



## UNITED STATES DEPARTMENT OF EDUCATION

### OFFICE OF MANAGEMENT

December 20, 2018

### **Improving the Effectiveness and Efficiency of FERPA Enforcement**

*The U.S. Department of Education (Department) has determined that this document is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices.<sup>1</sup> Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this document to provide educational agencies and institutions with information to assist them on meeting their obligations under section 444 of the General Education Provisions Act, commonly referred to as the Family Educational Rights and Privacy Act (FERPA) and implementing regulations (34 CFR part 99). This document also provides members of the public with information about their rights under the law and regulations. If you are interested in commenting on this document, please email us your comment at Michael.Hawes@ed.gov or write to us at the following address: Michael Hawes, U.S. Department of Education, 400 Maryland Avenue, SW., room 6W113 LBJ, Washington, DC 20202.<sup>2</sup>*

The Department is committed to protecting student privacy. To provide more timely and effective assistance to parents and students and to address a recommendation made by the Department's Office of the Inspector General to "implement a risk-based approach to processing and resolving FERPA complaints,"<sup>3</sup> the Department is modifying its investigatory practices to more efficiently address and resolve complaints and violations under FERPA.

FERPA is a Federal law that protects the privacy of student education records maintained by, or on behalf of, educational agencies or institutions.<sup>4</sup> FERPA applies to all educational agencies (e.g., school districts) and institutions (i.e., public elementary and secondary schools and postsecondary institutions) that receive funds under any program administered by the Secretary of Education.<sup>5</sup> FERPA affords parents certain rights with respect to their children's education records maintained by educational agencies and institutions to which FERPA applies. These include the right to inspect and review their children's education records, to seek to have their education records amended, and to have some control over the disclosure of their education records or personally identifiable information (PII) contained therein.<sup>6</sup> These rights transfer to

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<sup>1</sup> 72 Fed. Reg. 3432 (Jan. 25, 2007). See <https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/E7-1066.pdf>

<sup>2</sup> For further information about the Department's guidance processes, please visit [www2.ed.gov/policy/gen/guid/significant-guidance.html](http://www2.ed.gov/policy/gen/guid/significant-guidance.html).

<sup>3</sup> U.S. Department of Education, Office of Inspector General, "Office of the Chief Privacy Officer's Processing of Family Educational Rights and Privacy Act Complaints," ED-OIG/A09R0008, pp. 29-30, Recommendation 1.7 (November 26, 2018) (ED IG Rep.).

<sup>4</sup> 20 U.S.C. § 1232g; 34 CFR part 99.

<sup>5</sup> 34 CFR § 99.1.

<sup>6</sup> See 34 CFR part 99, subparts B, C, and D.

the student when he or she reaches the age of 18 years or attends a postsecondary institution at any age (and then becomes an “eligible student” under FERPA).<sup>7</sup>

If parents or eligible students believe that their rights under FERPA have been violated, they may file a formal complaint with the Department.

The Secretary must take appropriate actions to enforce FERPA and to investigate violations.<sup>8</sup> Historically, under Subpart E of part 99, the Department has “formally” investigated all timely complaints that it receives from parents and eligible students; however, in part because the formal investigation process may involve numerous written communications and responses between the Department and the parties to the complaint, final determinations for these investigations can sometimes take months or even years to complete. In some cases, by the time the investigation has concluded, the underlying issue has long since been resolved or the student is no longer in attendance at the educational agency or institution.

FERPA should operate effectively and efficiently to enable the resolution of complaints as quickly as possible; ideally, this should occur within a short period of time after the filing of a complaint. With that objective in mind, we have given considerable thought to OIG’s recommendations to improve implementation of the statute and regulations.

Based on our expertise in implementing FERPA and our fair and considered judgment, informed by an in-depth examination of applicable statutory and regulatory provisions and scrutiny of the regulatory history, we have determined that Subpart E of part 99 does not require formal investigation of all complaints, but rather specifies steps to take if the Department decides formal investigation is the appropriate action to address a complaint.<sup>9</sup> Pursuant to this in-depth analysis, we have also determined that the best and most reasonable approach to improve processes consistent with law is to make a case-by-case determination for every timely complaint<sup>10</sup> to determine the best mechanism for resolving the underlying situation. Sometimes, the action will be a formal investigation; for these complaints, we will investigate consistent with the regulatory provisions under Subpart E of part 99. For other complaints, consistent with the statute and applicable regulations, we will take appropriate actions such as acting as an intermediary or providing resolution assistance. We will ensure that for every timely complaint received from a parent or eligible student, the Department will take appropriate action to enforce rights and address violations.

Complaints implicating a parent’s or eligible student’s right to access or amend the student’s education records are often the most time-sensitive from the perspective of reducing potential harm to the student, and these complaints are frequently the result of a simple misunderstanding of FERPA’s requirements. When appropriate, based on an individualized determination, the

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<sup>7</sup> 34 CFR §§ 99.3, “Eligible student,” and 99.5(a)(1).

<sup>8</sup> 20 U.S.C. § 1232g(f).

<sup>9</sup> 34 CFR § 99.64(b) states, “The Office investigates a timely complaint...to determine...” We read this language to specify that when we investigate we do so for the purpose of determining whether a recipient of Federal funds has failed to comply with a provision of the statute or implementing regulations. We do not read it to mandate investigations for all complaints.

<sup>10</sup> A complaint also must contain specific allegations of fact giving reasonable cause to believe that a violation of the statute or the implementing regulations occurred.

Department may address these complaints by acting as an intermediary between the educational agency or institution and the parent or eligible student, with the aim of resolving the dispute in a mutually satisfactory way.

A large number of the complaints the Department receives involve isolated incidents of inadvertent or accidental disclosures of student education records or PII contained therein. Often, the most effective response to these complaints will involve assisting the educational agency or institution to improve its policies, practices, and security controls to help prevent future incidents. Following an individualized evaluation and determination, the Department may refer these complaints to the Department's Privacy Technical Assistance Center (PTAC).<sup>11</sup> If a complaint cannot be resolved through resolution assistance, we will determine -- on a case-by-case basis -- appropriate follow-up action.

The Department will continue to conduct full, formal investigations where necessary and appropriate to enforce rights and resolve violations under the statute and regulations. In making these determinations, we will adopt the Office of Inspector General's recommendation to prioritize the highest risk complaints for formal investigation based on "the severity of risk to student privacy, the number of students affected, [and] other relevant factors."<sup>12</sup> We believe having this array of options and making case-by-case determinations based on the Department's expertise and evaluation of individual complaints will allow for expedited processing because not every complaint would involve numerous written communications. It will also ensure appropriate action is taken with regard to each complaint in the most efficient and effective manner.

We will also continue to conduct self-initiated investigations in the absence of a filed complaint, when we identify violations that warrant such investigation.

If the Department finds that an educational agency or institution has violated FERPA, the Department will work with the educational agency or institution to bring it into compliance. Only in those instances where an educational agency or institution is unwilling or unable to come into voluntary compliance with the law and it is otherwise appropriate will the Department withhold federal funds.

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<sup>11</sup> The Department's Privacy Technical Assistance Center (PTAC) helps educational agencies and institutions improve their privacy and security policies and procedures.

<sup>12</sup> ED IG Rep., *supra* note 1, at pp. 29-30, Recommendation 1.7.

The Department remains committed to protecting student privacy. These changes to our enforcement practices will enable the Department to provide more efficient and effective assistance to parents and students. We are confident that these changes to our enforcement operations will result in quicker and more successful resolution of the privacy issues facing parents and students, as well as faster and more effective mitigation of privacy and security vulnerabilities at educational agencies and institutions.



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