



**MASSACHUSETTS COMMUNITY COLLEGES
OFFICE OF THE GENERAL COUNSEL**

**c/o MIDDLESEX COMMUNITY COLLEGE
SPRINGS ROAD, BUILDING 2
BEDFORD, MASSACHUSETTS, 01730**

**TELEPHONE: (781) 275-9400
FAX: (781) 275-2735**

MEMORANDUM

TO: All Community College Presidents

FROM: Kenneth A. Tashjy, General Counsel

DATE: January 13, 2009

**RE: FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)
SUMMARY OF NEW REGULATIONS – JANUARY 2009**

The United States Department of Education has released new rules related to the Family Educational Rights and Privacy Act ("FERPA"), which generally bars the release of educational records by colleges without students' permission. The last time FERPA's regulations were significantly up-dated was in 2000. Below is a summary of the new rules. The new rules include modifications to key definitions found in the regulations, clarifies disclosure of educational records to contractors, consultants, and state and federal officials, and establishes a new standard for disclosing educational records under the regulation's health or safety exception. This latter change was prompted by calls from college and university officials for greater flexibility in releasing student record information to parents and school officials in the wake of the Virginia Tech shootings. The effective date for the new rules is January 8, 2009.

A complete version of the new rules is available at the Department of Education's website: www.ed.gov/print/policy/gen/guid/fpco/ferpa/index.html.

**cc: Vice Presidents of Student Services and Enrollment Management
Vice Presidents of Academic Affairs
Registrars**

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)
SUMMARY OF NEW REGULATIONS
JANUARY 2009

1. **DEFINITIONS – SECTION 99.3**

- **Attendance**

- **Current Regulation** – The term includes, but is not limited to: (a) Attendance in person or by correspondence; and (b) The period during which a person is working under a work-study program.
- **New Regulation** – The term includes, but is not limited to: (a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and (b) The period during which a person is working under a work-study program.

- **Directory Information and Student ID Numbers**

- **Current Regulation** - "Directory information" is information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.
- **New Regulation** – Directory information may now include a student ID number if the number cannot be used to gain access to education records except when used with one or more other factors to authenticate the user's identity. Said other factors must only be known to the user.
- A SSN can never be designated as directory information.

- **Educational Records and Peer Grading**

- **Current Regulations** - Defines "education records" as records "directly related to a student" and "maintained by an educational agency or institution."
- **New Regulation** - Incorporates U.S. Supreme Court decision in *Owasso v. Falvo*, which held that the term "education record" does not include peer-graded papers before they are collected and recorded by a teacher. Such documents are not FERPA protected because they are not yet "maintained" by the institution.

- **Personally Identifiable Information**
 - **Current Regulation** – The term includes, but is not limited to:
 - (a) The student's name;
 - (b) The name of the student's parent or other family member;
 - (c) The address of the student or student's family;
 - (d) A personal identifier, such as the student's social security number or student number;
 - (e) A list of personal characteristics that would make the student's identity easily traceable; or
 - (f) Other information that would make the student's identity easily traceable.
 - **New Regulation** - The term includes, but is not limited to:
 - (a) The student's name;
 - (b) The name of the student's parent or other family members;
 - (c) The address of the student or student's family;
 - (d) *A personal identifier, such as the student's social security number, student number, or biometric record;*
 - (e) *Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;*
 - (f) *Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or*
 - (g) *Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."*
 - A “biometric record” is a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual, including fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

2. **STUDENT RIGHTS – SECTION 99.5**

- New regulations clarify that educational records may be released to a parent of an eligible student under the following situations:
 - Written consent is provided by the student;
 - Lawfully issued subpoena is received;
 - Health or Safety emergency exists;
 - Student is a tax dependant of the parent; or
 - Student is under 21 years old and has committed a disciplinary violation regarding the use or possession of alcohol or controlled substances in violation of any Federal, State, or local law, or any rule or policy of the institutions.

3. DISCLOSURE WITHOUT STUDENT CONSENT – SECTION 99.31

- **Expanding “School Official” to Include Outsourcing Organizations (99.31(a)(1))**
 - **Current Regulation** – Education records may be released to a “school official” who has a “legitimate education interest” in the education records.
 - **New Regulation** - Expands the “school officials” exception to include contractors, consultants, volunteers, and other outside service providers used by a college to perform institutional services and functions. A contractor (or other outside service provider) that is given access to education records must be under the “direct control” of the disclosing institution and subject to the same conditions on use and redisclosure of education records that govern other school officials. “Direct control” refers to a college’s control over the contractor’s use and maintenance of information from educational records.

- **Organizations Conducting Studies (99.31(a)(6))**
 - **Current Regulation** – Permits disclosure of educational records to organizations conducting studies for or on behalf of educational institutions to (A) develop, validate or administer predictive tests; (B) administer student aid programs; or (C) improve instruction.
 - **New Regulation** - Requires colleges that uses this exception to enter into a written agreement with the recipient organization that specifies the purpose, scope, and duration of the study and the information to be disclosed; require the organization to destroy or return all personally identifiable information when no longer needed for the purposes of the study; and specify the time period during which the organization must either destroy or return the information. The written agreement must also specify that information from education records may only be used to meet the purposes of the study stated in the written agreement and that the study will be conducted in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests.

- **Dependent Student (99.31(a)(8))**
 - **Current Regulation** – Permits disclosure of educational records to parent of a tax dependent student.
 - **New Regulation** – Encourages colleges to advise parents to redact all information on tax form other than that information necessary for establishing dependency. Department has also developed 2 forms it encourages colleges to use in place of reliance on tax forms. Those forms are available at the DOE website at:
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html>
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>

- **Registered Sex Offenders (99.31(a)(16))**
 - Permits colleges to disclose information it receives from a State concerning a student who is required to register as a sex offender in the State.

4. **REDISCLASURE OF EDUCATIONAL RECORDS**

- **Redisclasure of educational records received by a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense – Sections 99.31(a)(13) & 99.33**
 - **Current Regulation** – The “final results” of a disciplinary proceeding may be released to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. Such information, however, could be released to said victim only on the condition that the victim would not disclose the information to any other party without the prior consent of the alleged perpetrating student. In many cases, colleges had victims sign non-disclosure agreements as a condition of receiving the final results.
 - **New Regulation** – Permits the disclosure of the final results of a disciplinary proceeding to an alleged victim of a crime of violence or a non-forcible sex offense and a college may not require a victim to sign a non-disclosure or confidentiality agreement as a condition of receiving such information.
 - Under the federal Jeanne Clery Act (a/k/a “Criminal Statistics Act” or “Right To Know” Law) colleges are required to inform both the accuser and accused of the outcome of an institution’s disciplinary proceeding regarding an alleged sex offense.
- **Redisclasure of educational information by federal and state officials – Sections 99.31(a)(3), 99.33 & 99.35**
 - **Current Regulations** – According to 99.31(a)(3), federal and state officials and educational authorities may receive educational records without consent if the information is provided “in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.” When the information is not longer needed for these purposes, it must be destroyed by the federal or state officials or authorities. Said parties have no right to redisclasure the educational records.
 - **New Regulations** - The final regulations permit federal and state officials to redisclasure education records under the same conditions that apply currently to other recipients of education records under Section 99.33. Under Section 99.33, a party receiving educational records may redisclasure that information in accordance with Section 99.31.

6. **HEALTH OR SAFETY EMERGENCIES – SECTIONS 99.31(a)(10) & 99.36**

- **Current Regulation** – It is permissible under Section 99.31(a)(10) to release personally identifiable information without consent in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. This section “will be strictly construed.”
- **New Regulation** – Removes the “strict construction” requirement. If the school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to appropriate parties, including the student’s parents, whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. Colleges are required to record the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. If there is a rational basis for the determination, the Department will not substitute its judgment for that of the college in deciding to release the information.

7. **DISCLOSING DIRECTORY INFORMATION – SECTION 99.37**

- Under the current and new regulations, a student may opt-out of the college’s policy of releasing directory information without the student’s consent. Under such circumstances, a college is not permitted to release any of the student’s educational records absent an exception under Section 99.31. The new regulations require colleges to honor a former student’s opt-out request made while in attendance unless it has been specifically rescinded by the former student. This will make clear that schools may not disclose the directory information of a former student if the student opted out of the disclosure while the student was in attendance.