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**REPORT ON THE UPDATED FERPA REGULATIONS AND CLARIFICATION ON THE APPLICATION OF FERPA AND HIPAA TO STUDENT HEALTH RECORDS**

**Action Requested:** Receive the report on recent changes to FERPA regulations and clarifications on the application of FERPA and HIPAA to student health records.

**Executive Summary:** In December 2008, the Department of Education (DOE) published the final rules adopting changes and clarifications to the Family Educational Rights Privacy Act (FERPA) regulations. The new regulations implement United States Supreme Court decisions and statutory amendments, respond to advances in information technology, and address issues identified through practical experience in administering FERPA. In November, 2008, the DOE in conjunction with the Department of Health issued joint guidance on the application of FERPA and the Health Insurance Portability and Accountability Act (HIPAA) to student health records.

**FERPA Regulations**

**Definitions**

**Attendance** – The regulations have been modified to include attendance via “other electronic and telecommunication technologies.” This change recognizes that many institutions are providing instruction via technology methods that do not require physical presence of the student in the classroom.

**Directory Information** – The DOE clarified that a student’s Social Security Number (SSN) may not be classified as directory information. The DOE further clarified that a student identification number issued by the institution may be classified as directory information if it cannot be used to gain access to education records except in conjunction with another identifier, such as a PIN.

**Disclosure** – The regulations clarify the practice of returning an education record to its source is not included in the definition of “disclosure,” meaning an institution is permitted to do so without consent or reliance upon one of the FERPA exceptions. This practice is typically done for verification purposes or to authenticate a suspected fraudulent document.

**Education Records** – Alumni records are not considered education records under FERPA. To be excluded from the definition, the record must be created or received after the individual is no longer a student and cannot contain information that is directly related to the individual’s attendance at the institution. A record that is created after a student is no longer in attendance but directly concerns the student’s attendance at the institution is still considered an education record subject to FERPA.

The regulations also implement the United States Supreme Court’s decision in *Owasso V. Falvo*, 534 U.S. 426 (2002), which holds that grades on peer-graded papers are not considered education records until they are collected and recorded by the teacher.

**Personally Identifiable Information** – The “easily traceable” standard has been removed from the regulations. In recognition of the growing ease with which otherwise de-identified information may be cross-referenced or linked so as to reveal the identity of the student, the updated regulations state that a record is considered personally identifiable if alone or in conjunction with other information a reasonable person in the school or community with no personal knowledge of the situation could identify the student with reasonable certainty. For instance, a well-publicized incident may render otherwise properly de-identified records personally identifiable. The DOE further clarified that in making this determination, the institution cannot utilize a broader community-wide standard if the record would be considered personally identifiable under the narrower school community standard. Additionally, if the institution reasonably believes the requestor has direct personal knowledge of the identity of the student whom the records are related to, then the information is considered personally identifiable and may not be released absent consent.

The definition of personally identifiable information has also been updated to include biometric records, such as fingerprints and handwriting, and indirect identifiers, such as mother’s maiden name or birth date.

### **Disclosure Provisions**

**Directory Information** – A request to opt out of directory information disclosure must be honored even after the student is no longer in attendance at the institution. However, a student may not use the “opt out” provision to prevent his/her name from being revealed in the classroom setting.

The DOE clarified that a SSN or other non-directory information may not be utilized by an institution to verify a request for directory information. For example, a requestor may provide a student’s SSN when seeking confirmation that the individual is in attendance at the institution. In responding to the request, the institution cannot utilize the SSN to verify attendance, because doing so would implicitly confirm that the confidential information is that of a particular student. While not required, the DOE recommends that an institution clarify it is not using non-directory information to respond to such requests.

**Disclosure to Parents** – Parental rights typically transfer to students either when the student turns eighteen (18) or when the student enters a post-secondary institution. An institution may continue to disclose records to a parent without the student’s consent if the parent can establish that the student is a dependant under Internal Revenue Service Code § 152. Dependent status may be established with a recent tax return, appropriately redacted to protect parental privacy. The current regulations do not, however, require institutions to rely on tax returns alone when making this determination.

**Disclosure to a Student’s New School** – An institution may transfer education records to a new school not only when a student seeks enrollment, but after the student is already enrolled as well, provided the records are related either to the student’s current enrollment or the initial transfer. An institution may disclose any record that could have been disclosed when transfer was initially sought, including health and disciplinary records.

**Disclosure to a Former Institution** – The regulations clarify that FERPA does not provide authority for institutions to release education records to a former institution that the individual is no longer in attendance at.

**Outsourcing** – The term “school official” has been expanded to include outside parties to whom the institution has outsourced functions that would otherwise be performed in-house. In order for the exception to apply, the outside party must be under the direct control of the institution, meaning the institution has the power to control the maintenance, use and redisclosure of education records. The outside party is subject to use and redisclosure restrictions of FERPA, but the burden is on the institution to ensure compliance. The Family Policy Compliance Office (FPCO) recommends institutions clearly spell out FERPA obligations in contracts with outside parties.

**Educational Research** – Institutions are permitted to disclose personally identifiable information without consent to an organization conducting research or studies on behalf of the institution. The parties must enter into a written agreement that specifies the scope, purpose, duration and information disclosed pursuant to the study. The agreement must also require destruction or return of confidential information once the study has concluded. The purpose of the study must be limited to either (1) development, validation or administration of predictive tests; (2) administration of student financial aid programs; or (3) improvement of instruction.

**Health and Safety Emergency** – Institutions are permitted to disclose education records to “appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.” When information is disclosed under the health and safety exception, the institution must record the articulable and significant threat that forms the basis for disclosure and the parties to whom the information was shared. Institutions are not, however, permitted to routinely share confidential information with law enforcement or health officials.

**Ex Parte Orders** – The new regulations implement the provision of the U.S. Patriot Act which specifically excludes ex parte orders issued pursuant to the act from FERPA requirements; including, recordation and notification. An institution that complies in good faith with the ex parte order cannot subsequently be held liable to any party for producing the information.

### **Enforcement of FERPA**

The new regulations clarify that the FPCO may investigate an alleged violation even if a timely complaint has not been filed or a complaint has been withdrawn. The FPCO may take any enforcement action legally available. The FPCO does not need to find the alleged violation is based on a policy or practice of the institution in order to initiate enforcement action. Prior to taking corrective action the FPCO must make a finding of substantial non-compliance and provide the institution with a reasonable opportunity to voluntarily come into compliance with FERPA.

### **FERPA and HIPAA Clarifications**

**Postsecondary Institutions** – FERPA typically applies to student health records maintained by postsecondary institutions and to records maintained by campus health clinics. However, medical or psychological treatment records that are made, maintained and used only in connection with the provision of treatment and are not made available to persons other than those providing treatment are excluded from the definition of education records. An institution may release medical records for purposes other than treatment with a student's consent or under one of the exceptions to consent outlined in FERPA, but in doing so the records become education records subject to the obligations of FERPA.

**Clinic Records of Non-students** – While most university clinics cater primarily to students, there may be instances when a non-student, such as a spouse or staff member, has access to the facilities. In this situation, the non-student medical records would be subject to the HIPAA Privacy Rule, while the student medical records continue to be covered by FERPA.

**University Affiliated Hospitals** – Although a hospital may be affiliated with a particular university, it is generally not subject to FERPA obligations because these entities typically don't provide healthcare to students on behalf of the institution. University affiliated hospitals provide healthcare to individuals regardless of their status as a student. Thus, medical records of a student seeking treatment at a university hospital are subject to HIPAA provisions. If, however, the hospital does run a student health clinic on behalf of the university, the student medical records maintained by the clinic would be considered either education or treatment records subject to FERPA.

**Records of Students/Employees** – When an individual is both a student and an employee of the university his/her health records are considered education or treatment records subject to FERPA. While FERPA excludes student/employee records from coverage in limited instances, in order to fall within this exclusion the record must relate exclusively to the individual in his/her capacity as an employee. This definition could be met if, for example, the individual sought a health service that was made available only to employees.