



FERPA & VIRTUAL LEARNING DURING COVID-19

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WEBINAR LOGISTICS

- Phone lines will be muted
- Due to the number of attendees, we will not be able to take live questions
- If you have questions, please contact us at FERPA@ed.gov or by phone at [855-249-3072](tel:855-249-3072)
- The recording of this webinar will be made available on the Department's Student Privacy Policy Office website at: <https://studentprivacy.ed.gov/>



FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)



- FERPA Statute: 20 U.S.C. § 1232g
- FERPA Regulations: 34 CFR Part 99
- The [Student Privacy Policy Office \(SPPO\)](#), at the U.S. Department of Education is responsible for implementing FERPA, including establishing policy and investigating complaints under FERPA. SPPO (formerly the Family Policy Compliance Office or FPCO) and the Privacy Technical Assistance Center (PTAC) provide technical assistance.

WHAT IS FERPA?

- Federal privacy law that applies to educational agencies and institutions and applicable programs funded by the U.S. Department of Education.
- Provides parents and eligible students the right:
 - To access education records and seek amendment of education records;
 - To provide consent to disclosure of personally identifiable information (PII) from student education records unless a FERPA exception applies; and
 - To file a complaint under FERPA.

*An eligible student is over the age of 18 or enrolled in a postsecondary institution.



FERPA & VIRTUAL LEARNING

This webinar is intended to provide information on:

- Common questions about FERPA under current circumstances
- Privacy and security best practices
- Other resources



VIRTUAL LEARNING

- Moving education from the school to the home presents many challenges.
- Privacy is just one of those challenges.
- It also presents opportunities: individualized learning, learning at student's own pace, building more independent learners & application of instruction to daily life, etc.



HOW FERPA COMES INTO PLAY?

WHAT WILL WE COVER TODAY ?

- FERPA's school official exception to the general consent requirement – what it is and how it works in the virtual learning environment.
- Use of video or other forms of instruction (emails, group chats, teleconferences, etc.).
- Significance of defining education records and identifying PII in student education records.
- Right to access records.
- Electronic consent.
- Health or safety emergency exception.

SCENARIO #1

- I am a college professor or public school teacher and need information about my students on hand while I switch to virtual instruction. Can I take home with me PII from my students' education records?

SCENARIO #1 – TAKE AWAYS

- Yes - FERPA does not prohibit teachers from taking PII from students' education records home with them as long as the teacher has a legitimate educational interest in the education records, as determined by their educational agency or institution.
- School officials, including teachers, who take education records home are prohibited from further disclosing the PII from the education records, except as otherwise permitted under FERPA; and, should use reasonable methods to protect the education records, and the PII in those records, from further disclosure.
- These protections can include access controls that are physical, technological, and administrative controls.



SCENARIO #1 – QUESTIONS TO CONSIDER

- What education records, or PII from education records, will school officials be "taking home"?
- How will those education records or PII be brought home?
- How will the school official secure the PII in those education records while the records are at home?

SCENARIO #2

Our school is planning to use video conferencing or other virtual learning software apps to hold classes virtually. Can a school or district use such apps under FERPA?



SCENARIO #2 – TAKE AWAYS

- Yes under the **school official exception** to FERPA's general consent requirement, educational agencies and institutions may disclose students' education records, or PII in those records, to a provider of such a service or application as long as the provider:
 1. Performs an institutional service or function for which the educational agency or institution would otherwise use its own employees;
 2. Has been determined to meet the criteria set forth in in the educational agency's or institution's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records or PII;
 3. Is under the direct control of the educational agency or institution regarding the use and maintenance of the education records or PII; and
 4. Uses the education records or PII only for authorized purposes and does not re-disclose the education records or PII to other parties (unless the provider has specific authorization from the educational agency or institution to do so and it is otherwise permitted by FERPA). *See 34 CFR §99.31(a)(1)(i).*

SCENARIO #2 – TAKE AWAYS

- FERPA does not require an educational agency or institution to enter into an [agreement](#) under the [school official exception](#), although it is a best practice to clarify the issues of direct control and legitimate educational interest .
- The school's annual notification of FERPA rights includes its criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

SPPO resources:

- [Model annual notification of FERPA rights](#)
- [Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices](#)

SCENARIO #2 – QUESTIONS TO CONSIDER

- Does your educational agency or institution currently allow this type of software?
- What is your agency or institution's process to review requests for software?
- Refer to PTAC's resources such as:
 - [Protecting Student Privacy While Using Online Educational Services](#)
 - [Data Security Checklist](#)
 - **Read the platform's Terms of Service**

SCENARIO #3

- Does FERPA address which apps can be used?



SCENARIO #3 – TAKE AWAYS

- No, as FERPA is a privacy rule and does not include explicit information security standards.
- Under FERPA, educational agencies and institutions may disclose, without consent, education records, or PII contained in those records, to the providers of online learning software apps under the “school official” exception provided they meet the conditions of that exception.
- Schools and school districts should work with their information security officers and attorneys to review information security requirements and terms of service.

SCENARIO #3 – TAKE AWAYS

- FERPA does not address the use of specific apps.
- The Health Insurance Portability and Accountability Act of 1996 (as amended) (HIPAA), has a Privacy Rule and a Security Rule.
- HHS-OCR used its HIPAA waiver authority for emergencies under Section 1135 of the Social Security Act.
- [HIPAA notices](#) issued during the COVID-19 public health emergency identified some apps that represent they are compliant with the HIPAA standard and may be used for telehealth services provided there is an appropriate business associate agreement (BAA) under HIPAA.

SCENARIO #4

- Can non-students observe a virtual lesson?
 - What information about students might be disclosed during the virtual classroom time?



SCENARIO #4 – TAKE AWAYS

- Assuming that during the virtual lesson, PII from student education records is not disclosed, FERPA would not prohibit a non-student from observing the lesson.
- The directory information exception permits certain PII from education records which an educational agency or institution has designated as directory information to be disclosed during classroom instruction to students who are enrolled in, and attending, a class.
 - The directory information exception may not be used to opt out of disclosures of a student's name, identifier, or institutional email address in a class in which the student is enrolled. 34 CFR §99.37(c)(1).



SCENARIO #4 – TAKE AWAYS

- As a best practice, educational agencies and institutions should discourage non-students from observing virtual classrooms in the event that PII from a student's education record is, in fact, disclosed in such virtual classrooms.
- Schools may wish to include instructions for students participating in the virtual classroom regarding not sharing or recording any PII from education records that may be disclosed in the virtual classroom or to obtain prior written consent to permit any such sharing of PII from education records.

SCENARIO #4 – QUESTIONS TO CONSIDER

- Does your school have a policy regarding visitors in the virtual classroom?
- Does your school have a policy regarding sharing existing lessons or instructional materials?

SCENARIO #5

Due to our transition from holding in-person classes to virtual lessons, is it permissible to record classes and share the recording of the virtual classes to students who are unable to attend?



SCENARIO #5 – TAKE AWAYS

- Yes - assuming the video recording does not disclose PII from student education records during a virtual classroom lesson or appropriate written consent is obtained if PII from the education record, FERPA would not prohibit the teacher from making a recording of the lesson available to students enrolled in the class.

SCENARIO #5 – TAKE AWAYS

- What is an “education record” under FERPA? “Education records” are, with certain exceptions, those records that are –
 - Directly related to a student; and
 - Maintained by an educational agency or institution or by a party acting on behalf of the educational agency or institution.
- Video recordings of virtual classroom lessons qualify as “education records” protected under FERPA only if they directly relate to a student and are maintained by an educational agency or institution or by a party acting on their behalf. FERPA’s nondisclosure provisions may still apply to such video recordings even if they do not qualify as “education records,” if the video recording contains PII from student education records.
- Look at your current vendor agreements to determine whether video recordings of virtual classroom lessons are or will be maintained as education records beyond the period of instruction, and if so – how, and by whom.

SCENARIO #5 – TAKE AWAYS

- Some considerations for a video recording of a virtual classroom lesson that is or will be an education record:
 - Rights of access by parents and eligible students to their education records;
 - In general, written consent must be obtained prior to disclosing a student's education record or PII in those records unless an exception applies; and
 - Parents and eligible students have the right to seek amendment of their education records.
- If there is PII directly related to multiple students, the above considerations are more complicated in instances where a recording of a virtual classroom maintained by educational agencies or institutions or by a party acting on their behalf.

SCENARIO #5 – QUESTIONS TO CONSIDER

- Will the video recording be maintained as an education record, and is it directly related to a student?
- What, if any, PII from education records, did the video recordings capture?
- With whom is the school sharing the video recordings?
- How is the school protecting from unauthorized disclosure video recordings that qualify as education records or that contain PII from education records?

SCENARIO #6

Our school is closed but a parent has requested access to his or her child's education record.

What steps can we take to meet the 45-day timeline for access to education records under FERPA?



SCENARIO #6 – TAKE AWAYS

- Under FERPA, a school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request.
- While required to provide a parent with access to his or her child's education records, a school is not generally required under FERPA to provide copies of education records.
- However, if circumstances effectively prevent a parent from exercising his or her right to inspect and review education records, the school would be required to either provide the parent with a copy of the records requested or make other arrangements that would allow for the parent to inspect and view the requested records. A case in point would be a situation in which the parent does not live within commuting distance of the school.
- FERPA does not identify exceptions in its statute or regulations that would permit a school to not comply with a parent's request to inspect and review their child's education records.



SCENARIO #6 – QUESTIONS TO CONSIDER

- How is your school or school district handling other administrative functions (e.g., is it open for limited hours)?
- Can your school provide electronic access or make a copy of the requested education record and email or mail them to the parent?
- Given social distancing and physical contact restrictions, schools and parents should work together to identify mutually agreeable options.

SCENARIO #7

Our college requires that students come in to sign consent forms for disclosure of their education records. With schools closed, we are unable to have students come in.

Is it okay to obtain consent using electronic means?



SCENARIO #7 – TAKE AWAYS

- Yes, FERPA permits electronic consent.
- A “signed and dated written consent” under FERPA must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made; and, may include a record and signature in electronic form that –
 1. Identifies and authenticates a particular person as the source of the electronic consent; and
 2. Indicates such person’s approval of the information contained in the electronic consent.

SCENARIO #7 – QUESTIONS TO CONSIDER

- Does the school have a standard consent form under FERPA?
- Does the school include a general description identifying the education records to be disclosed, the party to whom disclosure(s) will occur, and the purpose(s)?
- How do you authenticate the identity of the individual if an email is not already on file? (e.g., ask for other info.)



SCENARIO #8

I'm working from home. I'm a college professor and would like to have a conference with an eligible student to discuss an assignment. OR I'm a public school teacher and would like to conduct a parent-student conference.

My spouse is also at home and in the same room. Is it alright if I conduct the conference?



SCENARIO #8 – TAKE AWAYS

- Yes, as long as the teacher/professor --
 - Does not disclose PII from the student's education record in hearing of his or her spouse during the conversation; or
 - Moves away from his or her spouse to discuss PII from the student's education records so that the spouse does not overhear your discussion; or
 - Obtains prior consent in writing (electronic) from the parent or eligible student for the potential disclosure of PII from the student's education records to his or her spouse.

SCENARIO #8 – QUESTIONS TO CONSIDER

- How will this “conference” occur (phone call, video call, etc.)?
- What is the subject of the conference?
 - Reviewing subject matter instruction generally does not involve PII from a student’s education record.
- What precautions can you put in place to make sure the spouse does not overhear the conversation?

SCENARIO #9

Colleges received notice from an admissions council that their practices have changed during the COVID-19 pandemic, and the admissions council will accept student transcripts via email. Are colleges required to use secure transmission of PII by fax or email encryption software to transmit non-directory information via email? What is the information security standard under FERPA?

SCENARIO #9 – TAKE AWAYS

- FERPA does not have an explicit information security standard as it is a privacy, not an information security, law.
- There are ways to secure PII in student education records transmitted with email, such as encrypting attachments.
- Other best practice secure ways to share files include Secure File Transfer Protocol (SFTP).
- This PTAC video, [Email and Student Privacy](#), identifies some of these and other best practices.

SCENARIO #10

- Under FERPA, may the school or school district identify that a student has COVID-19 to parents of other students in the school when the student has been out of the school during the entire period of possible transmission and the school does not release the name?

SCENARIO #10 – TAKE AWAYS

- It depends, but generally yes, but only if that information is in a non-personally identifiable form.
- The educational agency or institution must make a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. See 34 C.F.R. § 99.31(b)(1). If an educational agency or institution discloses information about students in non-personally identifiable form, then consent by the parents or eligible students generally is not needed under FERPA.
- See related questions in [FERPA and the Coronavirus Disease 2019 \(COVID-19\) FAQs](#).

PRIVACY & SECURITY

TOP 5 THINGS TO CONSIDER

- 1. Look at what your school or district already uses** – Review your current solutions first, as many education platforms include features that can be leveraged to support distance learning.
- 2. Identifying options** – When identifying and choosing technology tools, work with your attorneys and information security specialists to vet prospective solutions against FERPA requirements using a risk-based analysis.

PRIVACY & SECURITY

TOP 5 THINGS TO CONSIDER

- 3. Things to look for** – Products that apply best practices like encryption, strong identity authentication, and a statement and terms of service that explain how the vendor’s use of PII from student education records complies with FERPA.
- 4. Communication** – Be transparent with parents, students, and the school community.
- 5. Ask for help** – Consult and ask questions of your attorneys, information security specialists and peers. SPPO and PTAC can also provide TA on FERPA.

FEDERAL AGENCY COVID-19 RESOURCES

- CDC resources: <https://www.coronavirus.gov/>
- U.S. Department of Education resources: <https://www.ed.gov/coronavirus>
- U.S. Department of Health & Human Services HIPAA resources: <https://www.hhs.gov/hipaa>

FERPA & COVID-19 RESOURCES

- [FERPA and the Coronavirus Disease 2019 \(COVID-19\) FAQs](#) discusses the health or safety emergency exception under FERPA in the context of COVID-19.
- [FERPA and Virtual Learning Related Resources](#) provides a compilation of helpful SPPO and PTAC resources.

GENERAL RESOURCES ON FERPA

- [FERPA Training Modules](#)
 - These videos provide basic information on FERPA.
- [School official exception](#)
 - This provides additional information on the school official exception in FERPA.
- [Policies for Users of Student Data Checklist](#)
 - Provides tips to schools and districts on drafting data use policies to protect student data.

VIRTUAL LEARNING-RELATED RESOURCES

- [Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices](#)
 - This resource identifies applicable exceptions under FERPA, including the school official exception, and includes best practices for safeguarding student education records under FERPA.
- [Protecting Student Privacy While Using Online Educational Services: Model Terms of Service](#)
 - This checklist helps evaluate online educational apps.

VIRTUAL LEARNING-RELATED RESOURCES

- The [Security Best Practices](#) section of our website, <https://studentprivacy.ed.gov>, includes additional resources on safeguarding education records.
- Our video, [Email and Student Privacy](#), identifies best practices for emails.
- With regard to videos and virtual classrooms, to the extent videos are recorded and maintained as education records, the [FAQs on Photos and Videos under FERPA](#) might be useful.

CONTACT INFORMATION

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