

Family Educational Records Privacy Act ("FERPA"), 20 U.S.C. § 1232g Governing Law and Appalachian State University Policies

I The Governing Law

A *Federal Statutes*

The Family Educational Records Privacy Act ("FERPA"), 20 U.S.C. § 1232g, provides that:

No funds shall be made available . . . to any educational . . . institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization, other than to . . . other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required.

20 U.S.C. § 1232g(b)(1)(A).

Although the statute initially grants the rights of privacy and access concerning education records to the student's parents, the student becomes the "owner" of those rights upon his or her eighteenth birthday or upon beginning attendance at a college-level institution. Thus, "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." 20 U.S.C. § 1232g(d).

Under FERPA, "the term 'education records' means . . . those records, files, documents, and other materials which . . . contain information directly related to a student." 20 U.S.C. § 1232g(a)(4)(B)(i). The term "'directory information' relating to a student" includes:

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.

20 U.S.C. § 1232g(a)(5)(A).

The statute does not define "legitimate educational interests," although the statutory language indicates that such interests must "includ[e] the educational interests of the child for whom consent would otherwise be required." *See also* Lynn M. Daggett, "Bucking up Buckley I: Making the Federal Student Records Statute Work," 46 *Cath. U.L. Rev.* 617, 631 n. 109 ("Pursuant to 1994 amendments, the child's own educational interests must be considered.") (Spring, 1997).

However, "[e]ach educational agency or institution" must "maintain a record, kept with the education records of each student," on which the educational agency or institution identifies "all individuals [other than "school officials . . . determined . . . to have legitimate educational interests"], agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information." 20 U.S.C. § 1232g(b)(4)(A). This record must be available for inspection by the student's parents or the student (if he or she is eighteen years of age or older). *Id.* In other words, the student has a right to know, and the University must document: (1) every instance of a person or

entity seeking or obtaining access to the student's records; and (2) the specific "legitimate educational interest" such person or entity has for obtaining such information.

B Department of Education Implementing Regulations

The Department of Education regulations implementing FERPA likewise do not define "legitimate educational interest." However, in language similar to that of the statute, 34 C.F.R. § 99.31(a)(1) provides that "[a]n educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required . . . if the disclosure . . . is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." Likewise, **an institution may disclose such information without the student's consent "to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954."** 34 C.F.R. § 99.31(a)(8) (emphasis supplied).

Furthermore, once each year, the educational institution must notify students currently in attendance of their rights under FERPA and the Department's regulations. 34 C.F.R. § 99.7(a)(1). That annual notification must inform eligible students or parents that they have the right to:

- (i) Inspect and review the student's education records;
- (ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- (iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and
- (iv) File with the Department a complaint . . . concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

34 C.F.R. § 99.7(a)(1)(i)-(iv). In addition, the notice must describe "(i) The procedure for exercising the right to inspect and review education records"; and "(ii) The procedure for requesting amendment of records. . . ." 34 C.F.R. § 99.7(a)(3)(i) and (ii).

Significantly, "[i]f the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1)" (*i.e.*, making disclosures "to other school officials . . . determined to have legitimate educational interests"), the annual notification of rights must include "a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest." 34 C.F.R. § 99.7(a)(3)(iii). In other words, ASU's annual notification of FERPA rights must specify: (1) the basis on which ASU determines who may obtain access to educational records; and (2) the nature of the legitimate educational interests that support such access.

If an unconsented disclosure under § 99.31 is not permitted, "[t]he parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records. . . ." 34 C.F.R. § 99.30(a). Such written consent must: "(1) Specify the records that may be disclosed; (2) State the purpose of the disclosure; and (3) Identify the party or class of parties to whom the disclosure may be made." 34 C.F.R. § 99.30(b)(1)-(3).

II ASU Policies

A *Guidelines for Providing Access to Information at Appalachian State University*

Two Appalachian State University Policy Statements are relevant FERPA issues. These are the "Guidelines for Providing Access to Information at Appalachian State University" (the "Access Guidelines")¹ and the "Policy Statement on the Family Educational Rights and Privacy Act of 1974" (the "FERPA Policy Statement").² (The Access Guidelines are subtitled "Policy One" and the FERPA Policy Statement is subtitled "Policy Two.")

According to the Access Guidelines, only "[t]he following individuals [or "persons . . . officially designated in an acting capacity" for any such individual] will have access to student educational records":³

Those persons who report directly to the Vice Chancellor for Academic Affairs
Chairpersons of departments
Current faculty who are seeking access to a given student's education record and who are currently teaching or have previously taught that student
Academic advisors (faculty and staff) to whom a student comes for academic advice regarding his or her (the student's) program of study
Those persons responsible for the maintenance of educational records (*i.e.*, those persons who receive and record information regarded as a part of a student's educational records), and those persons to whom these persons directly report
Controller
Internal Auditors
Director of Alumni Affairs
Director and Assistant Director of Career Planning and Placement
Dean of Students
Director of Health Services and physicians associated with the University Health Center
Director of Counseling and Psychological Services Center and staff counselors in the Counseling and Psychological Services Center
Director of Student Programs
Director and Assistant Directors of Student Financial Aid

B *Policy Statement on the Family Educational Rights and Privacy Act of 1974*

The FERPA Policy provides, *inter alia*, that "Appalachian State University will disclose information from a student's education records only with the explicit written consent of the student, except that records may be disclosed without such consent when the disclosure is . . . [t]o Appalachian State University officials who have a legitimate educational interest in the records."

¹See http://www.appstate.edu/www_docs/resource/admpol1a.htm. Note that although the Access Policy repeatedly makes reference to "1.b," the Policy as it appears on the ASU Website does not include section numbers.

²See http://www.appstate.edu/www_docs/resource/admpol2a.htm.

³The Access Guidelines state that "[a] student educational record is defined in Administrative Policy Statement 2," *i.e.*, the FERPA Policy Statement.

An "Appalachian State University official" is defined to include, among others, "a person employed by the University in an administrative, supervisory, academic, research, or support staff position, including health and medical staff," and "a member of the Appalachian State University Board of Trustees, acting in his or her official capacity."

Further, the FERPA Policy provides that "[a]n Appalachian State University school official has a legitimate educational interest if that official is, among other things:

- performing a task that is specified in his or her position description or contract agreement.
- performing a task related to a student's education.

* * * * *

- providing a service or benefit relating to the student or student's family, including, but not limited to, health care, counseling, job placement, or financial aid.