

New FERPA Issues

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Amendments to FERPA Regulations

Amendments to the FERPA regulations went into effect **August 7, 2000**. See 65 Fed. Reg. 41852 (July 6, 2000). The amendments expanded the definition of "directory information" to include "electronic mail addresses" and "photographs." The new definition provides as follows (with the additional language underlined):

Directory information means 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.

65 Fed. Reg. 41852-53. The definition is not exhaustive and simply lists the type of information that a school may consider as directory information subject to disclosure without prior consent by the parent or eligible student. Once a school determines what it will designate as directory information, notice must be sent to parents to permit them to opt out of disclosures of such information. 34 C.F.R. §99.37(a). This "opt-out" provision should be incorporated into the annual notice.

Although the regulations took effect August 7, schools were not required to include e-mail addresses and photographs in the list of directory information sent to parents at the beginning of the school year. However, if a school did not update its list of directory information it may not now rely on the amendment and release that information. The school cannot treat "e-mail addresses" and "photographs" as directory information until parents have been notified and provided with an opportunity to opt out of the disclosures. Schools that did not have time to modify their definition of directory information at the start of the school year may decide whether to revise the definition mid-year or wait until next year to disclose e-mail addresses and photographs.

Falvo v. Owasso Independent School District

Questions have been raised about the effect of the Tenth Circuit's decision in *Falvo v. Owasso Independent School District*, 2000 WL 1707798 (10th Cir. Oct. 4, 2000), [\[1\]](#) on disclosure of school honor rolls and other announcements of student performance. In *Falvo*, a parent challenged a school district's practice of allowing school students to grade each other's homework and tests followed by students calling out their own grades to the teacher. The parent contended that together these policies violated the student's 14th Amendment right to privacy and FERPA. The court first held that grades were not the sort of highly personal information, which was entitled to constitutional protection. The Tenth Circuit then held that FERPA creates an enforceable right to privacy in educational records, which is actionable through a Section 1983 action. Rejecting a contrary opinion letter by the Director of the Family Policy Compliance Office, the court found that the grades constituted "education records" maintained by an educational agency. According to the court, grade books are education records and, therefore, the grades contained in them are also education records.

In addition, the students were acting for the teacher when they graded the papers and they maintained a record by preserving the grade until they could convey it to the teacher. Because it was not previously clearly established that this practice was covered by FERPA, the defendants in this case were entitled to qualified immunity.

If *Falvo's* rationale is followed by the Third Circuit, the question arises of whether schools would no longer be able to publish student honor rolls, names of valedictorians, and the like in the newspaper. This concern may be unwarranted, however, especially in light of the amended regulations. Whereas directory information formerly included "degrees and awards," the new definition specifies that "degrees, *honors* and awards" constitute directory information. Because appearing on the honor roll and being named valedictorian are honors, the information can be disclosed without prior approval if parents are provided with the opportunity to opt out of disclosure of honors and awards received. To be sure that parents understand what might be disclosed, the school may want to identify the types of honors and awards which are published in the newspaper.

A more difficult question is whether a school may display individual student papers. An example would be posting papers on bulletin boards for back-to-school night. The *Falvo* court makes it clear that grades are education records. Although it is anticipated that the U.S. Department of Education will issue guidance in light of the *Falvo* decision, we recommend that districts obscure the grades students receive on these papers before displaying them.

New Annual Notice

Following this article is the most recent model notification form provided by the U.S. Department of Education. As part of the annual notification, we recommend an additional section in which the school district designates enumerated types of directory information. This enables the school district to release this information without prior parental consent unless the parent objects in writing to the designation. Enclosed is a paragraph that the district may wish to add to the annual model

notice after review by the district solicitor. In addition, the relevant administrators and solicitors should discuss how or if this information will be disseminated to the teaching staff.

Public Notice of Directory Information

As part of the School District's annual notification under FERPA, we designate for the school year [2000-2001] the following types or categories of information as "directory information." Directory information means information contained in the educational record of a student, which is not considered harmful or an invasion of privacy if disclosed, so that it may be disclosed without prior parental consent. The School District's list of directory information includes: 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, participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received and the most recent education agency or institution attended. Examples of how the School District may disclose directory information include releasing to the newspaper, or other news sources, information about students who have been named to the honor roll, National Honor Society, or as valedictorian, or who participate in any student clubs, activities or sports. [Fill in other common examples.] These examples are for illustration only and are not an exclusive list of the manner in which directory information may be disclosed.

This notice provides you as a parent or eligible student with an opportunity to object in writing to any or all of those types of information that the School District has designated as directory information. You have the right to refuse to permit release by notifying the School District in writing that you do not want any or all of those types of information to be designated as directory information for your child or yourself. Please submit any refusal with the types of information you wish removed from the list of directory information and mail your objections on or before [_____ fill in day and date _____] to [_____ name _____] at the following School District address:

If you have any questions regarding this notice, please call [_____ name _____] at [_____ phone number _____]. If you do not submit a written refusal on or before [_____ fill in day and date _____], then the School District may disclose this directory information without your prior consent."

We have included in the list all classifications or types of information, which FERPA identifies as possible directory information. The School District may delete from the list at its discretion.

for Elementary and Secondary Schools

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records. These rights are:

1. The right to inspect and review the student's education records within 45 days of the day the School receives a request for access. Parents or eligible students should submit to the School principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The School official will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.
2. The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate or misleading. Parents or eligible students may ask the School to amend a record that they believe is inaccurate or misleading. They should write the School principal [or appropriate official], clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading. If the School decides not to amend the record as requested by the parent or eligible student, the School will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.
3. The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent. One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. A school official is a person employed by the School as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the School Board; a person or company with whom the School has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. [Optional] Upon request, the School discloses education records without consent to officials of another school district in which a student seeks or intends to enroll.

[NOTE: FERPA requires a school district to make a reasonable attempt to notify the parent or eligible student of the records re-quest unless it states in its annual notification that it intends to forward records on request.]

4. The right to file a complaint with the U.S. Department of Education concerning alleged failures by the School to comply with the requirements of FERPA. The name and address of the Office that administers FERPA are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-4605

[NOTE: In addition, a school may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification

[1] On October 4, the Tenth Circuit denied rehearing and rehearing en banc. At the same time, the court withdrew its earlier decision of July 31, 2000, reported at 220 F.3d 1200 and 37 SLIE No. 84, and filed an amended opinion. The amended opinion expands on the discussion of individual grades as education

records and raises the question of whether parents are entitled to a hearing for each grade received.