FERPA, IDEA Part C & HIPAA

Overview

Baron Rodriguez, PTAC Director
Privacy Considerations in Using Early Childhood Data

• What legal obligation do EC educational agencies and institutions have to protect PII from students records?

• Privacy of individual student records are protected under FERPA
  • Other Federal, State, and local laws, such as HIPAA and IDEA, may also apply

• Determine how/which information is going to flow between agencies to help assess which laws may apply

• Develop data sharing agreements which ensure data is only shared for authorized purposes and adequately protected at all times.
FERPA Rules Governing Education Data

- The Family Educational Rights and Privacy Act (FERPA) requires prior written consent before personally identifiable information (PII) from education records can be disclosed to a third party;
- A number of exceptions to this consent requirement exist;
- FERPA’s “Audit and Evaluation” Exception provides one mechanism for linking education and wage data without consent.
Key Points to Remember

• Properly de-identified data can be shared without any FERPA considerations and should be your FIRST option as it limits the risk of unauthorized PII disclosure.

• In most cases, consent is the best approach for sharing PII with non-profit organizations.

• Directory Information is often misunderstood. Opt-out provisions do not prevent data from being shared under the Audit/Evaluation or School Official exceptions.
What is FERPA?

The Family Educational Rights and Privacy Act (FERPA) is a federal law that affords parents the right to have access to their children’s education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.

When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student ("eligible student").
## Education Records and Early Intervention Records

**FERPA:** “Education records” are records that are directly related to a student; and maintained by an educational agency or institution or by a party acting for the agency or institution.

**Part C:** “Early intervention records” to mean “all records regarding a child that are required to be collected, maintained, or used under part C of the Act and the regulations of this part.”

Health records on students, including immunization records, maintained by an educational agency or institution subject to FERPA are “education records” subject to FERPA.
### Personally Identifiable Information

**FERPA**: includes, but is not limited to the student’s name, name of the student’s parent or other family members, address of the student or student’s family, social security number, student’s date of birth, place of birth, and mother’s maiden name. Also, includes other information that, alone or in combination, is linked or linkable to a specific student; or information requested by a person believed to know the identity of the student to whom the education record relates.

**Part C**: Means personally identifiable information as defined in 34 CFR 99.3 as amended, except that the term ‘student’ in the definition of personally identifiable information in 34 CFR 99.3 means ‘child’ as used in this part and any reference to ‘school’ means ‘EIS’ provider as used in this part.
<table>
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<tr>
<th>Inspection and Review of Records</th>
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<td><strong>FERPA</strong>: Provides that educational agency or institution, as well as the SEA, afford parents and eligible students the right to inspect and review their education records, within 45 days of receiving request.</td>
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<tr>
<td><strong>Part C</strong>: Requires each participating agency to comply with a parent’s request to inspect and review any early intervention records relating to their children that are collected, maintained, or used by the agency without any unnecessary delays and before any meeting regarding an IFSP, or any hearing pursuant to §§ 303.430(d) and 303.439, and in no case more than 10 days after the request has been made.</td>
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<tr>
<td>Amending Records</td>
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<td><strong>FERPA:</strong> Affords parents the right to seek to amend information in their child’s education records and an opportunity for a hearing to challenge the content of education records.</td>
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<td><strong>Part C:</strong> Provides the same opportunity for a hearing to challenge the content of education records as FERPA provides. Part C states that a hearing held under § 303.411 must be conducted according to the procedures in FERPA.</td>
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Consent Requirements

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<th>Consent for Disclosure</th>
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<td><strong>FERPA</strong>: Requires that a parent or eligible student provide a signed and dated written consent before a school discloses education records, except for specific exceptions.</td>
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<td><strong>Part C</strong>: Requires parental consent before PII is disclosed to parties, other than to authorized representatives, officials, or employees of participating agencies in order to meet Part C requirements; and parental consent before using PII for any purpose other than meeting the requirements of Part C.</td>
</tr>
<tr>
<td><strong>Part C</strong>: Part C lead agency or other participating agency may not disclose PII to any party except participating agencies (including lead agency and EIS providers) that are part of the State’s Part C system without parental consent, unless authorized to do so under Part C or one of the exceptions in FERPA, where applicable to Part C.</td>
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## FERPA Exceptions to Consent Relevant to Part C

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<th>Exception</th>
<th>Details</th>
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<tbody>
<tr>
<td>To comply with a judicial order or subpoena</td>
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<td>To respond to a health or safety emergency</td>
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<td>In connection with audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.</td>
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<tr>
<td>Disclosure of PII from education records of children in foster care to: “agency caseworker or other representative” of a State or local child welfare agency (CWA) who has the right to access a student’s case plan under State or tribal law.</td>
<td>(Uninterrupted Scholars Act)</td>
</tr>
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## Record of Access

**FERPA**: Contains recordkeeping requirements for both schools and SEAs. Records must (1) be maintained as long as record is maintained; (2) include parties who requested or received information; and (3) include legitimate interest the parties had in receiving information.

**Part C**: Contains recordkeeping requirements for participating agencies. Agencies (1) must keep a record of parties obtaining access to early intervention records collected, maintained, or used under Part C; (2) and include name of party, date access given, and purpose for which the party is authorized to use the records.
• According to 20 USCS § 1003(8), the term “early childhood education program” means--

• “(A) a Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 et seq.), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;)

• (B) a State licensed or regulated child care program; or
C) a program that—

- (i) serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and
- (ii) is--
  - (I) a State pre-kindergarten program;
  - (II) a program authorized under section 619 or part C of the Individuals with Disabilities Education Act [20 USCS § 1419 or §§ 1431 et seq.]; or
  - (III) a program operated by a local educational agency.”
FERPA & IDEA

• FERPA and IDEA Part C

• FERPA generally applies to records subject to Part C of IDEA.

• The more specific provisions in the new Part C regulations published on September 28, 2011, (which regulations are consistent with, and incorporate the protections under, FERPA) govern the confidentiality rights of infants and toddlers with disabilities and their parents.
• IDEA Part C and Confidentiality
  
  Part C ensures the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary under Part C and by participating agencies, including the State lead agency and EIS providers, in accordance with FERPA.
### Translation of Terms

<table>
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<th>Part C</th>
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<td>Education record</td>
<td>Early intervention Record</td>
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<tr>
<td>Education</td>
<td>Early intervention</td>
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<tr>
<td>Educational agency or institution</td>
<td>Participating agency</td>
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<tr>
<td>School official</td>
<td>Qualified EIS personnel/Service coordinator</td>
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<tr>
<td>State educational authority</td>
<td>Lead agency</td>
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<tr>
<td>Student</td>
<td>Child under IDEA Part C</td>
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3 Major New Developments

1. 2012 FPCO Letter: IDEA Part C/FERPA/HIPAA
2. 2011 IDEA Part C regulations – new changes
3. FERPA exceptions – 2011 changes
2012 FPCO Letter to Edmunds clarifies that the term “early intervention records” in the new 2011 IDEA Part C regulations is the same operationally as “education records” under FERPA.

See also IDEA Part C regulation §303.414(b)(2)- Translation provision for FERPA terms:

- Education record = Early intervention record
- Educational = Early intervention
- Educational agency or institution = Participating agency
- School official = Qualified EIS personnel/Service Coordinator
- SEA & LEA = Lead agency
- Student = Child under IDEA Part C
Is parental consent required before referral to Part C?

- Primary referral source may be subject to HIPAA or other confidentiality laws because it contains PHI or “protected health information”

- PHI is defined in the HIPAA Privacy Rule as “individually identifiable health information that is: “(i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any form or medium.” And specifically excludes “individually identifiable health information in:
  1. (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;
Clarifies that IDEA Part C early intervention records are subject to FERPA and thus not subject to HIPAA.

Thus, if a state maintains early intervention records (not combined for other health purposes with other health records for that child), then IDEA Part C and FERPA regulations apply and not HIPAA’s Privacy Rule.
Is parental consent required **before** referral to Part C? (cont.)

- IDEA child find mandate requires disclosure of limited child find information for referral purposes.

- OSEP 2004 Letter to Anonymous in Maine
Part C confidentiality requirements apply--

-When:
  A child is referred to Part C until the child’s early intervention records are no longer maintained or required to be maintained (§303.402(c)(2))

-What:
  To prohibit disclosure of personally identifiable information or PII (§§303.401(b) & 303.414)

-To Whom:
  To State lead agency and EIS providers & “participating agencies” (§§303.401(b) & 303.403(c))
Is parent consent required …

…after a child is referred to Part C?
Is parental consent required after a child is referred to Part C?

- **General Rule:** Yes in general

- Obtain parent consent before disclosure of PII

- Unless exception under 34 CFR §303.414(b) (which cross-references FERPA exceptions in 34 CFR §99.31)
Two New Definitions

- **Participating agency** = State lead agency and EIS provider but not primary referral sources or public agency/private entity that act solely as funding sources for Part C services

- **Early intervention records** = All records regarding a child that are required to be collected, maintained, or used under IDEA Part C

(§303.403(c))
Other changes in the 2011 IDEA Part C confidentiality provisions

- Parent right to inspect & review record within 10 (not 45) days after parent request (§303.405(a))
- Provide at no cost to parent a copy of each evaluation, assessment, & IFSP as soon as possible after each IFSP meeting (§303.409(c))
- Parent right to hearing to challenge information in their child’s record can be Part C due process hearing if it meets FERPA hearing requirements (§303.411 & §303.413)
HIPAA Overview

• HIPAA applicability?
  • When NOT considered a student record otherwise FERPA applies

• FERPA security control requirements/best practices (AKA “Reasonable Methods”) generally meet HIPAA requirements anyway.
HIPAA Omnibus Rule: 2013 Update

- Applies to “covered entities”: including providers “who conduct health care transactions electronically.”
PTAC Resources

- **NEW GUIDANCE:** FERPA/IDEA Crosswalk
  - Help Desk
    - Technical Briefs, Issue Briefs, and White Papers
    - Case studies
    - Security Checklists
    - Frequently Asked Questions
    - Webinars, Presentations, and Training Materials
Contact Information

Family Policy Compliance Office

Telephone:  (202) 260-3887
Email:  FERPA@ed.gov
FAX:  (202) 260-9001
Website:  www.ed.gov/fpco

Privacy Technical Assistance Center

Telephone:  (855) 249-3072
Email:  privacyTA@ed.gov
FAX:  (855) 249-3073
Website:  http://ptac.ed.gov