

FERPA Update

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Housekeeping

- Not all FERPA rules and procedures are addressed or explained in these materials.
- References to the FERPA regulations are to 34 C.F.R. Part 99. Citations will read "\$99_."
- References to the Family Policy Compliance Office will read "FPCO." References to the U.S. Department of Education will read "ED."

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Housekeeping

- These materials focus on federal law. Consult state law on educational records and confidentiality as well.
- These materials are not legal advice, but information about the law.
- Talk to your school attorney if you have question about specific facts.

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Housekeeping

- Note that attached to the December 2011 FERPA regulations is Appendix B, a Model Notification of Rights Under FERPA for Elementary and Secondary Schools.
- You can download the document at:
<http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf>

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Broad Outline of Basic FERPA Provisions

Coverage: Any educational agency that receives any type of federal funding.

Purposes: (1) To allow parents access to educational records relating to their children. (2) To prohibit disclosure of education records to third parties unless the school obtains prior written parental consent for such disclosure, or an exception to the consent requirement applies.

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Broad Outline of Basic FERPA Provisions

Right to Inspect and Review Records (Subpart B, §99.10-§99.12):

(1) Schools must respond to a parent request within 45 days after receipt of request.

(2) Schools required to respond to reasonable requests for explanation and interpretation of records.

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Broad Outline of Basic FERPA Provisions

Right to Inspect and Review Records (Subpart B, §99.10-§99.12):

(3) Parents have the right to request that the District provide copies of the records if failure to provide copies would effectively prevent the parents from exercising the right to inspect & review the records.

(4) No destruction of records when request is pending.

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Broad Outline of Basic FERPA Provisions

Right to Inspect and Review Records (Subpart B, §99.10-§99.12):

(5) Schools' ability to charge for records restricted if cost prevents parent from inspecting/reviewing records. No fee can be charged for searching/retrieving records

(6) Limits on the right to inspect? YES, where records contain personally identifiable information about more than one student, parent may only review info on his/her student.

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Broad Outline of Basic FERPA Provisions

Right to Amend Records (Subpart C, §99.20-§99.22):

If parent or eligible student believes student's education records contain information that is inaccurate, misleading or in violation of student's rights of privacy, may request that school amend the record.

Schools must set up procedures to allow parents to request amendments to records, as well as a hearing process, in case the parents disagree with a school's decision to not amend a certain record.

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Broad Outline of Basic FERPA Provisions

Annual FERPA Notice to Parents. §99.7.

Must inform parents of rights to inspect and review records, seek amendment to records, consent to disclosure (unless an exception applies), consent to release of personally identifiable information, and file complaints with FPCO.

Must identify mechanisms or procedures to exercise those rights.

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Broad Outline of Basic FERPA Provisions

Annual FERPA Notice to Parents. §99.7.

Identify policies for disclosing records, and criteria for determining "school official," "legitimate educational interest." Identify directory information.

Notice must be effective (emphasis on language and disability concerns) and provided in a manner likely to inform parents of their rights.

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Broad Outline of Basic FERPA Provisions

Enforcement: ED has set up the Family Policy Compliance Office (FPCO) and the Office of Administrative Law Judges to enforce compliance with FERPA, review and investigate complaints, and, in the case of FPCO, provide technical assistance regarding compliance with FERPA.

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What is at the heart of FERPA?

- Protection of confidential information in a student's education records.
- So, we begin with discussion of that core piece, and the myriad definitions and exceptions that play into it.

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Restrictions on disclosure of personally identifiable information

- “§99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in §99.31.”

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Elements in the core FERPA requirement on disclosure, §99.30

- (1) Parent or eligible student
- (2) provides signed and dated written consent
- (3) before educational agency
- (4) discloses
- (5) personally identifiable information (PII)
- (6) from the student's education records
- (7) unless an exception applies

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(1) "Parent or eligible student"

Parent. §99.3 "Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian."

Either parent is accorded full rights under FERPA, unless the school has been provided with evidence of a court order, statute, or legally binding document relating to divorce, separation, or custody that specifically revokes those rights. §99.4

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(1) "Parent or eligible student"

Eligible student. §99.3
"Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education."

When a student turns 18 or enrolls in a post-secondary institution, the rights afforded to parents under FERPA transfer to the student, hence "eligible student." §99.5(a)(1).

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(2) "Provides signed and dated written consent"

● **Elements of the written consent. §99.30(b).**

1. Must be signed and dated
2. Specify the records that may be disclosed;
3. State the purpose of the disclosure; and
4. Identify the party or class of parties to whom the disclosure may be made.
5. An option for an electronic signature is also provided, with authentication requirements. 99.30(d).

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(3) "Educational agency"

- **Educational Agency, §99.3**
"Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a)."

For our purposes, think school or school district.

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(4) "Discloses" or "Disclosure"

- **Disclosure, §99.3**
"Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record."

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(4) "Discloses" or "Disclosure"

- **What happens after disclosure pursuant to a signed consent? §99.30(c).**

"(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and
(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed."

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(5) “Personally Identifiable Information (PII)”

- **Personally Identifiable Information, §99.3**
“The term includes, but is not limited to—
(a) the student’s name;
(b) The name of the student’s parent or family members
(c) The address of the student or student’s family
(d) A personal identifier, such as the student’s social security number, student number, or biometric record;

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(5) “Personally Identifiable Information (PII)”

- **Biometric record, §99.3**
“Biometric record, as used in the definition of personally identifiable information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.”

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(5) “Personally Identifiable Information (PII)”

- **Personally Identifiable Information (continued)**
(e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

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(5) “Personally Identifiable Information (PII)”

- **Personally Identifiable Information (continued)**

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”

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(6) The student’s “education records”

- **Record §99.3**

“Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”

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(6) The student’s “education records”

- **Education Records §99.3**

(a) The term means those records that are:

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.”

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(6) The student's "education records"

- **Education Records §99.3 (continued)**
(b) The term does **NOT** include:
 “(1) Records that are kept in the sole possession of the maker, and used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”

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(6) The student's "education records"

EXAMPLE OF SOLE POSSESSION: Lesson plans kept privately by a teacher and not shared with anyone except a substitute AND any any other notes or documents created by a staff person that are kept privately and not shared with other personnel are the private property of the staff person, are not subject to FERPA-- but would be subject to a SUBPOENA!!

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(6) The student's "education records"

The FPCO has added this helpful commentary.

“The main purpose of this exception... is to allow school officials to keep personal notes private. For example, a teacher or counselor who observes a student and takes a note to remind himself or herself of the student's behavior has a created a sole possession record, so long as he or she does not share the notes with anyone else.”

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(6) The student's "education records"

• **Education Records §99.3 (continued)**

(b) The term does NOT include:
 “(2) Records of the law enforcement unit of an educational agency or institution subject to the provisions of §99.8.”

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(6) The student's "education records"

• **Records of law enforcement unit does not mean—**

- Records created by the unit for a law enforcement purpose, but are not maintained by the law enforcement unit
- Disciplinary actions or proceedings conducted by the educational agency
- Education records and PII do not lose their protection while in possession of law enforcement unit. §99.8.

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(6) The student's "education records"

• **Education Records §99.3 (continued)**

(b) The term does NOT include:
 (3) Employment records (unless it's the student who is also employed at the school or district)

 (4) Medical/mental health treatment records of an eligible student

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(6) The student's "education records"

- **Education Records §99.3 (continued)**

(b) The term does NOT include:

"(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher."

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(6) The student's "education records"

- What if the employee saw or heard something– a couple of students fighting in the hall, for example, so that her knowledge of that event does not come from education records? Does FERPA govern disclosure of what she saw?

FPCO provides the answer....

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(6) The student's "education records"

- "FERPA applies to the disclosure of education records and of information derived from education records. FERPA does not prohibit a school official from disclosing information about a student obtained through the school official's personal knowledge or observation and not from the student's education records."

- (Continued next slide)

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(6) The student's "education records"

- "For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information from disclosure. Therefore, a school official may disclose what he or she overheard to appropriate authorities, including disclosing the information to local law enforcement officials, school officials, and parents." "Addressing Emergencies on Campus," FPCO (June 2011).
- FERPA does not apply, but good sense and the code of ethics do apply!

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(7) The exceptions when consent is not required to disclose, §99.31

While parental consent is the default FERPA requirement, exceptions apply (we'll highlight a few of them).

§99.31(a). "An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:"

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(7) When consent not required: School officials

"The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." §99.31(1)(i)(A)

- In its annual notice, the District must inform the parents of the criteria under which it determines who is a "school official" with "legitimate educational interests." §99.7(a)(3)(iii)

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**(7) When consent not required:
School officials**

- “Legitimate educational interest” does not mean “inquiring minds want to know”
 - Model FERPA Notice language “A school official has a legitimate educational interest if the official needs to review and education record in order to fulfill his or her professional responsibility.”
 - ASK: Do I need the information in order supervise, educate, counsel, discipline (etc.) the child?

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**(7) When consent not required:
School officials**

- **Precautions to ensure legitimate educational interest.**

“An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement[.]” §99.31(a)(1)(ii).

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**(7) When consent not required:
School officials**

- A “school official” may also include “a contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions” provided that the outside party:
 - “(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - (3) Is subject to the requirements of § 99.33(a) governing the use and re-disclosure of personally identifiable information from education.”

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**(7) When consent not required:
School officials**

- More examples of "school officials" from the Model FERPA Notice
- "A school official may also include a volunteer or contractor outside of the school who performs an institutional service or function... such as an attorney, auditor, medical consultant, or therapist, a parent or student volunteering to serve on an official committee... or a parent, student or other volunteer assisting another school official in performing his or her tasks."

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**(7) When consent not required:
Other schools & enrollment.**

Disclosures "to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer." §99.31(a)(2).

Subject to §99.34 requiring either annual notice of school's practice of forwarding records for enrollment, or school must attempt to notify parent at last known address.

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**(7) When consent not required:
Judicial order or lawfully issued subpoena**

School must make reasonable effort to notify parent/ eligible student in advance of compliance UNLESS

-Federal grand jury subpoena or other subpoena issued for law enforcement purposes and court has ordered its existence, contents and any response not be disclosed
OR

-Ex parte court order obtained by Assist. U.S. Att'y General or higher, for certain prosecutions. §99.31(a)(9).

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**(7) When consent not required:
Health or Safety Emergencies**

"An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." 99.36(a)

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**(7) When consent not required:
Health or Safety Emergencies**

The educational agency may "take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals."

AND

if it "determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." 99.36(c)

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**(7) When consent not required:
Health or Safety Emergencies**

"If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination." 99.36(c)

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**(7) When consent not required:
Health or Safety Emergencies**

Is it really an emergency? "Disclosures for health or safety emergencies do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities."

"Rather, disclosures... must be related to actual, impending or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease." "Addressing Emergencies on Campus," FPCO (June 2011).

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**(7) When consent not required:
Health or Safety Emergencies**

Duty to document the rationale for disclosure.

"Within a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed." Id., citing §99.32(a)(5)

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**(7) When consent not required:
Social workers (NEW)**

Pursuant to the "Uninterrupted Scholars Act," 20 U.S.C. 1221, FERPA was amended in January of 2013 to include disclosure without need for parent consent to "an agency caseworker or other representative of a State or local child welfare agency or tribal organization."

The disclosure cannot be re-disclosed except to an individual or entity engaged in addressing the student's education needs (and consistent with law).

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**(7) When consent not required:
Juvenile Justice**

The disclosure is to State and local officials for juvenile justice purposes.

What can be disclosed and when depends on the state's law and whether it was in place prior to November 19, 1974

Talk with your school attorney to determine how state law affects this exception for you. §99.31(5)

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**(7) When consent not required:
Directory information**

"The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in §99.37." §99.31(a)(11).

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**(7) When consent not required:
Directory information**

Directory information. §99.3 "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."

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**(7) When consent not required:
Directory information**

"Directory information 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; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; 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." §99.3

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**(7) When consent not required:
Directory information**

Directory information also includes:

"A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems" BUT only if it cannot be used, without another form of authentication (like a pin number) to access a student's education records. §99.3(c)(1).

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**(7) When consent not required:
Directory information**

Directory information also includes:

"A student ID number or other unique personal identifier that is displayed on a student ID badge," BUT only if it cannot be used, without another form of authentication (like a pin number) to access a student's education records. §99.3(c)(2).

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**(7) When consent not required:
Directory information**

A FERPA gambit to avoid wearing a student ID? NO.

§99.37(c) provides that a parent may not use the right to opt out of directory information disclosures to—
"Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibit information that may be designated as directory...."

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**(7) When consent not required:
Directory information**

Directory information "does not include a student's—
(1) Social security number; or
(2) Student identification (ID) number," except as discussed previously. §99.3(b).

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**(7) When consent not required:
Directory information**

School may disclose directory information (DI) if it has provided notice to parents and eligible students of:

- the types of PII the school has designated as DI
- parent's right to opt out to release of any or all DI
- time limits on opting out
- on former students, school must respect valid opt out made when former student attended unless rescinded. §99.37.

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**(7) When consent not required:
Some of the other exceptions.**

Disclosures to authorized representatives of certain government agencies, including ED, state and local educational authorities.

Disclosures in connection with student financial the student has applied for or received.

Disclosures to organizations conducting studies on behalf of educational agencies or institutions.

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**(7) When consent not required:
Some of the other exceptions.**

Disclosures to accrediting organizations as necessary to carry out their accrediting functions.

Disclosures to state and local officials or authorities to whom the information is specifically allowed to be disclosed pursuant to a state statute.

Disclosures to parents of a dependent student, as defined in the Internal Revenue Code.

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**Restrictions on Re-disclosure,
§99.33(a)**

- A District may disclose confidential information from education records, subject to the provisions of FERPA, only on the condition that the party to whom the information is disclosed will not disclose it to any other party without parental or eligible student consent (unless an exception allowing disclosure without consent applies).

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Records of Disclosure, §99.32.

- **Records of Disclosure. §99.32.**
 - School must maintain a record or log of each request or disclosure of a student's education records
 - Log must include the party requesting PII from educational records, the legitimate interests the party had in requesting or obtaining the information (including justification for a health or safety emergency); and a record of any further disclosure made by the party

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Records of Disclosure, §99.32.

- **Records of Disclosure. §99.32.**
 - The log must be maintained with the student's records.
 - The parent, eligible student, school official with responsibility for maintaining records, as well as auditing recordkeeping procedures may inspect the log

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Records of Disclosure, §99.32.

- **Exception to Record of Disclosure. §99.32(d).**
 - No record need be maintained if the request was from, or disclosure was to
 - The parent or eligible student
 - A school official (as described previously)
 - A party with written consent from parent or eligible student
 - Party seeking directory information
 - A few other minor exceptions.

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