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In this issue:

1 U.S. Department of Education Makes Minor But Significant Changes to FERPA

2 RFR's Gebhart Honored

4 RFR Speaker Showcase

U.S. Department of Education Makes Minor but Significant Changes to FERPA

by Brian M. Kester

On April 8, 2011, the United States Department of Education published a number of proposed changes to the regulations under the Family Educational Rights and Privacy Act ("FERPA"), 34 C.F.R. § 99.1 et seq. On December 2, 2011, following the required notice and comment period, the Department released the changes it officially adopted. These revised regulations, which became effective January 3, 2012, will have a significant impact on the way local education agencies, such as school districts and technology centers, must operate in the future. This article identifies the changes made and highlights the revisions that will have the greatest impact on local education agencies.

The Department began its update to FERPA by revising its definition section. For the first time, the Department has defined the terms "authorized representative," "early childhood education program," and "education program." 34 C.F.R. § 99.3. These newly added definitions largely expand the scope of FERPA. For instance, the Department has defined "authorized representative" to in-

clude not only those individuals directly employed by local or state educational agencies, but also any entity or individual designated by these agencies to perform audits, evaluations, or any compliance enforcement activity. Likewise, the Department has included an expansive definition for the term "early childhood education program," which includes not only Head Start and Early Head Start programs but also every other state licensed or regulated childcare program and other similarly situated programs. Finally, the last newly defined term, "education program," encompasses not only elementary, secondary, postsecondary, career and technical institutes and schools, but also includes "any program that is principally engaged in the provision of education." As these revised definitions show, the Department intends for FERPA to extend beyond those environments traditionally associated with education so that parents, guardians and students may enjoy the Act's protections in non-traditional settings as well.

In addition to these new definitions, the Department also revised an existing term – "directory information" –

which could significantly impact the protection of certain information. In its revision, the Department has now stated that information that would not ordinarily be directory information, such as student ID numbers and other unique personal identifiers, is directory information if such information is displayed on student ID badges without the use of additional security measures. That is, if the school does not require information beyond what is present on the student ID badges, such as individual passwords, for example, to authenticate the user's identity, then FERPA deems the information on student ID badges to be directory information. This change could cause grave privacy issues for schools that use their students' social security numbers for student ID numbers.

Because FERPA does not prohibit education programs from repurposing students' social security numbers as student identification numbers or as other unique personal identifiers, this alteration could require the display or release of these sensitive numbers to the world. Therefore, based on this revision, the Department has encouraged education programs to either eliminate or greatly minimize any practice of using a student's social security number in any way as an identification number or other personal identifier. The Department has not, however, prohibited this practice.

Besides these new and updated definitions, the Department has also revised other FERPA provisions as well. Some changes involve relatively minor alterations, such as consolidating the Secretary of Education's power to enforce decisions related to FERPA into one regulation. See 34 C.F.R. § 99.67. Other revisions generally alter FERPA's regulations to coincide with the new definitions so that the regulations will apply not only to educational agencies but also to "other recipient[s] of Department funds under any program administered

by the Secretary" and "any third party outside of an educational agency or institution." See 34 C.F.R. §§ 99.61, 99.64, 99.65, 99.66. The Department also revised 34 C.F.R. § 99.31 to clarify that FERPA-permitted entities may re-disclose students' personally identifiable information in education records as part of agreements with researchers who are conducting studies for, or on behalf of, the educational agencies and institutions. Unlike before, however, this new revision requires researchers who receive students' personally identifiable information to destroy that information after its use rather than return it to the education agency.

Beyond these relatively minor changes, the Department also altered two additional regulations – 34 C.F.R. §§ 99.35 and 99.37 – that will undoubtedly vary the way in which education programs must operate to be in compliance with FERPA. First, the Department revised 34 C.F.R. § 99.35, which pertains to the conditions that apply to disclosure of information for state and federal program purposes, by altering the requirements education programs must follow when releasing students' personally identifiable information.

This revised regulation now requires that when an education program discloses students' personally identifiable information to an authorized representative under one of the FERPA exceptions but without prior consent, it must first form a written agreement with that representative. To be valid, the written agreement must contain certain information, such as the identity of the authorized representative, the specific personally identifiable information that is to be disclosed, and a clear description of the activity and purpose for the disclosure. 34 C.F.R. § 99.35(a)(3)(i)-(ii). This written agreement must also require the authorized representative to destroy the students' personally identifiable information within a specific time

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period; the authorized representative is not to return the personally identifiable information to the releasing agency. 34 C.F.R. § 99.35(a)(3)(iii)-(iv). Finally, this revision now requires local education agencies to establish policies and procedures that will ensure that the personally identifiable information it releases to authorized representatives will not be re-disclosed by those representatives. 34 C.F.R. § 99.35(a)(3)(v).

The second, and likely most significant revision by the Department, alters 34 C.F.R. § 99.37 by changing the way local education agencies can release directory information. As the regulation now reads,

In its public notice to parents and eligible students in attendance at the agency or institution ..., an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information

will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice

34 C.F.R. § 99.37(d). As this modification shows, local education agencies now have the power to choose for themselves when and to whom they will release directory information, so long as their practice abides by the release constraints identified in the annual notification to parents. Once the local education agency provides its public notice identifying the limited release of directory information to specific parties, for specific purposes, or both, however, it must abide by its self-created constraints.

In addition to this modification to annual notices, the Department also modified another portion of 34 C.F.R. § 99.37 that will further affect the disclosure of directory information. Under the revised regulation, parents, guardians and eligible students still retain the general right to opt out of having their directory information disclosed. However,

RFR Paralegal Roxane Gebhart Honored

Rosenstein, Fist & Ringold paralegal N. Roxane Gebhart was recently honored by the Oklahoma Air Force National Guard by being named the Oklahoma Air Force National Guard Airman of the Year for 2011. Rosenstein, Fist & Ringold congratulates Roxane for this honor and thanks her for her service to our country.



RFR Speaker Showcase

Karen Long is chairing the Oklahoma Bar Association's School Law Seminar that will be held on April 19, 2012, at the Oklahoma Bar Association Center, 1901 North Lincoln Boulevard, in Oklahoma City. The seminar will focus on what tools are available for identifying child molestation, conducting investigations, and seeking solutions. Register online at: www.okbar.org.

that right, as before, has limitations. The regulation continues to state that parents, guardians and eligible students cannot opt out of disclosing directory information if the purpose is to prevent disclosure of "the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled." 34 C.F.R. § 99.37(c)(1). The revised regulation adds an additional exception to coincide with its revised definition of "directory information," however. Under the new exception, parents, guardians and eligible students cannot opt out of disclosing directory information if the only purpose is to "[p]revent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated [properly by the education program] as directory information" 34 C.F.R.

§ 99.37(c)(2). This means that while parents, guardians and eligible students may generally opt out of permitting the schools to disclose the student's directory information, they may not exercise this opt out option for either of the above-stated reasons.

The changes the Department made to FERPA, while relatively few in number, will impact the operations of local education agencies. Though all of the changes are significant, the two most important changes pertain to the manner in which students' personally identifiable information is released and treated by authorized representatives, and the information that schools must provide in the annual notification relating to the release of directory information. With these regulations now in effect, local education agencies must modify their practices accordingly.

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