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UNITED STATES DEPARTMENT OF EDUCATION GUIDANCE ON AMENDMENTS TO FERPA

On May 27, 2014, the US Department of Education issued updated guidance on interpreting and applying the mandates of the Uninterrupted Scholars Act (USA) to FERPA and the IDEA. The two primary clarifications allow for child welfare agencies or tribal organizations to have authorized access to personally identifiable information (PII) about students without prior parental consent when such agency is legally responsible for the care and protection of the student. In addition, no prior written notice or consent is required to release PII to child welfare organizations pursuant to a judicial order when a parent is a named participant in those proceedings. These two changes also impact the confidentiality provisions contained in the IDEA. The changes are new exceptions added to the existing longstanding exceptions to release of PII without consent (directory information, judicial order, lawful subpoena) and notice in specific situations. These new exceptions only apply to disclosure to child welfare agencies a) in foster care situations b) in which the legal care and protection of a student is established c) in out of home placements and d) where a case plan exists; the new exceptions do not apply to any other type of care arrangements which may involve a child welfare agency.

Keep in mind that the USA does not require disclosure of PII to child welfare agencies, it merely makes disclosure permissible. The USA does not waive an LEA's obligations regarding protection and penalties for impermissible re-disclosure, nor does the USA waive LEA obligations for return or destruction of PII by child welfare agencies once no longer relevant. Maintenance of recordkeeping regarding who has accessed PII also remains a requirement and applicable to such disclosures. Furthermore, as related to the IDEA, USA is entirely unrelated to issues of parental rights to make educational decisions on behalf of a student. Even though USA permits disclosure to the authorized child welfare agency, the USA also does not change any requirements regarding the appointment of a surrogate parent when required.

Thus, we recommend that prior to establishing a policy or practice of releasing student PII to a child welfare agency, the LEA obtain the following written assurances:

1. An authorized representative seeking PII from an LEA will establish in writing that their agency is legally responsible for the care and protection of the student;
2. An authorized representative of the child welfare agency provides written assurance that PII which is released shall be maintained as required by LEA local policy consistent with FERPA;
3. Acknowledgment that the child welfare agency agrees to be bound by the prohibitions on re-disclosure as defined by FERPA;
4. That return or destruction of PII will be consistent with LEA local board policy; and
5. Acknowledgement that disclosure of PII is solely at the discretion of the LEA on a case-by-case basis.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.