obtain education records for children in foster care.¹² Parents' right to restrict the disclosure of PII from their child's education records under FERPA is subject to a number of exceptions.¹³ The USA added a new exception for all children in out-of-home child welfare placements, including out-of-home kinship care and various forms of congregated care.¹⁴ Here, we refer to these out-of-home placements as "foster care."

The USA permits education agencies to disclose PII from a student's education records without parental consent to:

[A]n agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b)), who has the right to access a student's case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.¹⁵

Throughout this publication, we refer to a State or local child welfare agency, or tribal organization" as a "child welfare agency." A "case plan" is defined under federal law as "a written document" that must include, among other information, the "health and education records" of the children in out-of-home care by the child welfare agency.¹⁶ State law determines when a child welfare agency is "legally responsible" for a child's care and protection.¹⁷

¹² 20 U.S.C. § 1232(b)(1)(L) and (b)(2)(B).

¹³ See *Models for Change Information Sharing Toolkit*, second edition, FEDERAL LAWS (Dec. 23, 2014) www.jlc.org/infosharetoolkit

¹⁴ See U.S. DEP'T. OF ED., *Guidance on the Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act*, May 2014, at 7-9, available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/uninterrupted-scholars-act-guidance.pdf> (hereinafter "FPCO Guidance").

¹⁵ 20 U.S.C § 1232g(b)(1)(L).

¹⁶ 42 U.S.C. § 675(1).

¹⁷ 20 U.S.C § 1232g(b)(1)(L).

Why was this exception in the USA needed?

Professionals who work in the child welfare systems need accurate information about their clients' education needs to support learning and to make informed placement recommendations to the court. When educational information is responsibly shared with child welfare agencies, it can help courts to ensure that a child's future living placements are close to the child's current school and provide necessary educational supports.

Prior to the passage of the USA in 2013, court orders were the only way for child welfare caseworkers to access education records without parental consent. This delayed caseworkers' receipt of records and inhibited their ability to advocate for their clients. The USA aimed to speed up caseworkers' access to education records while protecting the confidentiality of students' PII.

How does the USA affect students involved with the juvenile justice system?

The USA allows child welfare caseworkers to obtain the school records of students involved in the juvenile justice system when those students, under state law, are considered to be the legal responsibility of a child welfare agency. For students with no open child welfare case, the USA may apply if a child has been placed in foster care through the delinquency system. This often occurs when a child is in a Title IV-E eligible foster care placement and meets the other Title IV-E requirements for foster care maintenance payments.¹⁸ In such situations, the USA applies because the child welfare agency is "legally responsible... for the care and protection of the student."¹⁹ Other youth placed in foster care as a result of delinquency may also qualify under the USA. Check your state's laws and regulations on Title IV-E funding and case responsibility structures.

¹⁸ Delinquent children will be IV-E eligible when they: (1) *have been removed from relatives* who meet the IV-E financial eligibility requirements established in the Aid to Families with Dependent Children (AFDC) eligibility criteria from 1996; (2) *satisfy substantive findings* that removing the child from home was in child's best interests (and that leaving child at home would have been contrary to the child's interests) and that the State made "reasonable efforts" to keep the child safely at home; and (3) are *placed in foster care*, defined as private child care institution, or a public child care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, *but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.* 42 U.S.C. §672; 42 U.S.C. §672(3)(c)(2).

¹⁹ 20 U.S.C § 1232g(b)(1)(L).

When can a case worker or other agency representative redisclose personally identifiable information from a child's education record to individuals/entities within the juvenile justice system?

When schools disclose education records to child welfare agency caseworkers through the USA exception, caseworkers may only share the records with others who are engaged in addressing the student's educational needs and are authorized by the agency to receive such disclosure, and such disclosure is consistent with the state or tribal laws.²⁰

To date, no federal guidance specifically addresses the release of information to juvenile justice personnel, such as probation officers, counselors, or juvenile justice facility staff. However, in analyzing a somewhat analogous scenario, federal guidance has explicitly recognized that independent contractors of a child welfare agency or tribal organization who are "engaged in addressing the student's educational needs" may legally receive PII from a child welfare agency.²¹ States should explicitly consider risks and benefits of redisclosing information to juvenile justice personnel. For example, juvenile probation officers or court officers have obligations not only to ensure the child's educational success, but also to report behavior to the courts. Sharing information with courts in delinquency cases, however, is not contemplated by the Uninterrupted Scholars Act. To address this issue, states should develop policies and protocols to ensure that education records, when released, is used only for the purpose of addressing the student's educational needs.²²

While a student who is 18 or in post-secondary school can generally consent to the release of his or her education records, federal guidance has stated that the "USA governs the disclosure of PII from the education records of an eligible student in the same fashion as it governs the disclosure of PII from the education records of a student under the age of 18."²³ This issue comes into play in states that have extended jurisdiction of foster care for individuals who are over 18.²⁴

²⁰ 20 U.S.C. § 1232g(b)(1)(L); Later, we'll discuss the juvenile justice exception to FERPA, which also allows narrow access to education records to certain officials in the juvenile justice system.

²¹ FPCO Guidance, *supra* at note 14.

²² For more on redisclosure, see FPCO Guidance, *supra* note 14.

²³ 20 U.S.C. § 1232(b)(1)(L); FPCO Guidance at 6, *supra* note 14.

²⁴ 42 U.S.C. 675(8)(B)(amending the definition of child Social Security Act to include certain individuals in the care of the state who are over 18 years old).

In addition to the USA, what other exceptions address the release of education records to the juvenile justice system?

In addition to the USA, several other exceptions to FERPA's parental consent requirement²⁵ may apply to the release of education records to the juvenile justice system. These exceptions include disclosure: for enrollment in school,²⁶ of directory information,²⁷ and to the juvenile justice system prior to a child's adjudication.²⁸ Additionally, schools may release a student's education records to certain officials without prior parental consent when the information is needed to protect health or safety,²⁹ or the school is served with a court order or subpoena.³⁰

(1) Enrollment in school

This exception allows officials of a student's school to transfer records without prior parental consent to other schools in which the student seeks or intends to enroll, as long as the student's parents are notified of the transfer policy, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.³¹ Therefore, when a student enrolls in school at a juvenile justice facility, the student's home school may transfer records to the facility's school without first obtaining parental consent, as long as the parents are provided with the notice and hearing opportunity described above. Similarly, when the student is later discharged from the juvenile justice community and returns home, the school at the juvenile justice facility may transfer the student's records to the student's home school.

(2) Directory information

The directory information exception to non-consensual disclosure states that a school may release the child's "directory information" if the school has given prior notice to parents of the types of directory information it intends to disclose *and* parents have an opportunity to notify the school in writing that they do not want their child's directory information

²⁵ Or student consent for a student who is 18 years old or attending a postsecondary institution. See 34 C.F.R. § 99.3.

²⁶ 20 U.S.C. § 1232g(b)(1)(B).

²⁷ 20 U.S.C. § 1232g(a)(5)(B).

²⁸ 20 U.S.C. § 1232g(b)(1)E.

²⁹ *Id.*

³⁰ 20 U.S.C. § 1232g(b)(1).

³¹ 20 U.S.C. § 1232g(b)(1)(B).

disclosed.³² Under FERPA, directory information includes—but is not limited to—the following information about a student: name, address, phone number, date and place of birth, participation in school activities, dates of attendance, photograph, and field of study.³³ Notice of intent to release that information can be provided by any means likely to inform eligible students and parents of the types of information it has designated as directory information.³⁴ Note, however, that an education agency may not disclose directory information that will ultimately reveal personally identifiable information in a child’s education records.³⁵

(3) Disclosure to the juvenile justice system prior to a child’s adjudication

For a school to release a student’s education records under this exception, *all* of the following conditions must be fulfilled: (a) the child has not yet been adjudicated delinquent³⁶ under state law;³⁷ (b) a state law specifically authorizes the disclosure; (c) the disclosure is to a state or local juvenile justice system agency; (d) the disclosure relates to the juvenile justice system’s ability to provide pre-adjudication services to a student; *and* (e) state or local officials certify in writing that the institution or individual receiving the information has agreed not to disclose it to a third party outside the juvenile justice agency.³⁸ At least 19 states statutes authorize this type disclosure. See Appendix A for more information on this subject.

(4) Health or safety emergency

Schools may release education records without parental consent in connection with a health or safety emergency if the information is needed to protect the health or safety of students or others.³⁹ To fall under this exception, a situation must constitute an “articulable and significant threat”⁴⁰ to a student or other individuals and the information must be needed to

³² 20 U.S.C. § 1232g(a)(5)(B).

³³ 20 U.S.C. § 1232g(a)(5)(A).

³⁴ US Dept. of Ed, “FERPA General Guidance for Students”, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>

³⁵ 34 C.F.R. §99.37(e).

³⁶ An adjudicated delinquent is a person under age 18 who has been found by a juvenile court judge to have committed a violation of a criminal law.

³⁷ 20 U.S.C. § 1232g(b)(1)E.

³⁸ 20 U.S.C. § 1232g(b)(1)E.

³⁹ 20 U.S.C. § 1232g(b)(1).

⁴⁰ *Id.* (explaining that for there to be an articulable and significant threat, a school official must be able to explain why he or she believes there is a substantial threat, based on the information available.).

protect their health or safety.⁴¹ When these conditions apply, the school may disclose the information to appropriate parties without parental consent. Typically, law enforcement officials, public health officials, trained medical personnel, and parents are the types of appropriate parties to whom information may be disclosed under this FERPA exception.⁴²

(5) *Judicial order or subpoena.*

Schools may also release information without written consent to comply with a judicial order or subpoena, but the school must make a “reasonable effort” to notify the parent before releasing the record.⁴³ Prior notice is not necessary, however, in any the following situations: (1) the subpoena is from a federal grand jury, the subpoena is issued for a law enforcement purpose,⁴⁴ or (3) the judicial order was issued in a court proceeding involving a child abuse and neglect proceeding to which the parent is a party.⁴⁵

How does state law affect the sharing of education records of children involved in the juvenile justice system?

FERPA provides the minimum requirements for guarding the privacy of education records, but states may provide more privacy protections.⁴⁶ For example, states can limit the number and type of officials to whom disclosure is permitted.⁴⁷ Moreover, as described above and further explore in the Appendix, some FERPA exceptions require state law authorizations to be effective.⁴⁸

Conclusion

States play a vital role in promoting thoughtful and targeted information-sharing to improve student outcomes, while still protecting student confidentiality and parental rights. Understanding and applying FERPA, and becoming familiar with the USA, can help states to engage effectively in this work. The responsible sharing of information from schools to the

⁴¹ *Id.*

⁴² *Id.*

⁴³ 20 U.S.C. § 1232g(b)(1).

⁴⁴ *Id.*

⁴⁵ 20 U.S.C. § 1232g(b)(2).

⁴⁶ Privacy Technical Assistance Center (PTAC), “The Family Educational Rights and Privacy Act Guidance for Reasonable Methods and Written Agreements”
http://www2.ed.gov/policy/gen/guid/fpco/pdf/reasonablemtd_agreement.pdf

⁴⁷ 34 CFR 99.31(5)

⁴⁸ 20 U.S.C. § 1232g(b)(1)E; *See infra* section on exceptions address the release of education records to the juvenile justice system

juvenile justice system can help states achieve better educational outcomes, and ultimately better life outcomes, for some of our most educationally vulnerable youth.