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Preface

The primary purpose of this AACRAO publication is to provide guidance and suggested implementation procedures for complying with the Family Educational Rights and Privacy Act of 1974, as Amended (subsequently referred to as "The Act" or FERPA). The publication has been updated to include the new changes to the FERPA Regulations which became effective in January 2009. These changes were the first extensive modification of the regulations since 1988 and incorporate changes reflecting a new world for postsecondary institutions following the Virginia Tech tragedy. The publication is intended to 1) assist institutional record-keepers and other school officials to understand their roles and responsibilities for implementing The Act, and 2) provide many practical training tips that can be used on a daily basis in training other institutional employees on FERPA.

A Preliminary Caution

As with most publications dealing with legal issues, federal legislation, interpretations, and new regulations can amplify and change what is included in this publication. For example, the tragedy at Virginia Tech brought to light the need for clarification of FERPA's "health and safety" exception, as well as the need to provide guidance on the interplay between FERPA and HIPAA. Similarly, the increased use of technology, including for creating fraudulent documents, has led to changes in the FERPA definition of a "disclosure." Such issues have impacted and will continue to affect the need for clarification and/or modification of the law. As such, these guidelines are, by definition, interpretive. They are not to be construed as law and are intended for use along with The Act and its published regulations. While consulting this document, the reader should be aware of any applicable privacy or public information laws of your state, which may be at variance with FERPA (*see* "Conflict with State Law" on page 5).

FERPA applies to all levels of education in the United States, but there are significant differences in how the law applies to postsecondary institutions as compared to K–12 schools. This publication applies to postsecondary education only. A companion volume covering FERPA at the K–12 levels, *FERPA and Secondary Education* (1997), sponsored by the National Association for College Admission Counseling and AACRAO, is available from AACRAO.

History and Contents of This Publication

The *Family Educational Rights and Privacy Act* (FERPA) was enacted by the United States Congress in 1974. In response, the AACRAO *Guide to Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974* was first printed in 1976.

In this original edition, AACRAO was assisted by representatives of the following associations in developing a comprehensive and concise set of recommended institutional guidelines and procedures for postsecondary institutions implementing this law: the American Council on Education, the National Association of College and University Attorneys, The College Board, and Educational Testing Service.

In 1984, the *1984 AACRAO FERPA Guide* was published, and it contained, for the first time, the format and content that is found in subsequent editions.

In 1988, new FERPA regulations brought about significant changes, of which the most prominent was the identification of two types of parental statuses: custodial and non-custodial. These new regulations outlined the role and rights of both types of parents under FERPA. The AACRAO Board of Director responded to this change by appointing a committee to revise the *1984 FERPA Guide*. This committee surveyed a randomly selected group of 500 AACRAO member institutions to assess current knowledge, procedures, and attitudes regarding FERPA. Their responses enabled the committee to identify key areas and topics that needed to be discussed and included in the next FERPA publication. This publication eventually became the 1995 edition of *The Guide to Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended*. The *1995 FERPA Guide* followed the outline of the 1984 publication, and expanded the appendices and added a bibliography.

The 1998 edition followed the same format. It also provided updated information on events, policies, rulings, and legislation that affected FERPA since the 1995 publication of the *Guide*. Following this publication, significant changes occurred with the issuance of the 2000 FERPA regulations, including: disclosure of records information when the student has been found in violation of substance abuse policies; disclosure of results from disciplinary hearings; and clarifying conditions under which an institution may disclose records in defending itself. In response, the AACRAO Executive Board appointed a committee of records administrators who had direct responsibility for administering FERPA on their campuses, and who also had extensive experience with FERPA, to develop the *2001 FERPA Guide*. It addressed the 2000 FERPA regulations and followed the same general format of previous *Guides,* while adding a new Chapter 6 which included training materials that practitioners could use on their campuses for training others about their responsibilities under FERPA.

By 2006, numerous social, political, and technological factors were influencing the implementation of The Act. The 2006 *Guide* discussed these and incorporated the changes made to the FERPA regulations since 2001. In addition, a few of the topics and issues contained in the 2006 edition included: e-signatures as they apply to FERPA; dual-enrolled students; U.S. Supreme Court cases: *Falvo* and *Gonzaga*; *Miami/OSU* federal court case; the Solomon Amendment; the *Patriot Act*; SEVIS; Graham-Leach-Bliley; and the *Digital Millennium Copyright Act*. A new enhancement in the 2006 Guide was the inclusion of a CD-ROM containing a digital version of FERPA training materials and forms.

What's New in this Publication?

This most recent revision of the *Guide* (2010) provides updates based on the recently revised FERPA regulations that were published in December 2008 and became effective in January 2009. While the scope of each chapter remains the same as the 2006 version, they have been updated to reflect all the changes in the 2009 regulations. Where applicable, section citations to the regulations preceded by the section symbol "§" (*e.g.,* §99.32) have been added to the relevant text to aide readers in locating the source of the provision. In addition, a revised format and index make it easier to find topics being researched.

Chapter 1 contains a summary of the changes to FERPA that are discussed throughout this edition of the *Guide*.

Some noteworthy items in the 2010 edition include:

- A copy of the FERPA regulations in Appendix B, with the 2009 amendments highlighted.
- A section-by-section analysis of the 2009 amendments in Appendix C.
- Updated training materials and forms for you to use at your institution.

  Note: All the training materials and forms in the 2010 *Guide* are available on the AACRAO Web site at www.aacrao.org/compliance/ferpa/.
- Appendix H was newly added and focuses on the intersection between FERPA and HIPAA. In the wake of the shootings at Virginia Tech, the U.S. Department of Education and U.S. Department of Health and Human Services published *Joint Guidance on the Application of FERPA and HIPAA to Student Health Records*, to address confusion of school administrators, health care professionals and others on the application of these laws to records maintained on students. This appendix includes the *Joint Guidance*, along with an article on FERPA and HIPAA myths, penned by the former heads of the offices at the Departments of Education and Health and Human Services, which are responsible for FERPA and HIPAA compliance respectively.
- Additional appendices, including background materials (*e.g.,* FPCO opinion letters in Appendix E) related to various 2009 regulatory changes and other

FERPA issues of interest to the postsecondary education community.

The 2010 Guide Team

Recognized and respected for their expertise in implementation, compliance, and training in FERPA, the editorial team for the 2010 *Guide* includes:

- Tina Falkner, Associate Registrar, University of Minnesota, Twin Cities
- Dennis Hicks, Registrar, Indiana University–East
- Brad Myers, University Registrar, Ohio State University
- LeRoy Rooker, Senior Fellow, AACRAO; former Director, Family Policy Compliance Office, U.S. Department of Education (chair)
- Sharon Shirley, Consultant; former staff member, Family Policy Compliance Office, U.S. Department of Education
- Rick Campanelli, Esq., Baker and Daniels, LLP, and former Director of the Office for Civil Rights at the U.S. Department of Health & Human Services

This publication is the culmination of their combined efforts.