



*From the Information Policy Analysis Division*

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## Proposed Changes to FERPA Regulations

*In the wake of law changes, court cases, school shootings – including Virginia Tech – and the need to allow for greater clarity and information sharing, changes to the regulations implementing the Family Educational Rights and Privacy Act (FERPA), 34 CFR Part 99, are being proposed by the U.S. Department of Education (Department). The following are excerpts from the Department’s proposal.*

The Department’s proposed regulations, background, rationale, and information on how to submit comments may be found at <http://edocket.access.gpo.gov/2008/pdf/E8-5790.pdf>. Public comments will be accepted until May 8, 2008. Any questions about the proposed regulations may be directed to the Department’s Family Policy Compliance Office at (202) 260-3887.

The proposed regulations will reflect the passage of the USA Patriot Act (Pub. L. 107-56) and the Campus Sex Crimes Prevention Act (Pub. L. 106-386), as well as decisions in two U. S. Supreme Court cases interpreting FERPA. In addition, the proposed regulations reflect parent and school concerns and Department experience with FERPA.

The term “education entity” is used here to mean a K-12 school, school district, post-secondary institution, or state department of education. A majority of proposed regulations are summarized below.

### § 99.3 – Definitions

**Covered students:** Will include those who take classes via internet or other means without being physically present in the classroom.

**Directory information:** May not include a student’s Social Security number, and an education entity may not confirm student identity for a requester by using a Social Security number. Directory information may include a unique student identifier used to access electronic systems, as long as education records may be accessed with additional information known only to the student, like a PIN. Finally, if a parent/eligible student has opted out of having directory information designated on a student, the student still must agree to disclosure of name and institutional email address for purposes of class participation. (See also § 99.37)

**Peer graded assignments:** Are not education records before they have been collected and recorded by a teacher.

**Personally identifiable information:** Refines this concept to address indirect information that might allow someone in the community to identify a particular student with reasonable certainty. Prohibits responding to a targeted request (one that describes an individual without naming him or her).

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Records on former students: Are covered by FERPA if they relate to the student's time at a school (such as a settlement of a lawsuit), but are not covered if they relate to alumni activities. If a parent/eligible student opted out of directory information, that must be honored after the student leaves unless rescinded.

Records re-disclosure without consent: An education entity may return records to the education entity that sent them without seeking parent/eligible student consent.

State auditor: Added to the list of state and federal officials who may access education records for an audit required by law of federal or state education programs.

### **§ 99.5 – Rights of students**

Parents of students who are 18 or older or post-secondary: Gives parents access to education records if their child is an income tax dependent; if there is a health or safety emergency; if the student is under 21 and has violated an institutional policy on alcohol or controlled substances; or if any other FERPA exception applies.

### **§ 99.31 – Prior consent not required to disclose**

School officials' access to education records: An education entity must insure that individuals access only education records in which they have a legitimate interest.

Outsourcing and volunteers: Contractors and volunteers will be allowed to access education records if they are performing functions that would otherwise be performed by employees, are under the direct control of the education entity, are subject to the same rules on use and re-disclosure that apply to school officials, and are included in the annual FERPA notification to parents/eligible students.

Requester's identification: Requires an education entity to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and others to whom education records are released. Suggests methods.

De-identified information: Provides standards under which an education entity may release, without consent, de-identified educational records. Prohibits responding to a targeted request.

Transfer records: The education entity a student is leaving may disclose records to the student's new education entity either before or after the transfer, as long as the disclosure relates to the student's transfer.

Students who are registered sex offenders: Education entities may comply with state laws that provide for disclosing information on students who are required to register as sex offenders.

USA Patriot Act court orders: An education entity served with one of these must do a facial check to see that the document appears legitimate; it need not notify a parent/eligible student when it discloses in response to such an order.

Release of education records for research: An education entity must enter a written agreement with a research organization before releasing education records to it. Specifies what the agreement must contain. Allows an education entity to participate in research it does not initiate and has no particular interest in.

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### § 99.33 – Redislosures

Postsecondary student sex offenses: An institution may not impose any re-disclosure limits on the accuser in a case involving campus discipline action for an alleged sex offense.

Re-disclosure of education records obtained pursuant to judicial order or subpoena: A party that does this must so notify parents/eligible students. Relieves the education entity from this responsibility.

Re-disclosure of education records received by federal, state, and local officials for audit purposes: Would be allowed as specified in the proposed changes.

### § 99.36 – Health and safety emergencies

Health and safety emergencies: The Department proposes to remove the requirement that this exception for release of education records without consent be strictly construed. Instead, considering the totality of the circumstances, there must be an articulable and significant threat to the health or safety of a student or other individuals, and the disclosure is to any person whose knowledge of the information is necessary to protect against the threat. If, based on the information available at the time of the determination, there is a rational basis for the determination; the Department will not substitute its judgment in evaluating the circumstances.

### §§ 99.62 through 99.67 – Enforcement

Enforcement: Proposed changes will specify what information the Department may require an education entity to submit in connection with investigation and other enforcement activities. The Department may investigate even if no complaint is made or if a complaint is withdrawn. Finding of a violation need not be based on a policy or practice, as opposed to a single failure by an education entity. However, funding may be withheld only for a policy or practice, not a single failure.

## New Workshops: Get Ahead in the Data Practices World!

IPAD is offering practical, interactive workshops geared toward government entity employees with data practices responsibilities. The workshops will focus on the data access guides required by Minn. Stat. §§ 13.03, subd. 2(b) and 13.05, subd. 8. Workshop participants will work on creating versions of the guides customized to their own government entity with the help of IPAD staff.

The dates for the workshops are June 18<sup>th</sup> or June 26<sup>th</sup>. For more information and to register, visit [www.ipad.state.mn.us](http://www.ipad.state.mn.us).

## 2008 Legislative Session Update

The conference committee for this year's Omnibus Data Practices bill (Senate File 3235/House File 3553) has begun meeting. The House bill passed the floor unanimously on April 16, 2008. On April 21, 2008, the following conference committee members were appointed: Representatives Simon; Lesch; Lillie; Hortman; and DeLaForest; and Senators Olson, M; Moua; Betzold; Scheid; and Limmer. Look for more information about the final bill in the summer issue of FYi.

# Opinion Highlights

*The following are highlights of recent advisory opinions by the Commissioner of Administration. All opinions are available on the IPAD website, [www.ipad.state.mn.us](http://www.ipad.state.mn.us).*

**08-001:** As allowed under the Open Meeting Law (Minnesota Statutes, section 13D.05, subdivision 3(c)), a city council closed public meetings to consider offers and counteroffers for the acquisition of two properties. The city asked whether it could release the tapes of the closed meetings. The Commissioner concluded that the city council's duty under the Open Meeting Law was to withhold the videotape recordings until one of certain events occurred or eight years had passed. The Commissioner also concluded that the classification, under Minnesota Statutes, Chapter 13, of the data on the tapes was presumptively public. Based on Minnesota Statutes, section 645.26 (conflicting statutory provisions), the Commissioner determined that the language in Chapter 13D prevailed and that the city must withhold the recordings from the public.

**08-002:** An individual (X) asked whether a public housing authority (pha) properly withheld access to a copy of a complaint another individual made. The Commissioner discussed Advisory Opinion 05-023 in which she opined that data about individuals who receive benefits for the purposes of rental housing are private under Minnesota Statutes, section 13.462. The pha stated that if it released the complaint letter to X, the identity of the complaining pha tenant most likely would be revealed. Therefore, the Commissioner concluded that the pha complied with Chapter 13 in refusing to release the data to X.

**08-003:** An individual asked whether a county properly withheld all data relating to a complaint that was made against the individual's client. The county asserted that the complainant's identity was protected under Minnesota Statutes, section 13.44. The county also stated that a release of any information about the complaint could lead to identification of the complainant. The Commissioner concurred that the county could not release any complaint-related data that identified the complainant. The Commissioner opined that if all data related to the complaint identify the complainant, the county responded appropriately to the data request.

**08-004:** An individual asked whether a city properly denied access to the following data: (1) the names of all retirees and dependents who currently receive free health care from the city and (2) the total value and nature of health care benefits each person has received. The Commissioner opined that pursuant to Minnesota Statutes, section 13.43, the city responded appropriately. She wrote: "The reason a former employee left [city] employment (absent final disciplinary action) is not public. The [requestor] did not ask for otherwise public data on former employees; he asked for identifying data about retirees and their dependents....If [the requestor], or anyone, were to ask for the names, value and nature of fringe benefits, and any other public data on former employees, the City could provide access to those data."

**08-005:** A state agency asked about the classification of certain personnel data. The agency, in complying with Minnesota Statutes, section 13.055 (notice of security breach), had released data specifying the nature of a complaint made against two employees. Someone then requested the names of the employees. Pursuant to section 13.43, when a complaint/charge has been made against an employee, the nature of the complaint is not public until the government entity makes its final decision about disciplinary action and a final disposition has occurred. In the facts provided by the state agency, a final disposition had not occurred. The Commissioner, based on Minnesota Statutes, section 645.26 (conflicting statutory provisions), opined that the state agency could not release the names of the employees unless/until a final disposition had occurred. The Commissioner also noted that section 13.055 applies only to state agencies and that the Legislature needs to weigh in on the policy implications brought to light by the agency's question.

## Temporary Classifications of Data\*

*Government entities need to know the classification of data they keep to properly protect not public data and correctly respond to data requests. There may be situations when an entity receives a request for data that no one has previously requested. The entity determines that the data are public, but realizes there may be a good policy reason to protect the data. For these types of situations, Minnesota Statutes, section 13.06, allows entities to make a request to the Commissioner of Administration to temporarily classify (as not public) certain public data. Temporary classifications have the same effect as any other statutorily classified data for the period of the classification. Each classification has an expiration date and, if an entity has the data, it must treat the data as not public until the classification expires, or until the Legislature acts on the classification. The temporary classifications currently in effect are listed below.*

<b>Current Temporary Classifications</b>				
<b>Description of data</b>	<b>Affected Entities</b>	<b>Classification</b>	<b>Status</b>	<b>Expiration</b>
An employer or union's position presented during Bureau of Mediation Services mediation and/or arbitration occurring as part of labor negotiations	All government entities	Protected nonpublic	Approved by Commissioner and Attorney General's Office	June 1, 2009 (unless the Legislature acts sooner)
Home address, private telephone number, and private email address on applicants for appointment or appointees for volunteer positions in state or local government that are not filled pursuant to the open appointment process (does not apply to individuals in elective positions)	All government entities	Private	Approved by Commissioner and Attorney General's Office	June 1, 2010 (unless the Legislature acts sooner)
Identifying data about individuals or organizations collected for non-regulatory research or evaluation purposes	Minnesota Department of Agriculture	Private or Nonpublic	Approved by Commissioner and Attorney General's Office	June 1, 2010 (unless the Legislature acts sooner)

More information about temporary classifications is at [www.ipad.state.mn.us/tempclass.html](http://www.ipad.state.mn.us/tempclass.html).

*\*This section is a new addition that will continue to be a regular feature in the newsletter.*

## Genetic Information Work Group – Update

The Minnesota Genetic Information Work Group is continuing its work in preparation for the report due to the Legislature on January 15, 2009. The committees discussing genetic information safeguards and secondary uses of genetic information have been meeting each month since January. The full work group will meet again on June 24<sup>th</sup>. As always, the committee and work group meetings are open to the public and anyone is welcome to attend.

More information about the work group is available at [www.ipad.state.mn.us/geneticinfo.html](http://www.ipad.state.mn.us/geneticinfo.html).

## Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email [info.ipad@state.mn.us](mailto:info.ipad@state.mn.us).

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This document can be made available in alternative formats, such as large print, Braille or audiotape by calling 651.296.6733. For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

