# DEPARTMENT OF EDUCATION

#### 34 CFR Part 99

RIN 1880-AA57

#### Family Educational Rights and Privacy

## **AGENCY:** Department of Education. **ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 438 of the General Education Provisions Act. These amendments are needed to implement a provision of the Higher Education Amendments of 1992, which modified the conditions under which records of an institution's law enforcement unit are excluded from the definition of "education records." As amended, FERPA excludes from the definition of "education records," and thereby from the restrictions and rights of access under FERPA, records that are maintained by a law enforcement unit of an educational agency or institution that were created by that unit for the purpose of law enforcement.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

# FOR FURTHER INFORMATION CONTACT: Ellen Campbell, Family Policy Compliance Office, Office of Management, U.S. Department of Education, 600 Independence Avenue, S.W., Washington, D.C. 20202–4605. Telephone (202) 260–3887. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal

Information Party Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Postsecondary institutions that have questions relative to any of the requirements in the Higher Education Act regarding disclosure of information about campus safety policies and procedures and campus crime statistics should contact Paula M. Husselmann or Kimberly L. Goto at (202) 708–7888.

SUPPLEMENTARY INFORMATION: On August 11 and December 14, 1993, the Secretary published two notices of proposed rulemaking (NPRMs) for 34 CFR part 99 in the **Federal Register** (58 FR 42836– 42837 and 58 FR 65298–65300, respectively). The second NPRM did not change the proposed regulations but merely asked for additional public comment based on the response to the first NPRM.

The proposed regulations define for the first time both "law enforcement unit" and "disciplinary action or proceeding." In contrast to law enforcement unit records, the Department has been legally constrained to treat the records of a disciplinary action or proceeding as "education records" under FERPA (20 U.S.C. 1232g), that is, protected against nonconsensual disclosure except in statutorily specified circumstances and subject to inspection and review by parents and eligible students. The Secretary proposed the definition of "disciplinary action or proceeding" to help institutions distinguish disciplinary records from law enforcement unit records, which are excluded by statute from the definition of "education records" in the circumstances specified.

Many of the public comments received on the first NPRM challenged the Department's position on this issue and expressed the view that records of institutional disciplinary proceedings taken against students accused of criminal and other non-academic misconduct should not be considered "education records" under FERPA and should be available to the public even without the parent's or student's consent. This issue, which has been the subject of recent media attention, took precedence over the issue of law enforcement unit records in the comment process. The Secretary sought additional public comment on the issue because it raised important and sensitive concerns about campus crime as well as students' need for privacy and access to records in the educational process.

The Secretary remains legally constrained to conclude that records of an institution's disciplinary action or proceeding are "education records" under FERPA, not law enforcement unit records, and that excluding these records from the definition of "education records" can be accomplished only through a statutory amendment of FERPA by Congress. In support of this view, Congress enacted in 1990 a new statutory provision permitting non-consensual disclosure of only the *results* of disciplinary proceedings conducted by postsecondary institutions; the disclosure is limited to the alleged victim of a crime of violence as defined in the United States Code and not to the public generally. However, the Secretary also recognizes that the issue of full

public access to disciplinary hearing records concerning criminal and other non-academic misconduct is an important part of the ongoing debate concerning safety on college campuses and believes that, given the competing interests involved, these issues need to be aired and argued in the legislative arena. Therefore, the Secretary has notified Congress of the need to address this issue and has offered to work with Congress in drafting an appropriate FERPA amendment that identifies and balances these interests at various education levels.

#### **Analysis of Comments and Changes**

In response to the Secretary's invitation in the NPRMs to comment, approximately 150 parties submitted comments on the proposed regulations. An analysis of the comments and changes in the regulations since publication of the NPRMs follows. Substantive issues are discussed under the section of the regulations to which they pertain.

## Section 99.3 What definitions apply to these regulations? Definition of "Disciplinary action or proceeding."

Comments: A majority of commenters approved of the Secretary's effort to effectively clarify the distinction between disciplinary records and law enforcement unit records. Those commenters stated that to allow the release of student disciplinary records to the public without consent would compromise what they believe to be the fundamental educational mission of the campus judicial process. Several commenters also stated that if FERPA were amended to allow such disclosures, institutions would have to amend their disciplinary procedures to incorporate greater due process protections. These commenters, mostly officials at postsecondary institutions, argued that campus judicial systems have been effective in responding to violations of institutional policy because of the privacy protections afforded to students by FERPA.

A substantial minority, however, disagreed and stated that disciplinary records relating to criminal and other non-academic conduct should not be treated as "education records." They argued that postsecondary institutions have used FERPA to evade efforts by the public to gain access to information about crime on campuses. These commenters questioned the statement in the NPRMs that the Department has always considered records relating to an institution's internal proceedings that deal with violations of its own rules and standards of student conduct as