



Reaffirming Privacy Obligations While Facing New Challenges:

Guidance for States, Schools, and Universities

In its first 100 days, various Trump Administration efforts have focused predominantly on students, families, and educational institutions. Those efforts have included requests for student records by Immigration and Customs Enforcement (ICE), the U.S. Department of Education (USED), and Congressional committees; data sharing with ICE by campus law enforcement; and efforts by USED to use student privacy law to displace state and local policies protecting transgender students. Those efforts to obtain student records raise concerns that they conflict with schools' obligations under existing student privacy laws, especially the federal Family Educational Rights and Privacy Act (FERPA). This guidance outlines educational institutions' responsibilities under FERPA and how FERPA may apply to various Administration and Congressional efforts.

Summary: Key Provisions and Procedures

FERPA limits the ability of educational institutions to disclose student records, including to government agencies like ICE and USED. At its foundation, FERPA requires parental consent — or consent from the student if they are over 18 years old or enrolled in a postsecondary institution — before disclosing student records. FERPA includes 16 exceptions to that rule, including for responding to lawfully issued subpoenas, health and safety emergencies, and audits of educational programs. FERPA, however, does not permit broad, blanket releases, and no exception permits educational institutions to provide student records in response to informal governmental requests. Each of the 16 exceptions includes prerequisites that must be met before records are disclosed. For example, under the exception for subpoenas, the subpoena must be lawfully issued, and notice must generally be provided to the parent or student before disclosure. Likewise, these exceptions merely permit a school to disclose information — they do not require it.

In addition to adhering to FERPA's requirements, educational institutions should establish procedures for responding to ICE's presence on campus, informal requests (such as asking for documents or seeking information through social relationships), and formal demands for student records (such as presenting a subpoena). Those policies should identify a point person, provide training to institutional staff, and incorporate review by counsel.

This guidance details FERPA's requirements and analyzes its potential application to various scenarios that have arisen under the current Administration.¹

¹ Lead drafter, Cody Venzke, Senior Policy Counsel, ACLU. This document merely summarizes existing law and does not constitute legal advice. Educational agencies and institutions should consult with counsel to determine how the law described here applies to their exact circumstances and to assess what other laws may apply.

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FERPA Basics: Educational Institutions Must Protect Student Data, Even from Governmental Agencies

FERPA Precludes Disclosure of Students' Personal Information Without Consent Unless an Exception Applies

The federal Family Educational Rights and Privacy Act (FERPA)² is the primary student privacy law in the United States. FERPA applies to the use of “personally identifiable information” from a student’s “education record” by an “educational agency or institution” — meaning all three of the following must be true for FERPA to apply:

- The information is collected, used, or shared by an “**educational agency or institution**” that receives funds from the U.S. Department of Education and enrolls students. “Educational agencies and institutions” include public K-12 schools districts, public K-12 schools, charter schools, and public and private universities and colleges that accept students who receive federal financial aid.³ State departments of education are not considered “educational agencies or institutions” subject to FERPA because they do not directly enroll students, despite receiving USED funds.⁴
- The information comes from a student’s “**education record.**” While the traditional core of “education records” has been the “institutional records kept by a single central custodian” in “a filing cabinet in a records room at the school or on a permanent secure database,”⁵ it extends far more broadly. It encompasses any record that (1) directly relates to a student and (2) is maintained by the educational agency or institution.⁶ Those records can be maintained in any medium and include discipline and medical records,⁷ photos posted on a school bulletin board, surveillance videos,⁸ emails regarding students,⁹ and recommendations for

² 20 U.S.C. § 1232g.

³ 76 Fed. Reg. 75603, 75606 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-47>.

⁴ *Id.* (“[W]e have not generally viewed an SEA as being an educational agency under § 99.1(a)(2) . . .”).

⁵ *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433, 435 (2002)

⁶ 34 C.F.R. § 99.3.

⁷ Student Privacy Policy Office, *What Is an Education Record?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-education-record> (last visited Apr. 30, 2025).

⁸ Student Privacy Policy Office, *FAQs on Photos and Videos under FERPA*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa> (last visited Apr. 30, 2025).

⁹ *Cf.* 73 Fed. Reg. 74805, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-130>.

membership in the National Honor Society.¹⁰ The regulations also exempt certain types of records from the definition of “education record” such as staff members’ personal notes or “law enforcement unit” records, described below.¹¹

- The information coming from the education record is **personally identifiable information (PII)**.¹² PII is any information that “is linked or linkable to a specific student that would allow a reasonable person in the school community” to identify the student.¹³ This could include the student’s name, family members’ names, the student’s address, or descriptions of the student that would be identifiable by the wider school community,¹⁴ such as a widely known scandal about a school’s basketball players.¹⁵

FERPA provides parents and “eligible students” with three key rights: (1) the right to access their education records upon request, (2) the right to request amendment of those records, and (3) the right to consent before personally identifiable information is disclosed from those records.¹⁶ (An “eligible student” is a student who has turned 18 or enrolled in a college or university; once either of those requirements are met, rights under FERPA transfer to the student.¹⁷) Beyond a few notices that must be provided annually regarding school policies,¹⁸ FERPA does not impose proactive obligations to inform parents or eligible students about changes to the student’s education record. Instead, its right to access records requires access to be granted “within a reasonable period of time” upon request.¹⁹

FERPA, however, only provides a “floor” for protecting students’ information; states, educational institutions, and educational agencies have significant latitude to provide additional protections to student’s PII, so long as the state requirements do not “conflict” with FERPA.²⁰

¹⁰ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO ATTORNEY FOR SCHOOL DISTRICT IN ARIZONA REGARDING RECORDS RELATED TO NATIONAL HONOR SOCIETY (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society>.

¹¹ 34 C.F.R. § 99.3.

¹² See 34 C.F.R. § 99.30.

¹³ 34 C.F.R. § 99.3.

¹⁴ Id.

¹⁵ 73 Fed. Reg. 74806, 74833 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-304>.

¹⁶ 34 C.F.R. §§ 99.10, 99.20, 99.30.

¹⁷ 34 C.F.R. §§ 99.3, 99.5

¹⁸ 34 C.F.R. §§ 99.7, 99.34(a), 99.37(a).

¹⁹ 34 C.F.R. § 99.10. In contrast, the Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h, requires proactive notice to parents for certain surveys or medical examinations. For more information, see Student Privacy Policy Office, *What is the Protection of Pupil Rights Amendment (PPRA)?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-protection-pupil-rights-amendment-ppra> (last visited Apr. 30, 2025).

²⁰ See 34 C.F.R. § 99.5(b) (allowing educational agencies and institutions to grant students additional rights); *id.* § 99.61 (establishing procedures for addressing only state laws that prevent compliance with FERPA).

There Is No Exception for Disclosing to Governmental Agencies Generally or for Responding to Informal Governmental Requests

The right for parents and eligible students to provide consent before PII is disclosed is subject to 16 exceptions listed in the statute and regulations.²¹ None of those exceptions, however, permit disclosures to governmental agencies in general or for responding to informal requests from other governmental agencies.²² Consequently, disclosures to governmental agencies such as ICE or USED²³ must be made with parental consent or pursuant to one of FERPA's 16 exceptions.²⁴

Relevant Exceptions Are Narrow

Those 16 exceptions are narrow, and “schools [should] carefully limit the disclosure of students’ personally identifiable information” even when an exception is applicable²⁵ — FERPA does not permit broad, blanket disclosures. Five exceptions are particularly relevant to disclosures to law enforcement, ICE, and USED, but none of them provide open-ended permission to widely share students’ PII:

- **School official exception:** Educational agencies and institutions may provide PII from education records to “school officials,” who are not just teachers and paid staff but also volunteers, contractors, attorneys, technology platforms, and — occasionally — law enforcement.²⁶ Outside entities may qualify as a “school official” only if meet three requirements. They must: (1) perform “an institutional service or function for which the agency or institution would otherwise use employees”; (2) be “under the direct control of the agency or institution with respect to the use and maintenance of education records”; and (3) not further disclose the information and use it only for its original purposes.²⁷ Both employees and external “school officials” are limited to the PII they need to carry out their duties — known as a “legitimate

²¹ 20 U.S.C. § 1232g(b)(1)(A)–(L), (2), (3); 34 C.F.R. § 99.31(a)(1)–(16).

²² Cf. 73 Fed. Reg. 74805, 74828 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-264> (“There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students’ education records to non-educational State agencies.”).

²³ Cf. 34 C.F.R. § 99.31(a)(3)(iii) (FERPA exception permitting disclosures to USED for audits or evaluations of education programs).

²⁴ One of those exception permits disclosure of a type of information known as “directory information,” such as students’ names, grade levels, and activities, which may be disclosed without parental consent — *if* parents and eligible students have been provided notice and an opportunity to opt-out and have not exercised the opt-out. 34 C.F.R. §§ 99.3, 99.37. If the parent has not opted out, directory information may be provided to law enforcement, and secondary students’ names, addresses, and telephone listings *must* be provided to military recruiters. See 20 U.S.C. § 7908; 10 U.S.C. § 503(c).

²⁵ 73 Fed. Reg. 74805, 74827 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-252>.

²⁶ 34 C.F.R. § 99.31(a)(1).

²⁷ 34 C.F.R. § 99.31(a)(1)(i)(B)(1)–(3).

educational interest.”²⁸ The “legitimate educational interest” requirement would generally preclude law enforcement functioning as a school official from re-purposing student PII for general law enforcement activities.²⁹

- **Audit or evaluations:** The U.S. Secretary of Education — or her “authorized representative” — may receive PII from an education record to audit or evaluate an “education program” and its compliance with legal requirements for the program.³⁰ Use of the PII, however, is limited: the PII must be protected from further disclosure, may not be used for “other uses,” and must be destroyed when it is no longer needed.³¹
- **Lawfully issued subpoenas:** As described in more detail below, FERPA permits educational agencies and institutions to respond to “lawfully issued” subpoenas.³² A subpoena is “lawfully” issued if it is properly issued under state, federal, or administrative law.³³ However, parents and eligible students must be given notice of the subpoena “so that the parent or eligible student may seek protective action.”³⁴
- **Crimes of violence:** Finally, educational agencies and institutions may disclose “the final results of the disciplinary proceeding” if the institution has determined in the proceeding that the student has committed “a crime of violence or non-forcible sex offense,”³⁵ such as arson, assault, vandalism, or destruction of property.³⁶

²⁸ 34 C.F.R. § 99.31(a)(1)(i)(A), (ii).

²⁹ Privacy Technical Assistance Center, U.S. Department of Education, SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) at 12 (2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs.pdf (“This means that an off-duty police officer or SRO who is acting as a ‘school official’ under FERPA may not re-disclose, without appropriate consent, PII from education records to outside parties, including other employees of his or her police department who are not acting as school officials.”).

³⁰ 34 C.F.R. §§ 99.31(a)(3), 99.35.

³¹ 34 CFR 99.35(a)(2)(i)–(iii); 73 Fed. Reg. 74806, 74821 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-195> (“The statutory prohibitions on the redisclosure of education records apply to education records that SEAs, State higher educational authorities, the Department, and other Federal officials receive under an exception to the written consent requirement in FERPA, such as §§ 99.31(a)(3) and 99.35 (for audit, evaluation, compliance and enforcement purposes) . . .”).

³² 34 C.F.R. § 99.31(a)(9)(i).

³³ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>; LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER OF TECHNICAL ASSISTANCE TO THE REGENTS OF THE UNIVERSITY OF CALIFORNIA RE: DISCLOSURES TO EMPLOYMENT RELATIONS BOARD at 3 (1999), <https://studentprivacy.ed.gov/resources/letter-technical-assistance-regents-university-california-re-disclosures-employment>.

³⁴ 34 C.F.R. § 99.31(a)(9)(ii).

³⁵ 34 C.F.R. § 99.31(a)(14).

³⁶ 34 C.F.R. § 99.39.

However, that determination must be made pursuant to institutional procedures before “an honor court or council, committee, commission” or similar body.³⁷

- **Law enforcement unit:** As described below, FERPA permits an educational agency or institution’s “law enforcement unit” to create and maintain its own records, generally outside of FERPA’s requirements.³⁸ However, those records cannot include PII from students’ education records, nor can they be used for non-law enforcement purposes,³⁹ meaning FERPA’s protections will apply if the law enforcement unit obtains education records from other components of the educational agency or institution and mixes that information with their own records.

Crucially, each of these exceptions is permissive, not mandatory — educational agencies or institutions may disclose PII if an exception applies but are not required by FERPA to do so.⁴⁰ Thus, even if an educational agency or institution receives a subpoena or determine that a student has committed vandalism, they are not *required by FERPA* to disclose the information.

FERPA Protects Students with Respect to ICE and External Law Enforcement

Information May Be Disclosed in Response to a Valid Immigration Subpoena, but Disclosure Is Not Required

One of FERPA’s exceptions permits — but does not require — educational institutions or agencies to disclose PII from education records to “comply with a judicial order or lawfully issued subpoena.”⁴¹ Prior to responding to the subpoena, however, the educational agency or institution must make a “reasonable effort to notify the parent or eligible student” so that they “may seek protective action.”⁴² Notice is excused if the “issuing agency has ordered the existence or the contents of the subpoena. . . not be disclosed.”⁴³

Subpoenas issued by ICE likely will permit educational institutions or agencies to disclose students’ records in response to the subpoena, so long as the proper notice is first given. Although USED⁴⁴ has not directly addressed subpoenas issued by ICE, it has concluded that subpoenas and summons issued by agencies like the Internal Revenue Service are

³⁷ Id.

³⁸ 34 C.F.R. § 99.8.

³⁹ 34 C.F.R. § 99.8(b)(2).

⁴⁰ 73 Fed. Reg. 74806, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-124> (“The disclosure of education records under any of the conditions listed in § 99.31, including the ‘school officials’ exception, is permissive and not required.”).

⁴¹ 34 C.F.R. § 99.31(a)(9)(i).

⁴² 34 C.F.R. § 99.31(a)(9)(ii).

⁴³ 34 C.F.R. § 99.31(a)(9)(ii)(B).

⁴⁴ The component of the U.S. Department of Education responsible for interpreting and enforcing FERPA is the Student Privacy Policy Office or its predecessor, the Family Policy Compliance Office.

valid.⁴⁵ Moreover, both the FERPA statute and its regulations reference the “issuing agency,” suggesting the exception is not limited to judicial subpoenas.⁴⁶ Thus, subpoenas issued by administrative agencies such as ICE likely qualify for the exception.

Although the issuance of an administrative subpoena by ICE will *permit* educational institutions or agencies to disclose to PII from education records, a response is not *required*, for two reasons:

- First, all but one of FERPA’s exceptions are *permissive*, meaning that they allow but do not require disclosures — even if an exception applies, educational agencies and institutions are still free under FERPA to refuse to disclose the PII.⁴⁷
- Second, while longstanding law requires educational agencies and institutions to comply with valid *judicial* warrants and subpoenas, immigration agents often serve what are known as *administrative* subpoenas, which do not have the same legal force. The administrative subpoenas issued by ICE are not self-executing, meaning that to enforce them, ICE must first seek a court to compel compliance,⁴⁸ after which the recipient will have an opportunity to oppose compliance with the subpoena.⁴⁹

An administrative subpoena will be signed by an immigration officer or immigration judge within the Department of Homeland Security and bear the Department’s seal; in contrast, a valid court order or judicial subpoena will be issued by a state or federal court and signed by a state or federal judge or magistrate.

Unlike judicial warrants, administrative warrants *do not* give ICE agents authority to enter areas of school property that are not otherwise open to the public.⁵⁰ To enter those

⁴⁵ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>.

⁴⁶ 20 U.S.C. § 1232g(b)(1)(J)(ii); 34 C.F.R. § 99.31(a)(9)(ii)(B).

⁴⁷ 73 Fed. Reg. 74806, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-124>.

⁴⁸ See 8 U.S.C. § 1225(d)(4)(B) (providing authority for district court to issue order requiring compliance with subpoena, and providing that “failure to obey such order of the court may be punished by the court as a contempt thereof” (emphasis added)); *In re Nat’l Sec. Letter*, 33 F.4th 1058, 1063 (9th Cir. 2022) (“[W]hile an agency may issue a subpoena without prior judicial approval, it must invoke the aid of a federal court to enforce it. The power to punish is not generally available to federal administrative agencies, and so enforcement must be sought by way of a separate judicial proceeding.” (citations and internal quotation marks omitted)); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996).

⁴⁹ *United States v. Security State Bank and Trust*, 473 F.2d 638, 642 (5th Cir. 1973) (“The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.”); *U.S. Immigr. & Customs Enf’t v. Gomez*, 445 F. Supp. 3d 1213, 1214 (D. Colo. 2020) (discussing grounds upon which an administrative subpoena may be opposed).

⁵⁰ *Coolidge v. New Hampshire*, 403 U.S. 10, 14 (1948) (Fourth Amendment “neutral and detached magistrate” requirement not satisfied if person issuing warrant belongs to executive branch rather

places (absent a judicial warrant), ICE would need the school's consent, which school officials have no legal obligation to give.

When presented with a subpoena, educational agencies and institutions should consult with counsel to determine the type of subpoena and assess how both FERPA and other laws may apply. For more on educational institutions' rights when presented with administrative subpoenas by ICE, see the ACLU's April 2025 *Open Letter to College and University General Counsels*⁵¹ and *Know Your Rights: ICE Administrative Subpoenas*.⁵²

Failure to Provide Notice to Parents or Eligible Students May Result in a Court Order Against ICE

As noted above, prior to responding to a subpoena under FERPA's subpoena exception, notice must be provided to parents and eligible students so that they "may seek protective action."⁵³ However, if the "issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed,"⁵⁴ the advance notice requirement is "waive[d]."⁵⁵ Such orders are often known as a "non-disclosure order" or a "gag order." Presumably, only a *valid* nondisclosure order would

than member of judiciary); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Fourth Amendment protections apply to interactions between immigration officials and people they suspect to be undocumented); *Santos v. Frederick Co. Bd. of Comm'rs*, 725 F.3d 451, 468 (4th Cir. 2013) (deputies conducting arrest based on ICE civil arrest warrant violated noncitizen's Fourth Amendment rights); *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 979–80 (C.D. Cal. 2024) ("[A]n [ICE] administrative warrant is insufficient to enter the constitutionally protected areas of a home."). See also, *ICE Administrative Removal Warrants*, FED. L. ENF'T TRAINING CTRS., <https://www.fletc.gov/ice-administrative-removal-warrants-mp3> ("The primary difference [between an ICE warrant and a criminal warrant] is that, unlike a criminal warrant issued by the federal court, a removal warrant does not authorize the ICE officer to enter into an REP [Reasonable Expectation of Privacy] area to execute the warrant.").

⁵¹ American Civil Liberties Union Foundation, OPEN LETTER TO COLLEGE AND UNIVERSITY GENERAL COUNSELS (Apr. 17, 2025), <https://www.aclu.org/documents/open-letter-to-college-and-university-general-counsels-on-1-8-u-s-c-%C2%A7-1324-harboring-liability-and-2-ice-administrative-subpoenas>.

⁵² American Civil Liberties Union Foundation, KNOW YOUR RIGHTS: IMMIGRATION ADMINISTRATIVE SUBPOENAS (Apr. 17, 2024), <https://www.aclu.org/documents/know-your-rights-ice-administrative-subpoenas>.

⁵³ 34 C.F.R. § 99.31(a)(9)(ii).

⁵⁴ 34 C.F.R. § 99.31(a)(9)(ii)(B). In addition to nondisclosure orders issued by agencies, educational agencies or institutions may be alleviated of their notice responsibilities *also* in response to non-disclosure orders included in a federal grand jury subpoena or an "*ex parte* court order obtained by the United States Attorney General . . . concerning investigations or prosecutions of" certain terrorism-related offenses. *Id.* § 99.31(a)(9)(ii)(A), (C).

⁵⁵ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO THE INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION DIVISION REGARDING IRS SUMMONS at 2 (2002), <https://studentprivacy.ed.gov/resources/letter-internal-revenue-service-criminal-investigation-division-regarding-irs-summons>.

waive the advance notice requirement,⁵⁶ although USED has never directly addressed the issue.

ICE subpoenas typically include language purporting to order the recipient not to disclose the existence or details of the subpoena to the target of the investigation or to the public. However, these nondisclosure orders are unenforceable, as ICE officials do not have the legal authority to command nondisclosure.⁵⁷ This leaves the subpoena recipient free to communicate with the public, or even the person whose information was subpoenaed. USED has never addressed whether invalid or unenforceable nondisclosure orders may validly waive the advance notice requirement, and educational agencies and institutions should consult with counsel to determine the validity of the gag order and — if possible — provide notice of the ICE subpoena to parents and eligible students as a best practice.

In addition, to avoid accusations that advance notice was intended to obstruct the investigation⁵⁸ and to deter unjustified secrecy demands in issuance of subpoenas, educational agencies and institutions should establish policies and procedures for notifying parents and eligible students when they are the subject of a subpoena issued to the educational agency or institution, as is required by FERPA's subpoena exception.

Failure to provide that notice may result in courts delaying the disclosure of students' PII so that parents and eligible students can be notified. In one case in 2010, a federal judge issued a temporary restraining order enjoining disclosure by a school district in response to an ICE subpoena for failure to provide the required notice.⁵⁹ Other courts have declined to quash subpoenas for failure to provide the notice required by FERPA but instead issued protective orders requiring the notice to be provided.⁶⁰

⁵⁶ Cf. 34 CFR 99.31(a)(9)(i) (requiring that subpoenas be “lawful”).

⁵⁷ ICE's legal authority for the issuance of subpoenas, summonses, and Form I-9 notices are 8 U.S.C. § 1225(d)(4)(A) for general immigration enforcement; 8 U.S.C. § 1324a(e)(2)(C) for I-9 audits; 50 U.S.C. App. § 2411(a) for the Export Subpoena; 21 U.S.C. § 967 for the Controlled Substance Enforcement Subpoena; and 19 U.S.C. § 1509 for the Customs Summons, all of which lack secrecy or nondisclosure provisions. *See also* Doe v. Ashcroft, 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that “most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases,” for example, when a court so orders), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

⁵⁸ 18 U.S.C. § 1505 (“Whoever *corruptly*, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . commits an offense” (emphasis added)). We are unaware of any case in which providing notice to the subject of a subpoena was the basis of an obstruction charge.

⁵⁹ Order, Coulibaly v. N.Y. City Dep't Ed., No. 10-cv-5658, Doc. No. 10 (Sept. 16, 2010); Am. Compl. ¶¶ 27, 38, Coulibaly v. N.Y. City Dep't Ed., No. 10-cv-5658, Doc. No. 7 (Sept. 8, 2010).

⁶⁰ Jackson v. Willoughby Eastlake Sch. Dist., No. 16-cv-3100, 2018 WL 1468666, at *4 (N.D. Ohio Mar. 23, 2018); Rios v. Read, 73 F.R.D. 589, 600 (E.D.N.Y. 1977).

Schools Should Establish Policies and Procedures to Protect Students

In addition to adhering to FERPA, educational institutions and agencies should undertake other steps to protect students, including:

- Clearly demarcate the public and non-public areas in your schools. If school playgrounds, sports fields, etc., are not open to the public during certain hours, you can also post signage setting out those limits. Train staff that ICE is not permitted to enter any non-public areas without a judicial warrant.
- Establish protocols for exactly what school staff should do if immigration agents come to a school, including providing notification to institutional leadership and seeking advice of counsel. The following school districts and universities provide examples: Norristown Area School District,⁶¹ Wilkinsburg School District,⁶² Pittsburgh Public Schools,⁶³ and John Hopkins University.⁶⁴
- Train all school staff, based on your protocols, that if immigration agents come to a school, staff should immediately inform a designated, trained contact person (for example, the principal), who should then consult the superintendent and school's attorney. School staff should be instructed not to consent to immigration enforcement officers entering non-public areas, should not allow immigration enforcement officers to interview students, and not answer questions or otherwise assist the agents.
- Instruct school staff that immigration agents sometimes wear clothing intended to suggest they are police. Regardless of how they dress, federal immigration enforcement officials should not be allowed entry to a school and non-public areas on school grounds absent a valid judicial warrant.
- Have an attorney review any requests from immigration enforcement, including any warrant or subpoena presented. Schools may face legal repercussions under FERPA if staff provide student PII to immigration agents, which is why legal review of all requests is critical. The attorney can ensure that schools are acting consistent with

⁶¹ See, e.g., Norristown Sch. Distr., WELCOMING SCHOOL RESOLUTION (2024), https://core-docs.s3.us-east-1.amazonaws.com/documents/asset/uploaded_file/3691/NASD/5063250/Welcoming_Schools_Resolution.pdf; *Federal Procedure Change*, NORRISTOWN SCH. DISTR. (Jan. 28, 2025), <https://www.nasd.k12.pa.us/page/federal-procedure-change>.

⁶² Wilkinsburg Sch. Dist., A Resolution of the Board of School Directors of the Wilkinsburg School District Affirming its Commitment to a Safe and Supportive School Environment for all Students, Regardless of Immigration Status, [https://go.boarddocs.com/pa/wlkn/Board.nsf/files/DBWREW6DB232/\\$file/WSD%20Sanctuary%20Resolution\(20654320.1\).pdf](https://go.boarddocs.com/pa/wlkn/Board.nsf/files/DBWREW6DB232/$file/WSD%20Sanctuary%20Resolution(20654320.1).pdf).

⁶³ *Immigrant Families*, PITTSBURGH SCH. DISTR., <https://www.pghschools.org/community/immigrant-families>.

⁶⁴ Office of the General Counsel, John Hopkins University, GUIDANCE IN RESPONSE TO QUESTIONS ABOUT FEDERAL IMMIGRATION ENFORCEMENT (2025), <https://publicsafety.jhu.edu/assets/uploads/sites/9/2025/03/Revised-Immigration-Guidance.pdf>.

their legal responsibilities to students and that legal process presented by ICE is valid and can provide advice to school decision-makers about how to proceed.

- The school's attorney and decision-makers should hold immigration agents to the limits in the warrant or subpoena. Note that judicial warrants and subpoenas are often limited to particular spaces within an address or certain identified people.
- Create a policy under which you will disclose the existence and contents of an administrative subpoena to the parties whose records have been requested. An attorney can help you craft a disclosure policy that works for your specific situation. Announcing a policy of notice to parents and students on your webpage, law enforcement contact page, or other publicly accessible place can dissuade casual or frivolous subpoenas.
- Have a policy for responding to ICE subpoenas and related communications, including seeking review by counsel. You can safely ignore administrative subpoenas absent a court order, but you may prefer to provide a written response that explains your grounds for objecting to the subpoena, and state that you will notify the person whose records were sought.
- Prepare your legal counsel to oppose any court motion to compel compliance. Whether you actively contest the motion to compel or simply wait for a court order enforcing the subpoena, this may deter ICE from sending you frivolous subpoenas
- Observe and document any actions by immigration agents on school property. Schools should make copies of officers' identification documents, as well as any warrants or subpoenas.

K-12 School Districts Should Not Require Students or Families to Provide Immigration Status and Should Limit the Other Information They Collect

Requiring students, parents, or guardians to provide schools with information regarding their immigration status or taking other actions that significantly interfere with the right to a basic public education violates the constitutional guarantees that all children — regardless of immigration status — may access a K-12 education, as held in *Plyler v. Doe*.⁶⁵

Further, the information required to enroll in a K-12 school is often limited under state law to a handful of key documents, typically proof of residency, proof of age, and immunization records.⁶⁶ Some states have specifically prohibited schools from inquiring about or requiring students to provide any information relating to immigration status.⁶⁷ In addition:

⁶⁵ 457 U.S. 202 (1982); *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1245 (11th Cir. 2012); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995), on reconsideration in part, 997 F. Supp. 1244 (C.D. Cal. 1997); *accord* 22 Pa. Code § 11.11(d) (“A school may not inquire regarding the immigration status of a student as part of the admission process”).

⁶⁶ *E.g.*, 22 Pa. Code § 11.11(b); 24 Pa. Code § 13-1317.2; 24 Pa. Code § 13-1318.1(g).

⁶⁷ Cal. Educ. Code § 234.7; 22 Pa. Code § 11.11(d) (“A school may not inquire regarding the immigration status of a student as part of the admission process”). *See also*, *Plyler*, 457 U.S. at 223.

- Schools should not — and in many cases, may not — ask students for information such as a social security number⁶⁸ or place of birth that may indicate a student’s immigration status, with the limited exception that schools are required to identify those students born outside the United States who are eligible to participate in Title III federal education programs.⁶⁹
- Schools should not require documents for determining residency or age that only people with U.S. citizenship or current immigration status can have (*e.g.* U.S. passport, driver’s license, etc.). Instead, schools should provide a variety of means for establishing information necessary for enrollment. For example, the Pennsylvania Department of Education’s guidance explains that “schools should be flexible in consideration of the child’s circumstances” and provides a “non-exhaustive” list including baptismal certificate or record of baptism; notarized statement from the parents or another relative indicating the date of birth; prior school record indicating the date of birth.⁷⁰
- School administrators should limit the information collected from students, parents, and guardians. Student education records should be limited, consistent with state and federal law, to basic student information, such as grades, transcripts, course schedules, health records, directory information, enrollment dates, special education records, and disciplinary records. Beyond that, consider the general rule of thumb: *If there is no reason to collect it, then do not collect it.*

Schools should also review what information is contained in school directories, and remind parents, guardians, and adult students that *they have a right under FERPA to opt out* of having their “directory information” shared.⁷¹ While directory information is often released under FERPA, it requires notice to parents regarding their right to opt-out of disclosure of directory information, a request they may make at any time.⁷²

⁶⁸ See 5 U.S.C. 552a note (“It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”).

⁶⁹ See 20 U.S.C. § 7011(5) (defining “immigrant children” eligible to receive federal funding for language instruction as students who were not born in any State and have not been attending one or more schools in any one or more States for more than three full academic years).

⁷⁰ *Student Enrollment FAQ*, PA. DEPT EDUC., <https://www.pa.gov/agencies/education/resources/policies-acts-and-laws/basic-education-circulars-becs/purdons-statutes/enrollment-of-students/student-enrollment-faq.html>.

⁷¹ 34 C.F.R. § 99.37.

⁷² 20 U.S.C. § 1232g(a)(5)(B).

FERPA and School Law Enforcement Units

Law Enforcement Units Are Subject to Restrictions in Their Use of Education Records

Law enforcement operating at several universities have entered into agreements with ICE to assist in immigration enforcement.⁷³ FERPA provides a different standard of protection for the components of an educational agency or institution that are responsible for law enforcement or security duties, known as “law enforcement units.” If certain requirements are met, the records of a law enforcement unit are entirely exempt from the protections provided by FERPA.⁷⁴ However, records that do not meet those requirements, even those handled by law enforcement units, remain subject to FERPA’s protections.

To qualify as a “law enforcement unit,” personnel or components within the educational agency or institution must be “officially authorized or designated” to conduct one of two sets of activities:⁷⁵

- “Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself”; or,
- “Maintain the physical security and safety of the agency or institution.”

Any “individual, office, department, division, or other component of an educational agency or institution” can qualify.⁷⁶ Law enforcement units may be “a unit of commissioned police officers or non-commissioned security guards,”⁷⁷ or even a “vice principal” officially assigned security duties.⁷⁸ A law enforcement unit can also conduct other duties without losing its status as a law enforcement unit.⁷⁹ However, not all school security or police have been designated as a law enforcement unit, and consequently may not meet FERPA’s requirements as a law enforcement unit.

Only certain records held by law enforcement units are exempt from FERPA. Those records must meet all three of the following requirements; the record must be:⁸⁰

- Created by the law enforcement unit;
- Created for a law enforcement purpose; and,

⁷³ Josh Moody, *More Florida Colleges Sign ICE Agreements*, INSIDER HIGHER EDUCATION (Apr. 29, 2025), <https://www.insidehighered.com/news/government/politics-elections/2025/04/29/least-15-florida-institutions-have-ice-agreements>.

⁷⁴ 34 C.F.R. § 99.3 (definition of “education record”).

⁷⁵ 34 C.F.R. § 99.8(a)(1)(i)–(ii).

⁷⁶ 34 C.F.R. § 99.8(a)(1).

⁷⁷ 34 C.F.R. § 99.8(a)(1).

⁷⁸ Privacy Technical Assistance Center, U.S. Department of Education, SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) at 14 (2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs.pdf

⁷⁹ 34 C.F.R. § 99.8(a)(2).

⁸⁰ 34 C.F.R. § 99.8(b)(1).

- Maintained by the law enforcement unit.

Thus, neither law enforcement units nor every record they have access to are exempt from FERPA. For example, education records transferred from other components of the institution remain protected and *cannot* be used in immigration enforcement unless another FERPA exception applies. Likewise, records maintained by the law enforcement unit for a *non*-law enforcement purpose “such as a disciplinary action or proceeding” initiated by school staff under a student code of conduct are not law enforcement records.⁸¹

Educational Institutions and Agencies Should Establish Additional Procedures Governing Their Law Enforcement Units

Although FERPA restricts law enforcement units’ use and disclosure of education records, schools can take additional steps to protect students’ information, even where FERPA would not provide protection. We recommend that educational agencies and institutions:

- Require law enforcement units to commit — through a signed agreement or official policy — not to inquire about immigration status, not to engage in immigration enforcement activities, and not to detain students and family members for purposes of immigration enforcement.
- Educate law enforcement units about the legal protections for immigrant students (including their right to an education) and inform them that if they engage in immigration enforcement activities, they run the risk of violating federal and state law.
- Ensure that such school security officers are trained on and properly follow Fourth and Fifth Amendment standards for detention, interrogation, search, and seizure, and are not arresting students for incidents that can be handled as matters of school discipline. These concerns carry extra weight for undocumented students, for whom school policing has the potential to undermine the education rights outlined in *Plyler*. Too often, police in schools arrest students for misdemeanor offenses like disorderly conduct when the school disciplinary process could better address such behaviors.⁸² Police in schools sometimes also collect intelligence on students, for

⁸¹ 34 C.F.R. § 99.8(b)(2)(ii).

⁸² See, e.g., Denise C. Gottfredson et al., Effects of School Resource Officers on School Crime and Responses To School Crime, 19 *Criminology & Pub. Policy* 905–40 (2020); Emily K. Weisburst, Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes, 38 *J. Policy Analysis & Mgmt.* 338–365 (2019); F. Chris Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement, 126 *American J. Educ.* 33-63 (2019); Emily G. Owens, Testing the School-to-Prison Pipeline, 36 *J. Policy Analysis & Mgmt.* 11-37 (2017); Chongmin Na & Denise Gottfredson, Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors, 30 *JUST. Q.* 619, 620 (2013); Steven C. Teske, A Study of Zero Tolerance Policies in Schools: A Multi-integrate System Approach to Improve Outcomes for Adolescents, *J. OF CHILD AND ADOLESCENT PSYCH. NURSING*; Matthew T. Theriot, School Resource Officers and the Criminalization of Student Behavior, 37 *J. OF CRIM. JUST.* (2009).

example, to enter them into a database of alleged gang associates. In addition to the detrimental impacts these forms of policing have on any student,⁸³ undocumented students risk having their application for citizenship or other immigration benefits placed in jeopardy or being prioritized for deportation.

- Review their policing practices to focus attention on protecting the school community from outside threats and limit law enforcement interactions with students to immediate threats to physical safety.

FERPA Is Applicable to Other Governmental Investigations

Congressional Letters May Not Qualify as a “Subpoena” and FERPA May Not Permit Disclosure of Student PII in Response to Them

Congressional leadership has recently sent letters to several universities requesting documents related to a broad range of campus activities and incidents.⁸⁴ Those letters request, for example, all documents related to disciplinary action related to protests, encampments, “alleged antisemitic events,” law school clinic representation of protestors, and hiring materials and performance reviews of specific faculty.

In many instances, these materials are likely to implicate students’ PII from education records; FERPA, however, is unlikely to permit disclosure of students’ PII. There is no general exception for providing students’ PII to governmental entities, and FERPA’s exemptions permit disclosure only to specific executive branch agencies⁸⁵ or pursuant to specific processes that must be followed, such as obtaining a subpoena.⁸⁶ None of those exceptions contemplate disclosures in response to a Congressional letter, and USED has

⁸³ See, e.g., Sarah E. Redfield & Jason P. Nance, American Bar Association, PRELIMINARY REPORT: SCHOOL-TO-PRISON PIPELINE (Feb. 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf; American Psychological Association Zero Tolerance Taskforce, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, AM. PSYCHOLOGIST (Dec. 2008), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>; Gary Sweeten, *Who Will Graduate?* “Disruption of High School Education by Arrest and Court Involvement,” 23 JUST. Q. 4 (2006) (a first-time arrest during high school almost doubles the odds of drop out); Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. OF EDUC. 4 (2009).

⁸⁴ Hon. Tim Walberg & Burgess Owens, *Walberg, Owens Demand Answers from Five Colleges Following Their Lackluster Response to Antisemitism*, HOUSE COMM. ED. & WORKFORCE (Mar. 27, 2025), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=412306>; Letter from Hon. Tim Walberg to Trustees of Columbia University (Feb. 13, 2025), https://edworkforce.house.gov/uploadedfiles/2.13.25_columbia_letter.pdf.

⁸⁵ 34 C.F.R. § 99.31(a)(2) (transfer to other educational institutions); *id.* § 99.31(a)(3) (U.S. Comptroller General, Attorney General, Secretary of education, or state or local “educational authorities”); *id.* § 99.31(a)(5) (juvenile justice programs); *id.* § 99.31(a)(7) (accrediting organizations); 20 U.S.C. § 1232g(b)(1)(L) (social work case workers)

⁸⁶ 34 C.F.R. § 99.31(a)(9); *id.* § 99.31(a)(6) (written agreements required for studies, limited to certain purposes); *id.* § 99.35 (procedures for disclosures under § 99.31(a)(3)).

previously rejected arguments that FERPA permits disclosures in response to informal legislative requests.⁸⁷

Moreover, such letters likely do not qualify for the subpoena exception under FERPA. USED has explained that “if a subpoena is issued in compliance with State law, it is ‘lawfully issued’” and that consequently, “institutions, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued.”⁸⁸ Congressional rules provide processes for the issuance of subpoenas,⁸⁹ which are issued on a specific form;⁹⁰ letters from Congresspeople requesting records are not issued under those processes, and consequently likely do not qualify as a subpoena under either congressional rules or FERPA.

Recent Civil Rights Demands Exceed Traditional Processes

USED has launched investigations of several postsecondary institutions⁹¹ and state departments of education,⁹² seeking information on alleged civil rights violations. These requests seek information about individual students, departing from USED’s ordinary

⁸⁷ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, LETTER TO UNIVERSITY OF ALASKA RE: DISCLOSURE OF EDUCATION RECORDS TO LEGISLATIVE AUDIT DIVISION (May 23, 2005), <https://studentprivacy.ed.gov/resources/letter-university-alaska-re-disclosure-education-records-legislative-audit-division>.

⁸⁸ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, Letter of Technical Assistance to the Regents of the University of California Re: Disclosures to Employment Relations Board at 3 (1999), <https://studentprivacy.ed.gov/resources/letter-technical-assistance-regents-university-california-re-disclosures-employment>.

⁸⁹ *E.g.*, RULES OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE, Rule 10 (118th Cong.), https://edworkforce.house.gov/uploadedfiles/118th_ew_committee_rules.pdf.

⁹⁰ *E.g.*, Letter from Hon. Virginia Foxx to Hon. Julie Su, Acting Secretary, U.S. Department of Labor, att. (Sept. 23, 2024), https://edworkforce.house.gov/uploadedfiles/subpoena_dol_misclassification_package.pdf.

⁹¹ U.S. Department of Education’s Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment, U.S. DEP’T ED. (Mar. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment>; U.S. Department of Education Probes Cases of Antisemitism at Five Universities, U.S. DEP’T ED. (Feb. 3, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-probes-cases-of-antisemitism-five-universities>.

⁹² *Title IX Special Investigations Team Launches Directed Investigation into Washington State Superintendent’s Office*, U.S. DEP’T ED. (Apr. 30, 2025), <https://www.ed.gov/about/news/press-release/title-ix-special-investigations-team-launches-directed-investigation-washington-state-superintendents-office-0>; *U.S. Department of Education Launches Investigation into Maine Department of Education for Alleged FERPA Violations*, U.S. DEP’T ED. (Mar. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-maine-department-of-education-alleged-ferpa-violations> (noting referral to Office for Civil Rights for alleged Title IX violations).

investigatory procedure;⁹³ educational institutions receiving those requests should be sensitive to the potential conflicts with FERPA and work with USED to avoid disclosures of students' PII.

These requests seek a variety of information: names, nationalities, "national origin/ethnicity/shared ancestry," "potential violations" of the universities' codes of conduct, and final disciplinary actions.⁹⁴

USED has long sought to enforce civil rights laws consistent with FERPA. Although the administration of federal civil rights laws overrides FERPA in cases of "direct conflict,"⁹⁵ USED has often reiterated across administrations of both parties that universities "should interpret [civil rights laws] and FERPA in a manner to avoid any conflicts."⁹⁶

Consistent with that longstanding position, educational agencies and institutions should work with USED to avoid disclosing PII. This includes information that may have direct identifiers like names removed but may nonetheless be identifiable to members of the community "because of a well-publicized incident or some other factor known in the community."⁹⁷

Properly Tailored Policies to Protect Transgender Students Do Not Necessarily Violate FERPA

In launching investigations of several state departments of education, USED has stated that the departments' policies may encourage or require school districts to "hide" students' gender identity from parents and guardians.⁹⁸ Depending on their nature and implementation, however, these policies may not violate FERPA.

⁹³ Laura Meckler, *New Trump Demand to Colleges: Name Protesters — And Their Nationalities*, WASH. POST (Mar. 25, 2025), <https://www.washingtonpost.com/education/2025/03/25/trump-administration-campus-antisemitism-investigations>.

⁹⁴ *Id.*

⁹⁵ 89 Fed. Reg. 33474, 33536-37 (Apr. 29, 2024), <https://www.federalregister.gov/d/2024-07915/p-863>; accord 85 Fed. Reg. 30026, 30426, 30428, 30433-34 (May 19, 2020); 20 U.S.C. § 1221(d).

⁹⁶ 89 Fed. Reg. 33474, 33536 (Apr. 29, 2024) (quoting 85 Fed. Reg. 30026, 30424 (May 19, 2020)), <https://www.federalregister.gov/d/2024-07915/p-870>.

⁹⁷ 73 FR 74806, 74831-32 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-298>.

⁹⁸ *Title IX Special Investigations Team Launches Directed Investigation into Washington State Superintendent's Office*, U.S. DEP'T ED. (Apr. 30, 2025), <https://www.ed.gov/about/news/press-release/title-ix-special-investigations-team-launches-directed-investigation-washington-state-superintendents-office-0>; *U.S. Department of Education Launches Investigation into Maine Department of Education for Alleged FERPA Violations*, U.S. DEP'T ED. (Mar. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-maine-department-of-education-alleged-ferpa-violations> (noting referral to Office for Civil Rights for alleged Title IX violations); *U.S. Department of Education Launches Investigation into California Department of Education for Alleged FERPA Violations*, U.S. DEP'T ED. (Mar. 27, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-investigation-california-department-of-education-alleged-ferpa-violations>.

For example, USED’s investigation into the California Department of Education (CDE) specifically cites the implementation of Assembly Bill 1955.⁹⁹ AB 1955 provides that school employees “shall not be required to disclose any information related to a pupil’s sexual orientation, gender identity, or gender expression to any other person without the pupil’s consent unless otherwise required by state or federal law.”¹⁰⁰

CDE has responded, explaining, “AB 1955 does not mandate nondisclosure. AB 1955 prohibits LEAs from mandating that staff disclose a student’s sexual orientation, gender identity, or gender expression”¹⁰¹ According to CDE, “AB1955 does not contradict parents’ rights to request to inspect and review their students’ education records under FERPA, even if they contain information related to a student’s sexual orientation, gender identity, or gender expression.”¹⁰²

Crucially, as USED has recognized, “FERPA does not provide an affirmative obligation for school officials to inform parents about any information, even if that information is contained in a student’s education records.”¹⁰³ Instead, FERPA only requires that education records be provided to parents and eligible students *upon request*.¹⁰⁴ Likewise, with limited exceptions,¹⁰⁵ FERPA does not mandate what information educational agencies and institutions choose to maintain in their education records.¹⁰⁶ Thus, so long as a challenged policy and its implementation¹⁰⁷ do not interfere with parents’ and eligible students’ ability to access their education records *upon request*, there is no direct conflict with FERPA.

However, it is worth emphasizing that educational agencies and institutions do *not* have the discretion to deem some records as the “official” “education record” subject to FERPA

⁹⁹ AB 1955, 2024 Cal. Stat. ch. 95, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1955.

¹⁰⁰ *Id.* sec. 5.

¹⁰¹ *Facts to Consider Regarding FERPA and AB 1955*, CAL. DEP’T ED. (Apr. 1, 2025), <https://www.cde.ca.gov/nr/el/le/yr25ltr0401.asp>.

¹⁰² Letter from Len Garfinkel, General Counsel, California Department of Education to Frank E. Miller, Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education (Apr. 11, 2025), <https://www.cde.ca.gov/nr/fa/yr25cosoltr0411b.asp>.

¹⁰³ Hon. Linda E. McMahon, Secretary of Education, & Frank E. Miller, Jr., Acting Director, Student Privacy Policy Office, U.S. Department of Education, *Cover Letters to the Department’s Annual Notices to SEAs and LEAs* at 3, U.S. DEP’T ED. (Mar. 28, 2025), <https://studentprivacy.ed.gov/resources/cover-letters-departments-annual-notices-seas-and-leas>.

¹⁰⁴ 34 C.F.R. § 99.10.

¹⁰⁵ 34 C.F.R. §§ 99.10(e) (prohibiting destruction of education records while there is a pending request to review them), 99.32(a)(2) (requiring keeping of record of requests and disclosures with students’ education records).

¹⁰⁶ *Does an Educational Agency or Institution Have Discretion Over What Education Records It Decides to Create and Keep?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/does-educational-agency-or-institution-have-discretion-over-what-education-records-it-decides> (last visited May 5, 2025).

¹⁰⁷ FERPA may be violated by not just official policies but also unofficial practices. 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.64(a).

while leaving others out.¹⁰⁸ FERPA’s definition of “education record” is broad and encompasses any record directly related to a student if it is maintained by the educational institution or agency.¹⁰⁹ Thus, education records include — as noted above — materials such as discipline and medical records,¹¹⁰ photos posted on a school bulletin board or surveillance videos,¹¹¹ emails regarding students,¹¹² and recommendations for membership in the National Honor Society.¹¹³

Educational agencies and institutions should consult with counsel to determine the scope of the education records they maintain and if their policies interfere with parents’ rights to request access to those records under FERPA.

FERPA Provides No Basis for Investigation of State Agencies

USED’s investigations of state departments of education may face a more significant hurdle: FERPA does not generally apply to those departments, also known as “SEAs.” As described above, FERPA only applies to “educational agencies or institutions,” and USED has steadfastly maintained that “we do not generally view SEAs as being ‘educational agencies’ under [FERPA] because we interpret the statutory definition of the term ‘student’ to mean that an educational agency is an agency attended by students.”¹¹⁴ Because SEAs and state departments of education do not have students directly attending them, they are not an “educational agency” subject to FERPA.

Consequently, USED “would only take actions against ‘non-school entities’” such as state departments of education if they “have not complied with FERPA requirements that relate to PII from education records they received under one of the exceptions to FERPA’s general

¹⁰⁸ *Easton Area Sch. Dist. v. Miller*, 659 Pa. 606, 627, 232 A.3d 716, 728 (2020) (bus surveillance video constituted education record); *President of Bates Coll. v. Congregation Beth Abraham*, No. CIV. A. CV-01-21, 2001 WL 1671588, at *4 (Me. Super. Feb. 13, 2001) (“[T]he statute, § 1232g(a)(4)(A) does not limit the definition of ‘other materials.’ As such that term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of the students.”); *accord* National Association of College and University Attorneys, *FERPA: THE BASICS AND BEYOND* at (2014) (“[T]he definition [sic] of ‘education records’ does not give institutions any discretion to determine for themselves what is or isn’t an ‘education record’ or to ‘treat’ certain records as non-education records, even though they meet the statutory definition.”), <https://oeo.utah.edu/resources/2020.04.21%20NACUA%20FERPA.pdf>.

¹⁰⁹ 34 C.F.R. § 99.3 (defining “education record” as “those records” that are “directly related to a student” and “maintained” by the education agency or institution).

¹¹⁰ Student Privacy Policy Office, *What Is an Education Record?*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/what-education-record> (last visited Apr. 30, 2025).

¹¹¹ Student Privacy Policy Office, *FAQs on Photos and Videos under FERPA*, U.S. DEP’T ED., <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa> (last visited Apr. 30, 2025).

¹¹² *Cf.* 73 Fed. Reg. 74805, 74814 (Dec. 9, 2008), <https://www.federalregister.gov/d/E8-28864/p-130>.

¹¹³ LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, *LETTER TO ATTORNEY FOR SCHOOL DISTRICT IN ARIZONA REGARDING RECORDS RELATED TO NATIONAL HONOR SOCIETY* (1998), <https://studentprivacy.ed.gov/resources/letter-attorney-school-district-arizona-regarding-records-related-national-honor-society>.

¹¹⁴ 76 Fed. Reg. 75603, 75606 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-49>.

consent requirement.”¹¹⁵ Beyond that limited scenario, “[t]he Department has no authority under FERPA to take actions for other PII these entities may possess.”¹¹⁶ When state departments of education *do* possess PII from education records, such as during an audit or in maintain a statewide data system, that PII will be subject to FERPA’s requirements regarding access, record-keeping, and re-disclosure.¹¹⁷

USED’s investigations into state departments of education do not allege that the departments themselves mishandled PII from education records, and FERPA is consequently not applicable to the alleged misconduct.

USED Must Follow Established Procedures to Enforce FERPA

In investigating state departments of education and other entities, USED must follow procedures established by law. Investigations may be initiated by a complaint by a parent or student, on USED’s own initiative, or based on information by a third party.¹¹⁸ Notice must be provided to the entity alleged to have violated FERPA with the “substance of the allegations.”¹¹⁹ The entity must be given an opportunity to respond, and oral argument may be permitted,¹²⁰ after which USED must provide the entity with “written notice of its findings and the basis for its findings.”¹²¹ If USED concludes that a violation has occurred, it must provide the educational agency or institution or “other recipient” of federal funds — such as a state department of education — with “a reasonable period of time” to voluntarily come into compliance with FERPA.¹²²

If a violation is found, several remedies are available to USED, including recouping funding from the educational agency or institution, withholding outstanding funds, seeking a cease-and-desist order before an administration law judge, and seeking an injunction in federal court.¹²³ Prior to withholding funds, however, USED must show that the violation was not a one-time incident, but based on a “policy or practice,” and that the entity failed to voluntarily comply with FERPA.¹²⁴

¹¹⁵ 76 Fed. Reg. 75603, 75632 (Dec. 2, 2011), <https://www.federalregister.gov/d/2011-30683/p-345>.

¹¹⁶ 76 Fed. Reg. at 75632.

¹¹⁷ 34 C.F.R. § 99.10(a)(2), 99.32, 99.33; Dale King, Directory, Family Policy Compliance Office, LETTER TO NEVADA DEPARTMENT OF EDUCATION ABOUT THE APPLICABILITY OF FERPA TO PROVIDING PARENTS WITH ACCESS TO THEIR CHILDREN’S EDUCATION RECORDS AT THE STATE LEVEL (2014), <https://studentprivacy.ed.gov/resources/letter-nevada-department-education-about-applicability-ferpa-providing-parents-access>.

¹¹⁸ 34 C.F.R. § 99.64; 73 Fed. Reg. 74805, 74841 (Dec. 9, 2008).

¹¹⁹ 34 C.F.R. § 99.65.

¹²⁰ 34 C.F.R. §§ 99.65(a)(2), 99.66(a).

¹²¹ 34 C.F.R. § 99.66(b).

¹²² 34 C.F.R. § 99.66(c)(2).

¹²³ 73 Fed. Reg. 74805, 74842 (Dec. 9, 2008); 34 C.F.R. § 99.67(a)(1)–(3); 20 U.S.C. §§ 1234a, 1234d, 1234e, 1234f.

¹²⁴ 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67(a); 73 Fed. Reg. 74805, 74842–43 (Dec. 9, 2008).

Entities subject to recovery of funds, withholding of funds, or issuance of a cease-and-desist order must be given an opportunity for a hearing before an administrative law judge.¹²⁵ Following that hearing, entities that have been “adversely affected” by the results of an administrative process may appeal to federal court.¹²⁶

Limitations on FERPA

FERPA Likely Cannot Be Used to Quash Valid Subpoenas

Although, as described above, courts have issued protective orders directing schools to provide the notice required by FERPA’s subpoena exception, FERPA is unlikely to provide grounds to outright quash the subpoena.

Although it has been addressed only occasionally, the majority of courts to analyze the issue have concluded that FERPA does not serve as a basis for quashing subpoenas. They have done so on two bases:

- In one extreme, courts have concluded that FERPA creates requirements for educational institutions and does not create individual rights, including evidentiary privilege that might be exercised to quash a subpoena.¹²⁷
- Others have more narrowly concluded that disclosures properly made under one of FERPA’s exceptions, usually the subpoena exception, may not be quashed.¹²⁸

However, there may be independent grounds to contest enforcement of a subpoena, such as lack of relevance, overbreadth, burdensomeness, violation of Fourth Amendment reasonable expectations of privacy, and commandeering of state resources in violation of the Tenth Amendment.

¹²⁵ 20 U.S.C. §§ 1234a(b)(1), 1234d(b), 1234e(b). Although FERPA’s regulations dictate that withholding of funds may occur after an investigation, 34 C.F.R. § 99.67(a)(1), the enforcement provisions specifically permit withholding to occur during the pendency of a hearing, 20 U.S.C. 1234d(d). This suggests that USED must first investigate and find that the entity violated FERPA but may withhold funds while the entity seeks a hearing from an administrative law judge.

¹²⁶ 20 U.S.C. § 1234g.

¹²⁷ *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463, 2019 WL 3071851, at *4 (S.D. Ohio July 15, 2019); *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004) (“Thus, while FERPA was intended to prevent schools from adopting a policy or engaging in a practice of releasing educational records, it does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure.”); *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (“It is obvious, however, that the 1974 Act does not provide a privilege against disclosure of student records. The statute says nothing about the existence of a school-student privilege analogous to a doctor-patient or attorney-client privilege.”).

¹²⁸ *Jackson v. Willoughby Eastlake Sch. Dist.*, No. 1:16CV3100, 2018 WL 1468666, at *4 (N.D. Ohio Mar. 23, 2018) (issuing motion to compel for education records, but also issuing protective order requiring compliance with the notice requirements under (9)(i)); *Smith v. Sw. Licking Sch. Dist. Bd. of Educ.*, No. 209CV778, 2010 WL 3910487, at *2 (S.D. Ohio Oct. 1, 2010); *LaFace Recs., LLC v. Does 1-5*, No. 2:07-CV-187, 2008 WL 513508, at *3 (W.D. Mich. Feb. 22, 2008).

Institutions Cannot Deem Certain Records to be Outside the FERPA-Covered Education Record

As described above, any record directly related to a student and maintained by an educational agency or institution is likely an “education record” subject to FERPA. Educational agencies and institutions do not have discretion under the law to deem *some* records as part of the “official” education record while excluding others unless an exception to the definition of “education record” applies.¹²⁹ One such exception is the personal notes of staff members, which are *not* education records under FERPA, as long as they “are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”¹³⁰

Law Enforcement Units Have Significant Discretion in Disclosing Properly Created and Maintained Law Enforcement Unit Records

Finally, as discussed above, the “law enforcement unit” of an educational agency or institution has significant discretion in its use of “law enforcement unit records” if those records are (1) created by the law enforcement unit, (2) created for a law enforcement purpose, and (3) maintained by the law enforcement unit.¹³¹

Conclusion

FERPA is a complex law, with many winding conditions and exceptions. However, the purpose and overall impact of the law is to protect the privacy of students and families. As such, FERPA’s exceptions should be construed narrowly, and educational institutions and agencies should be mindful that, even when an exception applies, they generally retain discretion to withhold requested information. Consequently, FERPA imposes important obligations to protect students’ and families’ information, even as powerful actors seek to use it for other purposes.

¹²⁹ See Morgan Sexton & Amelia Vance, *Recapping USED’s Recent Surge in FERPA Enforcement Activities*, PUB. INTEREST PRIVACY CTR. (Apr. 17, 2025), <https://publicinterestprivacy.org/ferpa-enforcement-recap>.

¹³⁰ 34 C.F.R. § 99.3.

¹³¹ 34 C.F.R. § 99.8(b)(1)(i)–(ii).