
FOR YOUR INFORMATION

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News for School Clients

PATRIOT ACT Creates Exception to Disclosure of Student Records

The USA PATRIOT Act (generally referred to simply as the Patriot Act), enacted in 2001 and reauthorized in 2005, contains a provision that amended the Family Educational Rights and Privacy Act (FERPA). With some exceptions, FERPA generally prohibits educational agencies or institutions that receive federal funds from disclosing personally identifiable information from a student's education records to a third party without the consent of the parent (or the student, if the student is 18 years or older). The Patriot Act amended FERPA to provide an additional exception to that general rule.

FERPA, as amended by the Patriot Act, now requires educational agencies (e.g., school districts) or institutions to disclose student education records to the U.S. Attorney General (or his designee) in certain circumstances pursuant to an *ex-parte* court order. An *ex-parte* court order is an order issued by a court to disclose a student record without providing notice to the adult student or the parents of the student whose records are requested.

The Attorney General or his designee may obtain the *ex-parte* court order by certifying to the court that there are specific and articulable facts giving reason to believe that the requested education records are relevant to an anti-terrorism investigation or prosecution. Once the Attorney General makes the required

certification, the court is required to issue the requested order, and the educational agency is required to release the requested records to the Attorney General.

In addition, the Patriot Act's amendment to FERPA includes an exception to FERPA's recordkeeping requirement. Generally, an educational agency is required to maintain a record that indicates all individuals, agencies, or organizations that have requested or obtained access to a student's education records, and the legitimate interest that each such person, agency, or organization had in obtaining the information. However, when an educational agency releases student education records to the Attorney General pursuant to the *ex-parte* court order described above, it is not required to make a record of the disclosure. Therefore, under these circumstances, a student's education records may be released without the parents or student ever knowing.

Finally, the amendment to FERPA provides protection to educational agencies that produce a student's education records pursuant to an *ex-parte* court order. An educational agency that, in good faith, produces education records in accordance with the court order is explicitly protected from liability for that production.

Even before the Patriot Act was enacted, there were several exceptions to the general FERPA prohibition against disclosing personally identifiable information from a student's

education records without consent of the parent or adult student. Those exceptions are reviewed here. Where the federal law provides an exception that is inconsistent with the Wisconsin pupil records law, and the state law would not permit the release without consent, the state law prevails, and is included in the exceptions reviewed below.

1. An educational agency may disclose records pursuant to a federal grand jury subpoena and is not required to provide notice to the parent or adult student or comply with the recordkeeping requirement.

2. An educational agency may disclose records pursuant to other subpoenas issued in relation to a court proceeding, but the records disclosed are to be used for the sole purpose of impeaching a witness in the proceeding, and the records must first be privately reviewed by the judge to determine whether the requested records are relevant to impeaching the witness. Before releasing the records, the educational agency must make a reasonable effort to notify the parent or adult student so that the parent or adult student has an opportunity to seek protective action (such as a court order to prohibit the disclosure).

3. An educational agency may disclose records to appropriate parties, such as law enforcement or public health officials, when it determines that doing so is necessary to protect the health or safety of the student or other individuals. The health or safety disclosure exception is to be strictly construed, and used only in situations involving imminent danger or the immediate need for the information in order to avert a

serious threat.

4. Law enforcement unit records are specifically exempted from the definition of “education records,” and, therefore, may be disclosed without consent. A “law enforcement unit” is an individual or department that is authorized or designated by the school district to enforce laws, or to maintain the safety and security of the school. A “law enforcement unit record” is a student record that is created by a law enforcement unit, created for a law enforcement purpose, and maintained by the law enforcement unit.

5. Directory information, such as a student’s name, address, date of birth, dates of attendance, and awards received, may be disclosed without the adult student’s or parent’s consent provided that he or she has first been given the opportunity to opt out of the disclosure.

6. Foreign students who are attending a U.S. educational institution under certain types of visas have already consented for the educational institution to release personally identifiable education information to U.S. Citizenship and Immigration Services.

The exceptions to the federal and state student records law and their requirements reviewed here are more complex than can be thoroughly discussed in this update. In order to avoid a violation of FERPA or the Wisconsin pupil records law, it is recommended that districts contact legal counsel before releasing records pursuant to one of the exceptions.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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