

**DEPARTMENT OF EDUCATION****34 CFR Part 99****Family Educational Rights and Privacy****AGENCY:** Department of Education.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amendments are needed to implement sections 951 and 952 of the Higher Education Amendments of 1998 (HEA), and to clarify several existing provisions.

**DATES:** Comments must be received by the Department on or before August 2 1999.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to LeRoy Rooker, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202-4605. Comments may also be sent through the Internet to FERPA\_Comments@ED.Gov.

**FOR FURTHER INFORMATION CONTACT:** Ellen Campbell, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202-4605. Telephone: (202) 260-3887.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotope, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:****Invitation To Comment**

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange comments in the same order as the proposed regulations.

The Secretary particularly requests comments from institutions of postsecondary education on whether the new regulatory definitions of "crime of violence," and "final results" under § 99.39 are sufficiently clear and provide adequate guidance in interpreting and applying the statutory amendment.

The Secretary also particularly requests comments on whether the provision concerning the nonconsensual disclosure of information to parents and guardians under § 99.31(a)(14) is sufficiently clear and whether it provides adequate guidance on this new permissible disclosure.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 2W113, FB-6, 400 Maryland Avenue, SW., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205-8113 or (202) 260-9895. An individual who uses a TDD may call the Federal Information Relay Service at 1-800-877-8339.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

**Background**

These proposed regulations have been reviewed and revised in accordance with the Department's "Principles for Regulating," which were developed to ensure that the Department regulates in the most flexible, most equitable, and least burdensome way possible. These principles advance the regulatory reinvention and customer service objectives of the Administration's National Partnership for Reinventing Government and are essential to an effective partnership with States and localities. The Secretary proposes these regulations and believes they are necessary to implement the law and give the greatest flexibility to local governments and schools. In addition, the regulations minimize burden while protecting parents' and students' rights.

**Summary of Major Provisions**

The following is a summary of the regulatory provisions the Secretary proposes as necessary to implement the statute (Pub. L. 105-244, effective October 1, 1998), such as interpretations

of statutory text or standards and procedures for the operation of the program. Some of the provisions merely restate statutory language.

The Secretary is not authorized to change statutory requirements. Commenters are requested to direct their comments to the regulatory provisions that would implement the statute.

**1. Section 99.1 Applicability**

FERPA applies to educational agencies and institutions to which funds are made available under any program which is administered by the Secretary. The proposed clarification of the term "educational agency" is necessary because the phrase "performs service functions for" causes confusion with the public. This revision clarifies that FERPA generally applies to educational agencies that have direct administrative responsibilities for the educational services provided by public elementary and secondary schools or by postsecondary institutions.

**2. Section 99.3 Definitions**

The Secretary proposes to amend the definition of the term "directory information" by adding additional items that may be designated by an educational agency or institution as "directory information" and to clarify the meaning of "dates of attendance." The term "dates of attendance" is intended to refer to the period of time during which an individual attended or was enrolled in an educational agency or institution and not to a student's daily attendance record.

The Secretary also proposes to clarify the definition of sole possession records. The Secretary proposes to provide more detailed guidance on the definition because there has been confusion over the term. Sole possession records are memory aids or reference tools that do not contain information taken directly from a student or records that are used to make decisions about the student.

**3. Section 99.5 Rights of Students**

The Secretary proposes to provide additional guidance regarding the requirement that a student attending one component of an educational agency or institution does not have rights under FERPA with respect to other components of the same agency or institution to which the individual has applied for admission. This clarification restates § 99.5(c) in a more direct manner in order to explain that an individual who is or has been a student at an agency or institution and who has been rejected for admission by a

component of that agency or institution does not have rights under FERPA with respect to that application for admission.

**4. Section 99.31(a)(3) Prior Consent Not Required for Disclosure to Attorney General of the United States**

The proposed regulations implement a new statutory provision that permits the disclosure of education records to authorized representatives of the Attorney General of the United States for law enforcement purposes without specific consent of the student.

**5. Section 99.31(a)(8) Prior Consent Not Required for Disclosures to Parents of a Dependent Student**

The Secretary clarifies that educational agencies and institutions may disclose education records to the parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986, without the student's consent. An educational agency or institution may disclose education records to either parent of a dependent student, regardless of which parent claims the student as a dependent.

**6. Section 99.31(a)(9)(iv) Prior Consent Not Required for Disclosures That Are Necessary for the Educational Agency or Institution To Defend Itself**

A new regulatory provision states that FERPA permits an educational agency or institution to release education records to a court, without a parent's or an eligible student's prior written consent and without a court order or lawfully issued subpoena, if the parent or eligible student has initiated legal action against the school. The disclosure is limited to those records that are necessary for the agency or institution to defend itself in court.

**7. Section 99.31(a)(13) and § 99.39 Disclosure of Final Results of Certain Disciplinary Proceedings**

The HEA amended the statute to allow a postsecondary institution to disclose the final results of any disciplinary proceeding conducted by the institution against a student who is an alleged perpetrator of a crime of violence if the institution determines, as a result of the proceeding, that the student committed a violation of the institution's rules or policies with regard to that crime.

A new section (§ 99.39) provides guidance to institutions regarding this change, and lists the applicable definitions. The Secretary particularly welcomes comment on this provision.

**8. Section 99.31(a)(14) Prior Consent Not Required for Disclosures to Parents and Legal Guardians Regarding Violations of Alcohol or Drug Laws or Rules**

The HEA amended the statute to permit postsecondary institutions to disclose to parents and legal guardians of students under the age of 21, without the student's consent, information regarding the student's violation of any Federal, State, or local law, or any rule or policy of the institution governing the use or possession of alcohol or a controlled substance.

In addition to this new provision, the statute already provides that postsecondary institutions may disclose certain information from a student's education records to parents or legal guardians under several exceptions to the prior consent rule. Under § 99.31(a)(8) of the regulations, institutions may release information to parents or guardians, without the student's consent, if the student is a dependent for tax purposes. Also, under § 99.31(a)(10), an institution may release information to a parent or guardian in connection with a health or safety emergency. This provision adds a new exception to the prior consent requirement of FERPA.

**Clarity of the Regulations**

Executive Order 12866 and the President's Memorandum of June 1, 1998 on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 99.31.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

**Regulatory Flexibility Act Certification**

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small local educational agencies (LEAs) receiving Federal funds from the Department and certain 4- and 2-year colleges and for-profit postsecondary trade and technical schools with small enrollments that receive federal funds, such as student aid programs under Title IV of the Higher Education Act of 1965. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure that LEAs comply with the educational privacy protection requirements in FERPA.

**Paperwork Reduction Act of 1995**

These proposed regulations do not contain any information collection requirements.

**Assessment of Educational Impact**

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

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(Catalog of Federal Domestic Assistance Number does not apply)

### List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Information, Privacy, Parents, Records, Reporting and recordkeeping requirements, Students.

Dated: May 25, 1999.

**Richard W. Riley,**

*Secretary of Education.*

The Secretary proposes to amend part 99 of title 34 of the Code of Federal Regulations as follows:

### PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows:

**Authority:** 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.1 is amended by revising paragraph (a)(2) to read as follows:

#### § 99.1 To which educational agencies or institutions do these regulations apply?

(a) \* \* \*

(2) The educational agency provides administrative control of or direction of public elementary or secondary schools or by postsecondary institutions.

3. Section 99.3 is amended by revising the definition of “Directory information”, and by revising paragraphs (b) introductory text and (b)(1) under the definition of “Education records” to read as follows:

#### § 99.3 What definitions apply to these regulations?

\* \* \* \* \*

**Directory information.** (a)(1) The term means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student’s name, address, telephone listing, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, photograph, degrees, honors and awards received, and the most recent educational agency or institution attended.

(2)(i) “Dates of attendance” refers to the general periods of time during which an individual attended or was enrolled in an educational agency or institution. Examples of “dates of attendance” include an academic year, a spring semester, or a first quarter.

(ii) The term “dates of attendance” does not include daily specific records of a student’s attendance at an educational agency or institution. A student’s attendance record is not “directory information” and may not be disclosed without consent under FERPA.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

\* \* \* \* \*

#### Education records.

\* \* \* \* \*

(b) The term does not include—

(1) Records that are kept in the sole possession of the maker of the record—often called sole possession records—that are not used for purposes other than a memory or reference tool, that are not accessible or revealed to any other person except a temporary substitute for the maker of the record, and that are typically maintained by the school official unbeknownst to other individuals. Records that contain information taken directly from a student or that are used to make decisions about the student are not sole possession records.

\* \* \* \* \*

4. Section 99.5 is amended by revising paragraph (c) to read as follows:

#### § 99.5 What are the rights of students?

\* \* \* \* \*

(c) An individual who is or has been a student at an educational agency or institution and who has been rejected for admission by a component of that educational agency or institution does not have rights under this part with respect to records collected and maintained in connection with consideration of that application for admission.

5. Section 99.31 is amended by revising paragraph (a)(3), revising paragraph (a)(8), adding paragraph (a)(9)(iv), revising paragraph (a)(13), adding a new paragraph (a)(14), and revising paragraph (b) to read as follows:

#### § 99.31 Under what conditions is prior consent not required to disclose information?

(a) \* \* \*

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States (for law enforcement purposes);

(iii) The Secretary; or

(iv) State and local educational authorities.

\* \* \* \* \*

(8)(i) The disclosure is to parents of a dependent student, as defined in section

152 of the Internal Revenue Code of 1986.

(ii) The educational agency or institution may disclose information under paragraph (a)(8)(i) of this section to either parent of a dependent student, regardless of which parent claims the student as a dependent.

\* \* \* \* \*

(9) \* \* \*

(iv) If a parent or eligible student initiates legal action against the educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student’s education records that are necessary for the educational agency or institution to defend itself.

\* \* \* \* \*

(13) The disclosure is in connection with a disciplinary proceeding conducted by an institution of postsecondary education against a student who is an alleged perpetrator of a crime of violence subject to § 99.39.

(14)(i) The disclosure is to a parent or a legal guardian of a student at an institution of postsecondary education regarding the student’s violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The student is under the age of 21; and

(B) The institution determines that the student has committed a disciplinary violation with respect to that use or possession.

(ii) Paragraph (a)(14)(i) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from making the disclosure permitted in this section.

(b) This section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11) and (13) through (14) of this section.

6. A new § 99.39 is added to read as follows:

#### § 99.39 What conditions apply to disclosure of records pertaining to disciplinary proceedings?

(a) An institution of postsecondary education may disclose the final results of a disciplinary proceeding conducted by the institution concerning an allegation of a crime of violence against a student who is an alleged perpetrator of a crime of violence, without the prior written consent of the student, if the institution determines as a result of that

disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to that crime.

(b) As used in this part:

*Crime of violence*, as that term is defined in section 16 of title 18, United States Code, means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. It includes, but is not limited to, the following offenses: criminal homicide,

forcible sex offense, robbery, aggravated assault, and arson, as these terms are defined in appendix E to 34 CFR part 668, as well as burglary of an occupied structure or dwelling and kidnaping.

*Final results* means only the name of the student charged, the violation committed, and any sanction imposed by the institution on the student.

(c) The institution must not disclose the name of any other student, such as a victim or witness, without the prior written consent of that other student.

(d) This section applies to disclosures made or to requests received by an institution of postsecondary education on or after October 1, 1998.

7. Section 99.63 is revised to read as follows:

**§ 99.63 Where are complaints filed?**

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, 400 Maryland Avenue, SW, Washington, D.C. 20202-4605.

(Authority: 20 U.S.C. 1232g(g))

**§ 99.64 [Revised]**

8. Section 99.64(d) is removed and reserved.

[FR Doc. 99-13853 Filed 5-28-99; 8:45 am]

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