

Attachment A



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

September 2005

Dear Chief State School Officer:

The No Child Left Behind Act of 2001 (NCLB) amended the Protection of Pupil Rights Amendment (PPRA) to require that the Department of Education (Department) notify annually each State educational agency (SEA) and each local educational agency (LEA) of their obligations under PPRA and under the Family Educational Rights and Privacy Act (FERPA). This letter serves to provide that notification to the SEA. The requirements placed on the SEA by each law are discussed separately below.

Family Educational Rights and Privacy Act (FERPA)

Statute: 20 U.S.C. § 1232g. Regulations: 34 CFR Part 99.

FERPA applies to an “educational agency or institution” that receives funds under a program administered by the U.S. Department of Education. While an SEA may receive funds from the Department, as a practical matter, FERPA generally would not apply to the records of an SEA. This is because FERPA defines “education records” as information directly related to a “student,” which itself is defined as excluding a person who has not been in attendance at the educational agency or institution. 20 U.S.C. § 1232g(a)(4) and (a)(6). Since students generally are not in attendance at an SEA, it follows that FERPA does not generally apply to the SEA. However, FERPA does provide parents with the right to inspect and review education records maintained by the SEA within 45 days of receipt of a request. 20 U.S.C. § 1232g(a)(1)(B); 34 CFR § 99.10(a)(2). **This includes, for example, State assessments administered by LEAs and maintained by the SEA.** The SEA may make the education records available to the parent either directly, by sending them to the LEA for inspection and review, or making other appropriate arrangements. For more information on this provision, see 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10.

FERPA permits educational agencies and institutions, such as LEAs and their constituent schools, to disclose education records to SEAs and other State educational authorities without a parent’s prior consent under certain conditions. For a review of the exceptions to the general prior consent rule in FERPA, see 34 CFR § 99.31. The most common exception that relates to disclosure to a State educational authority is found in 34 CFR § 99.31(a)(3) and § 99.35.

- The disclosure must be in connection with:
 - ◆ Audit or evaluation of Federal or State supported education programs; or
 - ◆ Enforcement of or compliance with Federal legal requirements relating to such programs.

- Information collected under this provision must be:
 - ◆ Protected so that information is not disclosed to anyone other than the authorized representatives of the State educational authority (34 CFR § 99.35(b)(1)); and
 - ◆ Destroyed when no longer needed for the purposes listed above (34 CFR § 99.35(b)(2)).

New NCLB Requirement for SEAs

Section 4155 of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. § 7165, as amended by the NCLB, requires a State that receives funds under the ESEA to assure the Secretary that no later than January 8, 2004, it “has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.” FERPA provides specifically that an educational agency or institution may disclose education records, without parental consent, to a school in which the student seeks or intends to enroll, subject to conditions set forth in 34 CFR § 99.34. FERPA also allows disclosure of appropriate information regarding specified disciplinary actions to teachers and school officials, including those in other schools, who have legitimate educational interests in the behavior of the student. See 34 CFR § 99.36(b).

Protection of Pupil Rights Amendment (PPRA)

Statute: 20 U.S.C. § 1232h. Regulations: 34 CFR Part 98.

PPRA applies to the programs and activities of an SEA, LEA, or other recipient of funds under any program funded by the U.S. Department of Education. It governs the administration to students of a survey, analysis, or evaluation that concerns one or more of the following eight protected areas:

1. political affiliations or beliefs of the student or the student’s parent;
2. mental or psychological problems of the student or the student’s family;
3. sex behavior or attitudes;
4. illegal, anti-social, self-incriminating, or demeaning behavior;
5. critical appraisals of other individuals with whom respondents have close family relationships;
6. legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. religious practices, affiliations, or beliefs of the student or student’s parent;
or
8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

PPRA also concerns marketing surveys and other areas of student privacy, parental access to information, and the administration of certain physical examinations to minors.

The rights under PPRA transfer from the parents to a student who is 18 years old or an emancipated minor under State law.

LEAs must provide parents and eligible students effective notice of their rights under PPRA. The notice must explain that an LEA is required to obtain prior written consent from parents before students are required to submit to a survey that concerns one or more of the eight protected areas listed above, if the survey is funded in whole or in part by Department funds. For surveys that contain questions from one or more of the eight protected areas that are not funded in whole or in part with Department funds, LEAs must notify a parent at least annually, at the beginning of the school year, of the specific or approximate date(s) of the survey and an opportunity to opt his or her child out of participating. LEAs must also notify parents that they have the right to review, upon request, any instructional materials used in connection with any survey that concerns one or more of the eight protected areas and those used as part of the educational curriculum.

PPRA requires LEAs to work with parents to develop and adopt policies on the following items unless the LEA or SEA had established comparable policies on or before the date of enactment of NCLB on January 8, 2002:

- The right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students and the procedure for granting a request by a parent for such access.
- Arrangements to protect student privacy that are provided by the LEA in the event of the administration of a survey to students containing one or more of the eight protected items of information noted above (including the right of parents to inspect, upon request, a survey that concerns one or more of the eight protected items of information).
- The right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students, and the procedure for granting a request by a parent for such access.
- Administration of physical exams or screenings of students;
- The collection, disclosure, or use of personal information (including items such as a student's or parent's first and last name, address, telephone number or social security number) collected from students for marketing purposes, or to sell or otherwise provide the information to others for marketing purposes, including the LEA's arrangements for protecting student privacy in the event of collection, disclosure, or use of information for these purposes.
- The right of parents to inspect, upon request, any instrument used in the collection of personal information for marketing or sales purposes before the instrument is administered or distributed to a student and the LEA's procedure for granting a parent's request for such access.

LEAs must notify parents of their rights under PPRA and of these policies at least annually and at the beginning of the school year. LEAs must also notify parents within a reasonable period of time if any substantive change is made to the policies.

In addition, an LEA must "directly" notify, such as through U.S. Mail or email, parents of students who are scheduled to participate in the specific activities or surveys listed below

and provide an opportunity for parents to opt their child out of participation in the specific survey or activity. An LEA may make this notification to parents at the beginning of the school year if the LEA has identified the specific or approximate dates of the activities or surveys at that time. Thereafter, parents should be provided reasonable notification of the planned activities and surveys and be provided an opportunity to opt their child out, as well as an opportunity to review any pertinent surveys. A model specific notification for use by LEAs is attached and may also be obtained on the Web site noted at the end of this guidance. LEAs must offer an opportunity for parents to opt their child out of participating in the following activities:

- The administration of any survey concerning one or more of the eight protected areas listed above if it is not funded in whole or in part with Department funds. (LEAs must obtain active consent, and may not use an opt-out procedure, if the survey is funded in whole or in part with Department funds.)
- Activities involving the collection, disclosure, or use of personal information collected from students for marketing purposes, or to sell or otherwise provide the information to others for marketing purposes.
- Any non-emergency, invasive physical examination or screening that is 1) required as a condition of attendance; 2) administered by the school and scheduled by the school in advance; and 3) not necessary to protect the immediate health and safety of the student, or of other students. This law does not apply to any physical examination or screening that is permitted or required by State law, including physical examinations or screenings permitted without parental notification.

NCLB does not preempt applicable provisions of State law that require parental notification. Also, requirements concerning activities involving the collection and disclosure of personal information from students for marketing purposes do not apply to the collection, disclosure, or use of personal information collected from students for the exclusive purpose of developing, evaluating, or providing educational products or services for or to students or educational institutions, such as the following:

- 1) College or other postsecondary education recruitment, or military recruitment.
- 2) Book clubs, magazines, and programs providing access to low-cost literary products.
- 3) Curriculum and instructional materials used by elementary schools and secondary schools.
- 4) Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students.
- 5) The sale by students of products or services to raise funds for school-related or education-related activities.
- 6) Student recognition programs.

An SEA or LEA may use funds provided under part A of title V of the ESEA to enhance parental involvement in areas affecting the in-school privacy of students, such as reimbursement for costs associated with this direct notification.

The Department will issue regulations to reflect the changes in FERPA and PPRA. The Family Policy Compliance Office (FPCO) in the Department of Education administers both FERPA and PPRA. The address and telephone number are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-5920
(202) 260-3887

Informal inquiries may be sent to FPCO via the following email addresses: FERPA@ED.Gov and PPRA@ED.Gov. The FPCO Web site address is: www.ed.gov/policy/gen/guid/fpc.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office