

PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

Guidance for Higher Education on Immigrant Student Privacy and FERPA¹

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The Family Educational Rights and Privacy Act (FERPA) applies to educational institutions and agencies that receive funding via programs administered by the Secretary of Education and protects all domestic students, including undocumented students.²

Key Takeaways

- The Family Educational Rights and Privacy Act (FERPA) broadly prohibits schools from disclosing student records without the written consent of the parent or student. FERPA applies to “education records”, defined broadly to mean records that are (i) directly related to a student and (ii) are maintained by an educational agency or institution.³
- FERPA has limited exceptions to its prohibition on disclosure of student “education records”, one of which is disclosure in response to a lawful subpoena.⁴ If served with a valid subpoena requesting disclosure of FERPA-covered information, the institution must make a “reasonable effort to notify” the student of the subpoena in advance of compliance to give the student a chance to challenge the subpoena, unless a court has ordered that the existence of the subpoena not be disclosed.⁵
- A distinction can be made between judicial subpoenas and administrative subpoenas. Judicial subpoenas, which are orders issued by a state or federal court and signed by the clerk of the court or other judicial officer, must be complied with. Administrative subpoenas (or immigration subpoenas), which are issued by Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), or the U.S. Citizenship and Immigration Service (USCIS) and signed by an immigration judge, are not enforceable on their own.⁶ Compliance with an administrative subpoena is only required if there is an order from the U.S. District Court requiring compliance.⁷

¹ This resource is intended for informational purposes only and does not constitute specific legal advice. Institutions or organizations should consult legal counsel to address their unique legal issues. For further questions, please contact the Presidents' Alliance at info@presidentsalliance.org.

² FERPA Overview. Presidents' Alliance on Higher Education and Immigration & American Association of Collegiate Registrars and Admissions Officers, December 2023. [FERPA Overview](#).

³ 20 U.S.C. § 1232g(a)(4)(A).

⁴ 34 CFR § 99.31(a)(9)(i) and (ii).

⁵ *Id.*

⁶ Warrants and Subpoenas: What to Look Out for and How to Respond. National Immigration Law Center, September 2020. [Warrants-Subpoenas-Facts.pdf](#).

⁷ *Id.*

- When a university receives a subpoena, they should first consult with legal counsel to review the subpoena to ensure that it is valid and enforceable under their state law. The Fourth Amendment imposes a reasonable standard to subpoenas, and challenges can be made if the subpoena is overbroad or places an undue burden on the recipient. If the subpoena is valid and enforceable, disclosure of the records stated in the subpoena falls under the exception to FERPA, and the subpoena must be complied with. If the subpoena is not valid or is an administrative subpoena signed by an immigration judge, immediate compliance is not required.
- In the absence of a subpoena, a university cannot disclose personally identifiable information from a student's education records without violating FERPA.

FERPA Background

The [Family Educational Rights and Privacy Act \(FERPA\)](#) is a federal law that protects the privacy of student education records. The law applies to all schools (public or private) that receive funding from the U.S. Department of Education programs.

FERPA broadly prohibits schools from disclosing student records without the written consent of the parent or student. The protections under FERPA apply to “educational records”, which is defined broadly to mean records that are (i) directly related to a student and (ii) are maintained by an educational agency or institution.⁸ A school may not disclose personally identifiable information from a student's education records without the consent of the student.

While FERPA protects from disclosure of personally identifiable information from “education records”, the protections do not apply to “directory information”.⁹ Directory information includes information such as a student's name, address, phone number, and other basic demographics.¹⁰ Because FERPA does not protect directory information, schools can release this information without the consent of the student, provided that the school has given public notice of what information it considers “directory information”, the right of the student to restrict disclosure of the information, and the time period which the student has to notify the school of their desire to not have the information disclosed.¹¹

Additionally, while FERPA prohibits the disclosure of personally identifiable information from education records without the consent of the student, FERPA does not protect the confidentiality of information in general.¹² Therefore, FERPA does not protect information derived from a source other than education records, such as through personal knowledge or observation.¹³

⁸ 20 U.S.C. § 1232g(a)(4)(A).

⁹ 34 CFR § 99.3.

¹⁰ *Id.*

¹¹ 34 CFR § 99.37.

¹² It is important to note that FERPA does not protect employment records, including those of DACA recipients employed by a university or campus, though does protect their educational records if those DACA recipients are enrolled on campus.

¹³ [FERPA: What it means and how it works-Student Press Law Center](#) (Student Press Law Center). Also see [FERPA regulations and recent guidance](#) (AACRAO).

Exceptions to FERPA

FERPA prohibits schools from disclosing personally identifiable information from a student's education records, however, the law contains a few exceptions under which a school can disclose this protected information. The most important exception to FERPA's general rule prohibiting disclosure of a student's education records is when disclosure is done pursuant to a lawfully issued subpoena.¹⁴ For purposes of FERPA, a "lawfully issued subpoena" is one that is in compliance with applicable state law.¹⁵ Under this exception, when served with a lawfully issued subpoena, a school must disclose the information requested by the subpoena, even if the student has not consented to disclosure.

However, while the subpoena exception allows a school to disclose otherwise protected information under FERPA, the school must still make a "reasonable effort" to notify the student of the subpoena in advance of compliance to give the student a chance to challenge the subpoena.¹⁶ In some cases, universities are required to disclose information pursuant to a lawfully issued subpoena without disclosing the existence of the subpoena to the student. Under an exception to the advance notice requirement, if the disclosure is in compliance with a valid subpoena and a court has ordered that the existence or the contents of the subpoena not be disclosed, then the order must be complied with without giving the student advance notice.¹⁷

If this occurs, schools should remind law enforcement officials of FERPA's notification requirements and determine whether the confidentiality request is supported by proper legal process. Schools should also consult legal counsel about their obligations to provide or withhold notice to students or parents.

An important exception to privacy protections are immigration records—not the full personnel file—for foreign nationals sponsored by the institution.¹⁸ F-1 and J-1 sponsoring institutions are required to maintain certain information mandated by law for F-1 and J-1 students and scholars and present this information to immigration officers upon request.¹⁹ This is an exception to FERPA only for students in F-1 and J-1 status and only for the specific information required by law.²⁰

¹⁴ 34 CFR § 99.31.

¹⁵ Technical assistance letter to California School District re: lawfully issued subpoenas. U.S. Department of Education, Student Privacy Policy Office. [Technical assistance letter to California School District re: lawfully issued subpoenas Protecting Student Privacy.](#)

¹⁶ 34 CFR § 99.31(a)(9)(ii).

¹⁷ *Id.*

¹⁸ See 8 C.F.R. § 214.1(h).

¹⁹ *Id.*

²⁰ *Id.*

Judicial vs. Administrative Subpoenas

While compliance is generally required when a university is presented with a lawfully issued subpoena under an exception to FERPA, not all subpoenas demand immediate compliance. An institution's obligations after receiving a subpoena depend upon whether the subpoena received is a judicial subpoena or an administrative subpoena.

To distinguish between judicial subpoenas and administrative subpoenas, the receiving institution should identify what court issued the order and who the order is signed by to determine their compliance requirements. Judicial subpoenas are issued by a state or federal court and are signed by a state or federal judge, magistrate, clerk of the court, or other judicial officer.²¹ If an institution receives a valid judicial subpoena, the order must be complied with, and failure to comply may result in being held in contempt of court.

Administrative subpoenas (or immigration subpoenas), on the other hand, are not issued by a state or federal court, but instead are issued by an administrative agency, such as Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), or the U.S. Citizenship and Immigration Service (USCIS).²² Administrative subpoenas are not signed by a state or federal judge, but instead are signed by an immigration officer or an immigration judge. Importantly, administrative subpoenas are not enforceable on their own; and administrative subpoena only becomes enforceable if the agency issuing the subpoena obtains an order from a U.S. District Court compelling compliance.²³ If a university receives a subpoena that they identify as an administrative subpoena requesting personally identifiable information from a student's education records, not only is compliance not required, but disclosure of the information in absence of a court order may violate FERPA.

Challenging Subpoenas

While compliance is generally required when a university is presented with a lawfully issued judicial subpoena, the institution may be able to challenge the subpoena on a variety of grounds before complying. Subpoenas may be challenged based on grounds such as imposing an "undue burden", being overbroad in scope, irrelevant, or improper in purpose. To challenge a subpoena based on one of these grounds, a motion to quash must be filed with the issuing court. When a university receives a subpoena, they should carefully examine the subpoena for the issues described below, and seek legal advice to determine the best course of action.

The Fourth Amendment's protections against unreasonable searches or seizures limit the government's subpoena powers. While subpoenas issued by grand juries are presumed to be

²¹ Warrants and Subpoenas: What to Look Out for and How to Respond. National Immigration Law Center, September 2020. [Warrants-Subpoenas-Facts.pdf](#).

²² *Id.*

²³ *Id.*

reasonable,²⁴ the Fourth Amendment places restrictions on the power of administrative agencies to compel physical evidence. The Fourth Amendment's reasonableness standard with respect to immigration subpoenas requires that the order not be overbroad in scope, irrelevant, improper in purpose, or impose an undue burden.²⁵ Subpoenas that fail to meet the Fourth Amendment's reasonableness standard often seek more records than the party is entitled to, using language such as "any and all records", failing to place date based limitations on the request, or seeking an unreasonably broad scope or records based on the nature of the case.²⁶ Subpoenas of this nature are often challenged because they impose an "undue burden" on the recipient—a broad, catch-all provision that allows the court to invalidate subpoenas when the recipient's burden outweighs the issuing party's needs.²⁷

Immigration rights organizations have had recent success challenging subpoenas based on these grounds. In May 2023, the Center for Constitutional Rights (CCR) successfully challenged subpoenas issued by Louisiana Attorney General Jeff Landry.²⁸ The subpoenas, which asked three local immigrants' rights organizations to turn over confidential information about their clients,²⁹ were withdrawn by Landry after CCR argued that the subpoenas were "overbroad", seeking information that is irrelevant" and "impose an undue burden".³⁰

²⁴ *U.S. v. R. Enterprises*, 498 U.S. 292 (1991).

²⁵ *See v. City of Seattle*, 387 U.S. 541, 544 (1967).

²⁶ Responding to a Third-Party Subpoena. Delahunty & Edelman LLP. [Responding to a Third-Party Subpoena.](#)

²⁷ Subpoenas: Responding to a Subpoena. Practical Law. [Responding to a Subpoena.](#)

²⁸ Patterson Belknap and The Center for Constitutional Rights Successfully Quash Government Subpoenas on Behalf of Immigrant Rights Organizations. Patterson Belknap. [Patterson Belknap and The Center for Constitutional Rights Successfully Quash Government Subpoenas on Behalf of Immigrant Rights Organizations.](#)

²⁹ Local immigrant rights organizations challenge attorney general's subpoenas. Daily advertiser. March 29, 2023. [Local Immigrant rights organizations challenge attorney general's subpoenas.](#)

³⁰ Patterson Belknap, *supra* note 22.