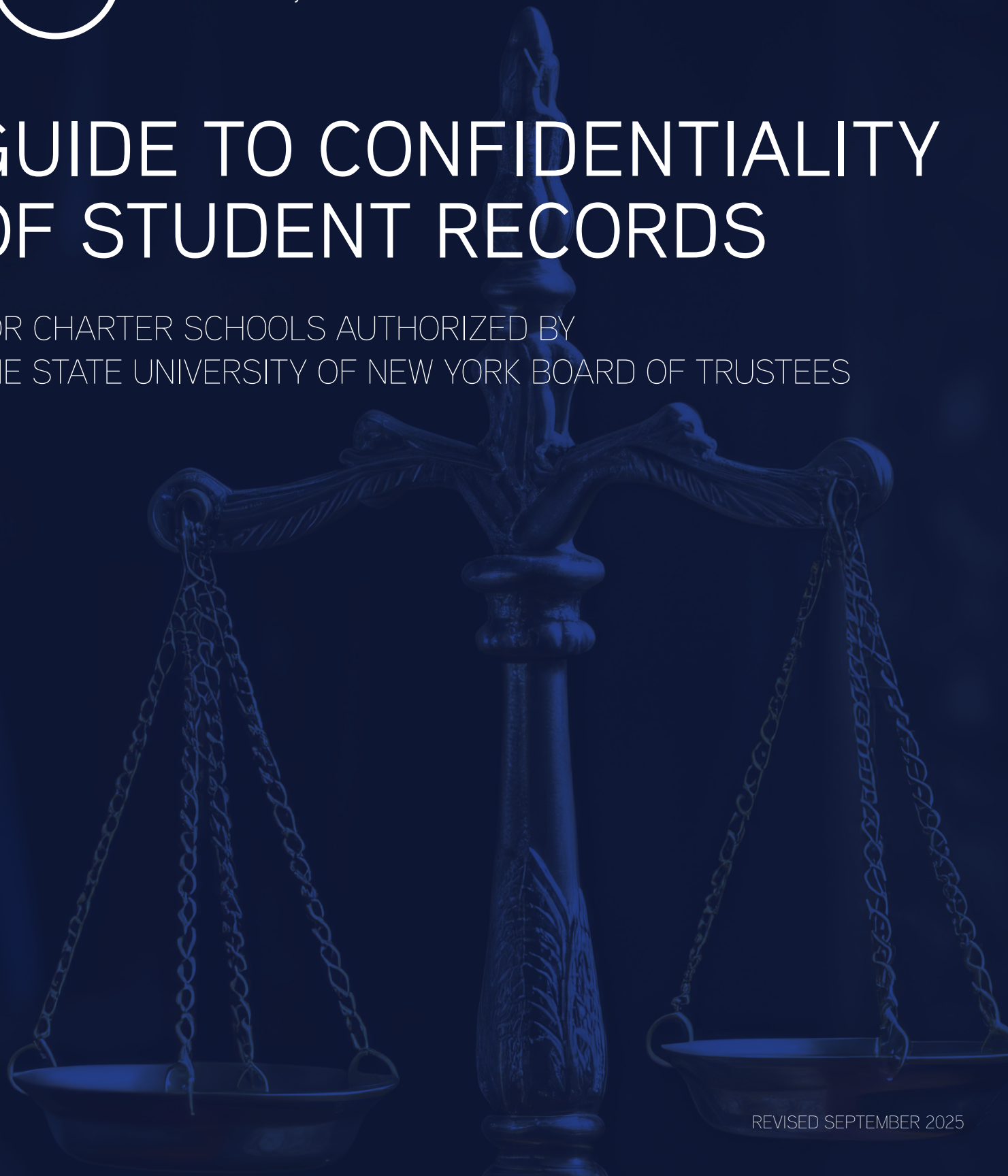




# GUIDE TO CONFIDENTIALITY OF STUDENT RECORDS

FOR CHARTER SCHOOLS AUTHORIZED BY  
THE STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES



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# INTRODUCTION

There are four important federal laws concerning the confidentiality of students' education records: the Family Educational Rights and Privacy Act ("FERPA"), the Individuals with Disabilities Education Act ("IDEA"), the Protection of Pupil Rights Amendment ("PPRA"), and the Children's Online Privacy Protection Act ("COPPA"). FERPA, IDEA, and PPRA apply directly to charter schools, whereas COPPA applies to operators of online services who collect personal information from children under the age of 13.

FERPA covers all education records of students enrolled in a charter school and ensures students and families have meaningful access to and the ability to amend their education records, while limiting access and release of such records to others. IDEA mainly concerns a subset of education records of students with disabilities and requires additional safeguards for these records. Many IDEA safeguards, however, overlap and are intertwined with the more general requirements of FERPA. PPRA limits the school's marketing activities, administration, or distribution of certain surveys to students, administration of certain physical examinations or screenings to students, and family access to certain instructional materials. Finally, COPPA regulates what operators of online services, including education websites and applications, must do to protect the privacy and safety of children under the age of 13. Since many schools utilize the services of online education websites and applications, it is important to understand what role the schools play in COPPA compliance.

This guidance and the attached sample forms offer an overview of what charter schools must do to comply with the above laws and corresponding regulations. The SUNY Charter Schools Institute (the "Institute") strongly encourages schools to work with their legal counsel to draft and implement confidentiality policies.

If you have any questions regarding the information in this guidance, please contact the Institute's Legal Department at [charter.legal@suny.edu](mailto:charter.legal@suny.edu).

## DISCLAIMER

Nothing implied or stated in this guidance should be construed to be legal advice. The SUNY Charter Schools Institute (the "Institute") is not a law firm and this guidance should not be interpreted as creating an attorney-client or legal advisor relationship. For questions regarding your specific situation, please consult a qualified attorney. This guidance contains general information and may not reflect current statutes, case law, or other legal developments. The Institute does not guarantee the guidance's content is correct, complete, or up-to-date.

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# REMINDERS

*These reminders provide a broad overview of a school's responsibilities regarding student records. Each of the below reminders are thoroughly explained in this guidance document.*

**Schools must develop and implement written confidentiality policies, which are distributed to students and families, and include:**

- The designated staff member to oversee compliance with FERPA and IDEA;
- Procedures for providing appropriate access to education records within 45 days of a student or parent request, or shorter if the records are connected to a meeting of the committee on special education ("CSE") or an IDEA-related due process hearing;
- Whether or not the school charges non-prohibitory fees for copying records requested;
- Requirement that parental consent to disclose records or information must be in writing and based on full information (i.e., the parent knows the specific records being released, the reason for the request, and to whom the records would be released); and,
- Procedures for requesting an amendment of a student's education record if it is believed it contains misleading or incorrect information including a reasonable time frame for the school's decision as to the request.

**Students' education records must be:**

For paper records:

- Stored in a central, locked location; and,
- Each student's folder must contain a record of access log identifying who has requested and/or accessed the records, the date, and the legitimate educational interest for accessing the records.

For electronic records:

- Password protected with electronic access tracking to track access of those with a legitimate educational interest.

For health records:

- NOT stored in the same physical location as student files; and,
- Stored in a locked or password protected location.

**If a school wishes to disclose directory information, it must provide annual notice to parents of:**

- The designated types of directory information (i.e., names, emails, photographs, grade levels, awards, etc.);
- The right to opt out of directory information disclosure; and,
- The time period to notify the school in writing of any opt out.

**Annually, schools must notify parents of their FERPA rights to:**

- Inspect and review their child's education records and the procedures for doing so;
- Request an amendment of misleading or incorrect information and the procedures for doing so;
- Consent to disclosures of personally identifiable information;
- File a complaint against the school for failure to comply with FERPA; and,
- The criteria for determining who constitutes a school official and what constitutes a legitimate educational interest, if the school has a policy of disclosing personally identifiable information to school officials.

**Annually, schools must notify parents of their PPRA rights and include:**

- The PPRA policies developed in consultation with parents to address the protection of student privacy;
- The specific or approximate dates in which certain protected area surveys, non-emergency, invasive physical screenings, and activities collecting, disclosing, or using personal information for marketing are scheduled or expected to be scheduled; and,
- Parents' rights to opt out of, deny consent to, or inspect such surveys, instruments, and instructional material.

**Schools must also maintain:**

- A list, available upon parent request, of the types and locations of education records collected, maintained, or used by the school; and,
- A list, available for public inspection, of the names and positions of school employees who may have access to the personally identifiable information of any student in the school.

**All school staff members should be:**

- Trained in FERPA, IDEA, PPRA, and COPPA compliance; and,
- Asked to sign a confidentiality agreement.

**Regarding COPPA, schools should:**

- Review the privacy and security policies of any educational website or application currently in use;
- Provide parents notice of any online services whose collection of data from students under the age of 13 the school consented to on behalf of parents; and,
- Continue to review the privacy and security policies of any potential educational websites and applications.

# APPLICABILITY

FERPA, IDEA, and PPRA apply to any charter school receiving federal funds. While COPPA applies to online companies, any school that uses educational websites and applications should be aware of how and why these companies collect students' personal information and the school's and families' rights

For the complete legal texts and further guidance, please refer to:

- FERPA: 20 U.S.C. § 1232g *et seq.*; FERPA Regulations: 34 C.F.R. Part 99 *et seq.*
  - The U.S. Department of Education's [FERPA website](#).
- IDEA: 20 U.S.C. 1400 *et seq.*; IDEA Regulations: 34 C.F.R. Part 300 *et seq.*
  - The U.S. Department of Education's [IDEA website](#).
- PPRA: 20 U.S.C. 1232h *et seq.*; PPRA Regulations: 34 C.F.R. Part 98 *et seq.*
  - The U.S. Department of Education's [PPRA website](#).
- COPPA: 15 U.S.C. 6501 *et seq.*; COPPA Rule: 16 C.F.R. Part 312 *et seq.*
  - The Federal Trade Commission's [COPPA website](#).

# IMPORTANT DEFINITIONS<sup>1</sup>

**Education records** are records that are directly related to a student and are maintained by a school who receives federal funds. Education records do not include:

- Records kept in the sole possession of the maker and used only as a personal memory aid;
- Certain records of the law enforcement unit of a school;
- Certain records relating to an individual who is employed by a school;
- Certain records on a student who is 18 years of age or older;
- Records created or received by a school after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; and,
- Grades on peer-graded papers before they are collected and recorded by a teacher.

**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.

Important note: Rights under FERPA transfer from the parents to the student when the student turns 18 years old. For ease, this guidance document refers to "parent" or "parents" to include the above broad definition under FERPA or students who are at least 18 years old.

# POLICY REQUIREMENTS

FERPA and IDEA require the development of procedures to facilitate student and parent requests to review, and potentially amend, their applicable education records.<sup>2</sup> While only IDEA specifically requires the designation of a staff member to assume responsibility for ensuring the confidentiality of students' education records, it is advisable and common practice that a staff member be assigned the responsibility of accommodating FERPA requests as well.<sup>3</sup>

1. For the full list of FERPA definitions, see 34 C.F.R. § 99.3.

2. See 20 U.S.C. § 1232g (a)(1)(A) (FERPA requirements); see also 20 U.S.C. § 1415(b)(1) (IDEA requirements).

3. 34 C.F.R. § 300.623(b) ("One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.").

Schools are required to submit their confidentiality or FERPA policy to the Institute for approval during the preopening process and compliance is reviewed at the time of renewal. Please see the Institute's [preopening resources](#) and [renewal requirements](#) on its website for more information about these processes.

The confidentiality policy should include compliance with FERPA, IDEA, and PPRA, and contain the provisions outlined below.

## Access of Records to Parents

Under FERPA, parents have the right to inspect and review all records relating to their child that the school collects, maintains, or uses regarding the identification, evaluation, and education placement of their child.<sup>4</sup> Under the IDEA, parents of students with disabilities have the explicit right to have a representative inspect and review the records.<sup>5</sup> In addition, parents of students with disabilities have the right to obtain explanations and interpretations of their children's education records so long as such requests are reasonable.<sup>6</sup>

A parent must be provided their student's record no later than 45 days from the date of a request. If the request is connected to a meeting of a CSE or to an IDEA-related due process hearing, the school must provide the requested record "without unnecessary delay" and prior to such meeting or hearing, or within 45 days, whichever period is shorter.<sup>7</sup>

The school may charge a reasonable fee for copying records requested, unless such fee would effectively prevent the parents from exercising their rights under FERPA and/or IDEA. The school may not charge a fee to search for or retrieve records.<sup>8</sup>

Schools may wish to provide forms for requests to access education records. A sample form is available as **Form 1 - Request to Review Records** on the Institute's [Confidentiality of Student Records resources](#).

Schools may also wish to consider implementing the following:

- Grant the staff member designated to oversee compliance with FERPA and the confidentiality provisions of the IDEA exclusive authority to handle requests and to consult with the school's legal counsel as needed;
- Require all requests for review of student records be received in writing;
- Establish a master calendar (with reminders) to track each request to ensure requests are handled within the 45-day period allotted or any shorter period prior to a meeting of the CSE or a due process hearing;
- Verification of individuals as parents or guardians; and,
- Make request forms readily available.

## Consent to Release Education Records/Personally Identifiable Information and Directory Information

### 1. Education Records and Personally Identifiable Information

With a number of limited exceptions, parents must give consent before any of their student's education records or personally identifiable information can be disclosed.<sup>9</sup>

4. 20 U.S.C. § 1232g(a)(1)(A).

5. 34 C.F.R. § 300.613(b)(3).

6. 34 C.F.R. § 300.613(b)(1).

7. See 34 C.F.R. § 99.10(b) and 34 § 300.613(a).

8. 34 C.F.R. § 99.11 and 34 C.F.R. § 300.617.

9. 34 C.F.R. § 622.

Personally identifiable information includes:

- Name of the student, parent, or other family member;
- Address of the student, parent, or other family member;
- Personal identifier number, such as the student's social security number or student number;
- Other indirect identifiers such as the student's date of birth, place of birth, and mother's maiden name; and,
- A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.<sup>10</sup>

FERPA and IDEA provide specific exceptions where a school does not need to obtain parental consent including but not limited to the following:<sup>11</sup>

- To state and local educational authorities, including but not limited to, the Institute and the New York State Education Department ("NYSED"), subject to the requirements of 34 C.F.R. § 99.35;<sup>12</sup>
- To officials of another school in which the student seeks or intends to enroll, subject to the requirements of 34 C.F.R. §99.34;<sup>13</sup>
- In response to a judicial order or subpoena, though a parent should be notified prior to disclosure in order to permit the parent to seek judicial protective action;<sup>14</sup> and,
- To other school officials, including teachers, whom the school has determined to have legitimate educational interests.<sup>15</sup>

The staff member designated to oversee compliance with FERPA and the confidentiality provisions of the IDEA should review those exceptions carefully, and consult with the school's legal counsel as necessary, when reviewing a request for access from anyone other than a parent or before disclosing any education records or personally identifiable information.

It is important school personnel understand FERPA restricts access absent written parental consent to only those individuals with a legitimate need for access. Accordingly, absent special reason, staff members should not have access to education records of students to whom they do not provide instruction or services. A school's confidentiality policy should ensure limits on accessing records not only to individuals or entities outside the school, but to staff members as well. To ensure school personnel are aware of this requirement, the school may wish to require employees to sign a confidentiality agreement. A sample agreement is available as **Form 2 – Confidentiality Agreement for School Employees** on the Institute's [Confidentiality of Student Records resources](#).

Where parental consent is required, schools should ensure such consent is received in writing. Schools should also ensure the consent is based on full information (i.e., the parent knows the specific records being released, the reason for the request, and to whom the records would be released).<sup>16</sup> Copies of the requested records should also be provided to the parents to assist them in making this evaluation if they so request. A sample parental consent form for the release of education records and/or personally identifiable information is available as **Form 3 - Consent for Release of Student Information** on the Institute's [Confidentiality of Student Records resources](#).

## 2. Directory Information

In contrast to education records and personally identifiable information which cannot be disclosed in most instances without the affirmative consent of a parent, FERPA permits the disclosure of certain categories of what is known as "directory information" without the affirmative consent of a parent.

10. See 34 C.F.R. § 99.3; see also Definitions, *supra*.

11. 20 U.S.C. § 1232g(b)(1)-(2) and 34 C.F.R. § 99.30-31 (FERPA); 34 C.F.R. 300.622 (IDEA).

12. 34 C.F.R. § 99.31(a)(3)(iii).

13. 34 C.F.R. § 99.31(a)(2).

14. 34 C.F.R. § 99.31(a)(9)(i).

15. 34 C.F.R. § 99.31(a)(1).

16. 34 C.F.R. § 99.30.



Directory information must be defined by the school, but may include the student's:

- Name;
- Address;
- Telephone listing;
- Email address;
- Photograph;
- Date and place of birth;
- Grade level;
- Dates of attendance;
- Participation in officially recognized activities and sports; and,
- Degrees, honors, and awards received.<sup>17</sup>

Annually, the school must provide parents notice of designated directory information with information and timeframe to opt out of directory information disclosure.<sup>18</sup> A sample notice to parents regarding directory information is available as **Form 4 - Notice of Intent to Disclose Directory Information** on the Institute's [Confidentiality of Student Records resources](#).

## Annual FERPA Notification

Annually, the school must notify parents of their rights under FERPA.<sup>19</sup> The notice must inform parents of their right to:

- Inspect and review the student's education records and the procedures for so doing, including the name, address, and work location of the school's designated FERPA person, whether or not copies of records will be made available (as opposed to access), and, if so, the cost per copy;
- Request an amendment of a misleading or incorrect record or a record that otherwise violates the student's privacy rights, and the procedures for so doing;
- Consent to disclosures of personally identifiable information contained in the student's education records, except where prior permission is not required under FERPA;
- The criteria for determining who constitutes a school official and what constitutes a legitimate educational interest if the school has a policy of disclosing personally identifiable information to other school officials; and,
- File a complaint against the school for failure to comply with FERPA.

A sample annual notification to parents is available as **Form 5 - Annual Notification** on the Institute's [Confidentiality of Student Records resources](#). Please note, this form requires modification for each school's policies and procedures and thus should not be copied verbatim.

## Record Storage and Records of Access (Logs)

Schools should ensure all education records are stored in a central, locked location with access limited to designated administrative personnel. However, if the school determines there is a legitimate educational interest, individual teachers may maintain secure records for their own use (e.g., grading books, personal copy of Individualized Education Programs ("IEPs"), IEPs kept by special education coordinators, and health records kept by the school nurse).

If education records are stored electronically, they must be password protected and have electronic access tracking.

17. See 34 C.F.R. § 99.3; see also Definitions, *supra*.

18. 34 C.F.R. § 99.37.

19. 34 C.F.R. § 99.7.

Under FERPA and IDEA, schools must maintain a record of every individual who requests or accesses a student's education records and must specify the legitimate educational interest for the access.<sup>20</sup> These are called records of access or logs. The only times a school is NOT required to log requests or access are when: 1) the parent makes the request; 2) the school discloses personally identifiable information to a school official with a legitimate educational interest; 3) the parent provides written consent for the disclosure; or, 4) the request is pursuant to a subpoena or court order and the school makes a reasonable effort to notify the parent.

IMPORTANT: Each student's individual record must contain a record of access log.

The records of access or logs themselves are confidential and are only available to parents, the school's custodian of records and assistants thereto, and school officials and authorized representatives of certain designated governmental officials who are charged with auditing the record keeping system.

A sample record of access for each student's education records is available as **Form 6 - Record of Access** on the Institute's [Confidentiality of Student Records resources](#).

## Requests for Amendments to Records

If a parent believes the information in a student's record is inaccurate, misleading, or violates the student's right to privacy or other rights, the parent may request the school amend the student's record. The school must then decide, within a reasonable period of time, whether to amend the student's record. If the school decides not to amend the information as requested, the school must inform the parent of the decision, and advise the parent of their right to a hearing.<sup>21</sup>

## Other Record Keeping Requirements

Under IDEA, schools must:

- Provide parents, upon request, a list of the types and locations of education records collected, maintained, or used by the school.<sup>22</sup> A sample list is available as **Form 7 - Records Maintained** on the Institute's [Confidentiality of Student Records resources](#).
- Maintain a list, available for public inspection, which contains the names and positions of those employees within the school who may have access to the personally identifiable information of any student in the school.<sup>23</sup> In compiling this list, it is important to note individuals on this list need not have actual access; rather, the list should contain the names of those individuals who might reasonably be expected to have access to any student records at some point during the school year. As such, schools should err on the side of being comprehensive.

## Annual PPRA Notification and Other Requirements

Like FERPA and IDEA, PPRA applies to schools receiving federal funds from the U.S. Department of Education. It governs student participation in surveys, the use of information for marketing, and certain physical exams. Schools must develop student privacy policies in consultation with parents and notify them of these policies annually at the start of each school year, and within a reasonable time after

20. 34 C.F.R. § 99.32 and 34 C.F.R. § 300.563.

21. 34 C.F.R. § 99.20 and 34 C.F.R. § 300.618.

22. 34 C.F.R. § 300.616.

23. 34 C.F.R. § 300.623.

any significant changes. The notice must include the dates or expected timeframes of the surveys and activities listed below. If these are scheduled later in the year, schools must give parents reasonable notice, allow them to review the materials, and provide an option to opt their child out. PPRA rights transfer from parents to students once they turn 18 or become emancipated under state law.

If a survey is funded as part of a program administered by the U.S. Department of Education and concerns one of more of the following eight protected areas, parental consent is required before the student is asked to participate in the survey:

1. Political affiliations or beliefs of the student or the student's parent;
2. Mental or psychological problems of the student or the student's family;
3. Sex behavior or attitudes;
4. Illegal, anti-social, self-incriminating, or demeaning behavior;
5. Critical appraisals of others with whom respondents have close family relationships;
6. Legally recognized privileged or analogous relationships, such as with lawyers, doctors, and ministers;
7. Religious practices, affiliations, or beliefs of the student or student's parent; or,
8. Income, other than as required by law to determine program eligibility.

In the following situations, parents must receive notice, either by U.S. mail or email, and provided an opportunity to opt a student out of:

- A survey concerning one of more of the above eight protected areas, but the survey is either not funded in whole or in part by the U.S. Department of Education;
- Any non-emergency, invasive physical examination or screening required by a school as a condition of attendance, administered by the school and scheduled in advance, and that is not necessary to protect the immediate health and safety of a student, with some exceptions; and,
- Activities of a school involving collection, disclosure, or use of personal information collected from students for the purpose of marketing or sale (or to otherwise distribute such information to others for that purpose), with some exceptions.

In the following situations, parents must be allowed to inspect, upon request:

- Surveys concerning one of more of the above eight protected areas and surveys created by a third party, before the administration or distribution of the surveys to a student;
- Any instrument used by school to collect personal information for the purpose of marketing or sale (or otherwise distributing such information for that purpose), before the instrument is administered or distributed to a student, with some exceptions; and,
- Instructional material, excluding academic tests or academic assessments, used as part of the educational curriculum for a student.

## **COPPA Compliance**

COPPA protects children's online privacy providing parents of children under the age of 13 the right to consent to information collected or used by websites or applications. Schools may stand in for parents and provide consent where the website or application is used for a school-authorized educational purpose and no commercial purpose. The website or application must provide the school the COPPA-

required notice of its data collection and use practices. Schools should consult their legal counsel to review privacy and security policies of any website of application, Notice of use of website or application should be provided to parents. If the use is not for a school-authorized educational purpose, the school may not consent on behalf of the parents.

When deciding whether to engage a potential websites and applications, schools should ask:

- What types of personal information will you collect from students?
- How do you use this personal information?
- Do you use or share the information for commercial purposes not related to the provision of the online services requested by the school? For instance, do you use students' personal information in connection with generating targeted advertising, or building user profiles for commercial purposes not related to the provision of the online service? If so, the school cannot consent on behalf of the parent.
- Do you let the school review and delete the personal information collected from their students? If not, the school cannot consent on behalf of the parent.
- What measures do you take to protect the security, confidentiality, and integrity of the personal information that you collect?
- What are your data retention and deletion policies for children's personal information?



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