

FOR YOUR INFORMATION

News for School Clients

**USING ELECTRONIC FORMAT FOR
DOCUMENTING PARENTAL CONSENT**

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Using Electronic Format for Documenting Parental Consent

One of the rights provided to parents or eligible students under the Family Educational Rights and Privacy Act, commonly known as FERPA, is the right to provide prior consent to the disclosure of education records. This right extends to parents of children with disabilities who receive services under the Individuals with Disabilities Education Act (IDEA). School districts typically obtain consent using an authorization form that is provided to the parent or eligible student for their written signature. On April 21, 2004, the U.S. Department of Education (DOE) published new regulations providing general guidelines for accepting “signed and dated written consent” in electronic format.

FERPA applies to any school district that receives funds from the U.S. Department of Education. It provides, in part, that no school district may have a policy or practice of denying parents or eligible students the right to consent to the disclosure of personally identifiable information from education records, except for limited statutory exceptions. The FERPA rights belong to the parent until the student has reached eighteen years of age or is attending an institution of postsecondary education, at which time he or she becomes an “eligible student” entitled to assert FERPA rights in lieu of his or her parents. Education records

are defined quite broadly to include records, files, documents and other materials that contain information directly related to a student and are maintained by the school district. Although FERPA does not define “personally identifiable information,” the term is generally interpreted to mean information about a student contained in his or her education records that are not directory information.

The previous federal regulations provided that written consent obtained from the parent or eligible student must be signed and dated, and specify the records to be disclosed, the purpose of the disclosure, and the party or class of parties to whom the disclosure may be made. In recent years, educational agencies have raised the question of whether some form of electronic consent and signature, including e-mail, would satisfy FERPA’s written consent requirement. The DOE recognized that evolving technologies and public acceptance of electronic formats for signatures and documents are rapidly changing. In response to this, they have finalized federal rules that will give schools the widest possible flexibility to adapt to technological changes, yet retain a methodology that operates within FERPA’s requirements for proper disclosure of education records.

The federal regulations have been revised to provide that “signed and dated written consent” under FERPA “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.” The rule is technology-neutral with respect to how to meet disclosure and signature requirements. The district may accept electronic consents and signatures when reasonable security is provided for the process.

The regulations do not specify desired methods for authenticating the electronic source of the consent received by a school district, but, instead, contain general guidelines adapted from other federal legislation, such as the Electronic Signatures in Global and National Commerce Act (E-Sign Act). The process must (1) establish a reasonable way to identify the individual and authenticate the identity of the particular eligible student or parent as the source of the electronic message or record requesting access or consenting to the disclosure of education records (authentication); (2) attribute the electronic signature to the unaltered message or document to prevent repudiation by the sender (attribution); (3) verify the integrity of the signed message or document in transmission and upon receipt (integrity or security of transmission); and (4) document the

requester’s approval of the text contained in the electronic message.

The DOE has indicated that the Federal Student Aid (FSA) Standards will be a “safe harbor” for districts, should they choose to implement the procedures outlined in those standards, in particular, the set-up and security measures. This method would involve the parent’s or eligible student’s use of a personal identification number (PIN) or password maintained in a secure database in an encrypted manner that is not generally accessible to school officials or other parties. The DOE has concluded that these standards are not unduly rigorous given the nature of the information that may be disclosed and the potential harm a student may suffer from an unauthorized disclosure. These standards can be viewed on the Internet at the following Web site: <http://www.ifap.ed.gov/dpccletters/gen0106.html>. However, districts are given the maximum flexibility to choose to implement another system for authenticating personal identification under FERPA provisions, if they desire.

The regulations balance the need to protect the rights of parents and students while minimizing the burden placed on school districts to comply with the requirements of FERPA. The DOE may issue guidance in the future to provide further explanation of alternative methods districts can properly use to comply with FERPA’s new provision.

If you have any questions regarding this topic, please call Joanne Harmon Curry of Lathrop & Clark LLP at 608-286-7248. Attorney Curry provides counsel in the areas of general school law, student discipline, special education law, disability and discrimination law, federal Indian and tribal law, and litigation, among other areas.

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