

FERPA Privacy Protections for Students related to COVID-19 Response

April 15, 2020—University of Arizona Registrar and Privacy Office Guidance

In March 2020, the Department of Education released guidance in the form of Frequently Asked Questions (FAQs) related to student privacy rights under FERPA in the context of school officials COVID-19 response efforts. This FAQs can be found at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa%20and%20coronavirus%20frequently%20asked%20questions_0.pdf. On March 30, 2020, the Student Privacy Policy Office of the ED shared best practices to keep in mind when delivering virtual learning which can be found at <https://studentprivacy.ed.gov/resources/ferpa-and-virtual-learning-during-covid-19>. The ED guidance and resources are summarized below along with additional best practices.

General Consent Rule and “Personally Identifiable Information”

Generally, under FERPA, the unauthorized disclosure of students’ “education records” is not permitted. Education records include any information or data recorded in any medium, including but not limited to, handwriting, print, tapes, film, e-mail, microfilm, and microfiche, which is directly related to a student and maintained by the University or by a person acting for the University. Education records may include interactions with students like teleconference recordings, e-mails, and group chats etc. when containing personally identifiable information (PII). When a record—or in combination with other available information—reveals the identity of an individual it is said to contain (PII). Students may provide consent to disclose education records that contain their PII to third parties.

More information on what is and is not included in an Educational Record is available at: <https://www.registrar.arizona.edu/personal-information/family-educational-rights-and-privacy-act-1974-ferpa>

Best Practices

- It is always proper and a required practice to obtain consent to disclose education records before disclosing to third parties.
- Consent may be obtained using an Authorization for Release of Information form that is submitted to the Office of the Registrar.
- If a student does not give consent and disclosure of a fact contained in an education record is important, consider if the Health and Safety Exception applies.
 - Please contact the Registrar of Chief Privacy Officer if considering a disclosure of information using the Health and Safety exception.
- Consider whether the objective of a disclosure can be met by providing relevant information, in an as limited as possible manner and/or in a de-identifiable manner. E.g. Sally Jones, a freshman living in ABC dorm, has X condition and is in critical care vs. a member of ABC residence hall community has tested positive or X condition.

- Please be aware that a student’s identity may be improperly revealed through a collection of disclosures and in combination with student directory or other publicly available information.

Virtual Learning Platforms and Privacy

In a virtual classroom setting, the best privacy safeguard measure is to avoid capturing PII in a recording. If there is no PII then the recordings are not considered to be Education Records that must be protected from unauthorized disclosure. Instructors should consider the type of student PII that might appear in a virtual setting and work to limit disclosure of PII. If no PII is captured in a virtual lesson or recording, the content may be shared with non-participants. It is important to note that although a student’s name could be directory information, their enrollment in a class is not and must be prevented from being disclosed publicly.

Specific guidance from the Department of Education regarding the recording of virtual lessons and sharing with other enrolled students requires that either no PII is captured in the recording or appropriate written consent prior to sharing with other enrolled students.

Best Practices

- Advise students not to share personal or contact information as they participate in virtual learning or communications in group settings.
- Personal discussions or communications involving the sharing of PII should take place in a secure, personal meeting (i.e. phone, personal Zoom meeting etc.)
- Instructors should communicate their participation and attendance requirements to students and advise that sharing of PII in group settings is not required and should be avoided.
- If despite these safeguards, PII is inadvertently included in a recording or communication, the education record (i.e. recording with PII) should not be shared or disclosed without the impacted students’ consent.

Health or Safety Emergency Exception Allowing Disclosure

In very limited situations, like to protect the health and safety of others, exceptions exist allowing the disclosure of education records of a particular student without consent.

The Department of Education has made clear in its FAQs that “FERPA permits educational agencies and institutions to disclose, without prior written consent, PII from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals” *citing* 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36. The “health or safety emergency” exception to FERPA’s general consent rule is limited, however.

Exception Requirements

- Only available for the time that a health or safety emergency persists.

- Determination of the health or safety emergency may be made by local public health authorities, and university officials can rely on this determination when applying this exception.
- If the exception applies, still must consider disclosures without consent on a case-by-case basis, based on all factors and information available.
- When disclosure is made pursuant to this exception, school officials must record in the student's education records (like in their health record), that such disclosure was made and articulate the basis for the disclosure. The record of disclosure should be made as close in time as practicable to the disclosure.

Disclosure Communications

Who and What?

- Disclosure under the Health or Safety Exception is limited to "appropriate parties." Parties that the Department of Education states are contemplated to be appropriate parties and can receive education records/PII without a student's consent under this exception include: law enforcement, public health officials, healthcare providers, and parents of the student.
- In some cases, like where risk of exposure or threat is heightened, wider disclosure of the risk and its connection to an identified student may be necessary. According to the Department of Education, "*[s]chool officials should make the determination on a case-by-case basis whether a disclosure of the student's name is absolutely necessary to protect the health or safety of students or other individuals or whether a general notice is sufficient, taking into account the totality of the circumstances, including the needs of such students or other individuals to have such information in order to take appropriate protective action(s) and the risks presented to the health or safety of such students or other individuals.*" Please consult with the Office of the General Counsel before making a disclosure with a student's name or PII. In all cases, disclosures should be narrowly tailored to meet the need to protect the health or safety of students or other individuals while guarding as much of the student's privacy as possible.
- Disclosure to the media is not appropriate under the Health or Safety Exception. All media inquiries should be directed to Chris Sigurdson.