

U.S. Department of Education guidance: Under FERPA, students cannot be required to waive rights as condition of participation

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In November 2017, the U.S. Department of Education (ED) issued a [letter](#) clarifying student and parental rights under the Family Educational Rights and Privacy Act (FERPA) when a school uses online third-party service providers to deliver all or a portion of an educational program. In response to a parent's complaint, ED concluded that a public charter school impermissibly required the parent to waive her rights under FERPA when, as a condition of enrollment, it required the parent to accept the specific terms and conditions set forth in an online service provider's terms of use and privacy policy, which gave the service provider broad rights to use and distribute information about the child.

The parent had alleged that as a condition of her child's receipt of certain educational services, the parent was forced to agree to the terms of use and privacy policy of the school's several online service providers, and that the service providers did not protect her child's personally identifiable information (PII) in compliance with FERPA. ED agreed that the school had violated FERPA with regard to those allegations.

In explaining its finding, ED pointed to previous guidance in which ED stated that "a parent or eligible student cannot be required to waive the rights and protections afforded under FERPA as a condition of acceptance into an educational institution or receipt of educational training or services." While ED acknowledged that parents may "choose to enroll" their children in online schools, such a choice does not diminish a school's FERPA obligations. ED previously has [explained](#) that "[i]n no circumstances does FERPA permit an educational agency or institution to require a student to waive the rights and protections under FERPA in order to apply for or receive educational training or services."

ED specifically took issue with the broad scope of the terms of use, which according to ED required the parent "to allow near-universal use and distribution by [the vendor] and various third party affiliates and licenses of information that could have constituted her child's PII," including "data, text, software, music, sound, photographs, graphics, video, messages, tags or other materials." ED found that the scope of the contractor's rights to use and distribute a child's PII in effect required the parent to forfeit her right to protect against the unauthorized disclosure of PII from her child's education records that was posted to or submitted to the contractor's site.

In order to come into compliance with FERPA, ED required the school within 30 days to

- provide assurance that it would no longer disclose student education records or PII to third-party contractors that include licensing provisions in their terms of use that (1) parents or eligible students are required to accept to apply for or receive educational services; (2) covers information that would constitute PII from education records; or (3) grants the service provider the right to use, reproduce, display, perform, adapt, modify, distribute, have distributed, or promote student PII in any form, anywhere, and for any purpose; and
- provide assurance that it would no longer, as a condition of attendance or receipt of educational services, require parents or students to accept or enter into an agreement that waives the rights and protections of FERPA.

In light of this guidance from ED, institutions that use third-party contractors to provide online services should review ED's letter and prior guidance as well as their agreements with third parties to determine whether the terms of such agreements, including licensing provisions, comply with ED's guidelines about compliance with FERPA.

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