

Student Records - Current Developments

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It's been less than four years since we visited the rights of students/parents and the duties of administrators with regard to students' records. In that short time, there have been some major revisions to the laws governing student records. Although the major law that controls is the Family Education Rights and Privacy Act ("FERPA"), other relevant laws are Chapter 12 (the regulations on students' rights and responsibilities), IDEA and its implementing regulations, section 1409 of the School Code and the Safe Schools Act. The changes include requirements related to military recruiters, additions to what may be identified as directory information, accessibility without consent because of suspected terrorism and clarification of what is an education record. In addition, in *Gonzaga University v. John Doe*, the United States Supreme Court ruled that students and parents may not sue for damages to enforce provisions of FERPA.

The starting principles are that student records are confidential and access is limited to parents and school employees who have a legitimate educational interest. Disclosures of personally identifiable information in education records require a written parental consent. How the district will determine what staff members have a legitimate educational interest should be part of your district's policy and you as principal should be able to articulate the criteria to your staff. **Legitimate educational interest** occurs when "the official needs to review an education record in order to fulfill his or her professional responsibility." The district is required to maintain a record of each disclosure, including the identification of the party and his/her legitimate interests. (34 CFR Sec 99.32) The district may predetermine a list of categories of employees who have access and include this list as part of the annual notice. By giving notice of the employees with access, recording each release to these employees may be avoided. The final general principle is that both the parent with physical custody and the noncustodial parent with legal custody retain all FERPA rights unless a court order specifically awards sole legal custody to one parent. The privacy and access rights of the parents transfer to the student who turns 18 years old (**eligible student**).

Education Records

"Education records" include those student records maintained by an educational agency or institution (the school) or by a party acting for the agency or institution (administrator, teacher). While this definition appears broad, FERPA also articulates specific criteria for what is NOT an education record. In addition to differentiating between "directory information" and "education record," FERPA also explains that records kept in the sole possession of a single maker - usually a teacher - and only viewed by a substitute are NOT education records. (34 C.F.R. §99.3.)

Peer Grading

In the first U.S. Supreme Court case interpreting FERPA, *Owasso v. Falvo*, the court examined the question of whether homework and classwork grades are a part of a student's "educational record" and therefore protected under FERPA. In the case, Kristja Falvo, the mother of three children in the Owasso School District, was upset when a teacher allowed students to grade one another's work and then the students verbally read their own grades to the teacher. According to Falvo, these grades were part of a student's "education records," and therefore should be confidential. The case deals with the question of whether homework and classroom grades should fall under the umbrella of "educational records" and be protected by the same standards of confidentiality.

In *Owasso*, the majority opinion (eight justices) argued that classwork and homework were not education records because the grades were not "maintained" at the institutional level by a person acting for the school. The court also explained that FERPA's intent was to examine school and institutional practice, rather than the actions of a teacher: "Congress focused on the policies and practices of schools and educational agencies, not the conduct of individual teachers." For school districts, the case emphasizes the idea that "education records" should be understood in terms of those lasting records that are kept on a more long-term basis and viewed by officials other than simply the teacher and a substitute.

For example, a student's transcript, which is kept at the institutional level and viewed by officials other than the teacher, is an education record, while the individual classwork and homework grades are not education records since they are not kept by the institution but by the individual teacher. Also relevant to the court was that when a document qualifies as an education record, then FERPA creates parental rights to an elaborate

procedure for amending the record, including a hearing. The Supreme Court did not want to extend hearing rights to classroom work and homework. The court suggests that education records include only documents kept in a central repository. Importantly, however, the court's repeated endorsement of the "central custodian" theory is combined with the explicit disclaimer that the opinion did not decide the status of teachers' grade books. As this article goes to press, the Department of Education (DOE) has advised that it is reviewing *Owasso* and may issue additional guidance or regulations to clarify the scope of the term "education record." With luck, DOE will recognize that the mandatory procedures for amending *education records* is a strong rationale for narrowing the scope to exclude anything that has not made its way to a central file. In its *Owasso* brief, DOE argued that only institutional records in a permanent file were covered, such as final course grades, student grade point averages, standardized test scores, attendance records, counseling records and disciplinary records.

Law Enforcement Unit

Records of a law enforcement unit are separate, distinct and exempted from the FERPA definition of *education records*. FERPA defines a "law enforcement unit" as an individual, office, department, division or other component of a school or school district, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by the school district to (1) enforce any federal, state or local law, or (2) maintain the physical security and safety of schools in the district. Section 778 of the School Code establishes a procedure by which the school district has the county court designate person(s) as school police officer(s) for the school district. The court's order may grant the officer the power to arrest, authority to issue citations for summary offenses or the authority to detain until local law enforcement arrives. Section 778 also authorizes employment of other security guards.

FERPA restrictions do not prohibit the sharing of information from these law enforcement records. To maintain the status of a law enforcement record, the record or document must be created by the unit, created for a law enforcement purpose and be maintained by the unit. If the records are created solely for a discipline action or proceeding, they become education records. Beware that education records do not lose their status as education records while simply in the possession of the law enforcement unit.

The Memorandum of Understanding with local and state law enforcement supplied by the Pennsylvania Department of Education (PDE) permits a school district to designate officially an individual(s) from the local police as the law enforcement unit by filling in a name(s) in the designated blank. This process of using a MOU with the local police is specifically approved in the joint publication of the U.S. Department of Justice and U.S. Department of Education entitled *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs*. The *Guide* explains that without this official designation, FERPA prohibits the school from disclosing information to law enforcement from education records unless an exception applies. This designation of an outside law enforcement officer as a "school official" must be specifically explained under the section of the annual notice identifying what "school officials" are predetermined to have a legitimate educational interest. According to the *Guide*, by making this designation, the school district is authorized to share freely information relative to law enforcement with the designated officer(s), and the parents will know that information may be shared for the purpose of maintaining safe schools.

The federal advice also emphasizes that nothing in FERPA prevents a school official from disclosing to local law enforcement authorities information that is based on that official's personal knowledge or observation and not in reliance on information contained in an education record. The example given is if a teacher were to observe that a student is involved in a gang or in illegal activities, FERPA does not prohibit the teacher from reporting the student to local law enforcement. If, as a result, local law enforcement investigates, then they should obtain a subpoena unless an exception applies. The *Guide* explains how education records and law enforcement unit records interact and when FERPA applies –

Because this FERPA exemption applies specifically to records that a law enforcement unit creates and maintains for a law enforcement purpose, FERPA would protect records that the law enforcement unit created for a purpose other than law enforcement – even when they are in the possession of the law enforcement unit. On the other hand, even if the law enforcement unit shares with another component of the school a copy of a record the unit created for a law enforcement purpose, FERPA would not restrict dissemination of the records maintained by the law enforcement unit.

Law enforcement unit records should not be confused with the records of a school's disciplinary actions or proceedings, which are education records. Although schools may disclose information from their law enforcement unit to other school officials (including

educators in other schools), the **copy** that the law enforcement unit gives to a principal or other school official becomes an education record once that official receives and maintains it. As such, the information is subject to FERPA and the principal or other official cannot disclose it to a third party without prior parental consent, unless one of the other exceptions to FERPA applies. However, the original document that the law enforcement unit created and maintained, which relates to activity that formed the basis for subsequent disciplinary actions or proceedings, does not become an education record merely because the unit shared it with another component of the school or because a copy is placed in the student's education file. It is, therefore, disclosable like other law enforcement unit records.

Directory Information

FERPA permits certain information to be released to third parties without the consent of the parents if it is identified as **directory information** in an annual notice to parents. **Directory information** is information contained in an education record "that would not generally be considered harmful or an invasion of privacy." 34 CFR 99.3. This is the information commonly found in sports programs, playbills and the school feature and news articles in the local newspaper. This information includes common statistics that are not considered private or harmful to a student - for example, the student's name, address, telephone listing, e-mail address, photograph, date and place of birth, dates of attendance, grade level, participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received and the most recent educational agency or institution attended.

Amendments to the FERPA regulations in 2000 expanded the items of possible directory information to include "e-mail addresses, photographs, grade level, enrollment status (for example, undergraduate or graduate, full-time or part-time) and honors. These items may be added to the list designated by the school district as directory in the annual notice. Parents must be notified of their right to request that any or all of the types of directory information not be disclosed without prior written consent. The notice should explain that the parents must notify the district in writing by a designated date. The notice may be given by a special letter, a student handbook, a district newsletter, or other method that is reasonably calculated to inform parents. **The federal DOE has developed a model form to be used by districts, which we have added to the PAESSP web page. To locate the model, click on "Legal Corner" on the home page and the subheading of "Student Records" under Student Rights.**

Military Recruiters

Presuming the parents have not filed a written objection, the general rule is that the district determines what is directory information and who it will share this information with. The district has no such discretion when it comes to military recruiters; military recruiters have special access to the records. Under both the No Child Left Behind Act of 2001 and National Defense Authorization Act for Fiscal Year 2002, military recruiters may request access not only to directory information, like a secondary school students' names, addresses and telephone listings, but also to any information generally provided to postsecondary educational institutions or to prospective employers. The annual notice must now explain that the school routinely discloses names, addresses and telephone numbers to military recruiters upon request, subject to a parent's request not to disclose such information without written consent.

Disciplinary Records

A student's discipline records are **education records** under FERPA and disclosing such records without a parent's consent constitutes a violation of FERPA. This legal conclusion was recently affirmed in *U.S. v. Miami University* by the Sixth Circuit Court of Appeals in the context of university disciplinary records. DOE sought and obtained a permanent injunction against two Ohio universities from disclosing their on-campus disciplinary records to the public under Ohio's open records law. The Sixth Circuit reaffirmed DOE's reading of the term "education records" and stated that Congress in amending FERPA in 1998 to allow post-secondary institutions to disclose the final results of disciplinary proceedings must have intended that disciplinary records be education records or this amendment would be superfluous.

FERPA currently permits schools to transfer any and all education records, including disciplinary records, of a student who is transferring to or seeks to enroll in another school, school district or postsecondary school. (Section 99.31(a)(2) and Section 99.34 of the FERPA regulations.) Section 4155 of the No Child Left Behind Act requires States, within two years, to provide an assurance that the State "*has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion by local*

educational agencies, to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends or is instructed to enroll, on a full- or part-time basis in the school.” Pennsylvania is “ahead of the curve” as a result of Act 26 of 1995, commonly known as the Safe Schools Act. Section 1305-A **requires** a certified copy of the student’s disciplinary record to be transported to any **public** school, IU or area vocational-technical school to which a student has transferred. The sending school entity has 10 days from receipt of a request to supply this certified copy of the student’s disciplinary record. Under No Child Left Behind, this provision will need to be expanded to include **private** elementary and secondary schools. In addition, under Section 1306-A, the student’s disciplinary record is available for inspection to the student, parent, guardian or other person having control or charge of the student, to school officials and to state and local law enforcement officials **as provided by law**. It specifically provides that **permission is not required** for the transfer of the individual student record to another public school entity within this Commonwealth or in another state in which the student seeks enrollment or is enrolled. It is important to note that this access created by the Safe Schools Act to a student’s disciplinary records does not apply to post-secondary institutions. For example, this does not permit the athletic director or a high school coach to share information contained in the disciplinary record of a student athlete with a college where the student seeks enrollment.

Under the FERPA safety emergency exception, the school is specifically permitted to include in the education record appropriate information concerning disciplinary action taken when the student’s misconduct poses a significant risk to safety or well-being of any member of the school community, and to share that information with teachers and school officials within the school or in other schools who have a legitimate interest in that student’s behavior. (34 C.F.R. §99.36.)

When the misconduct involves a special education student and a potential crime, there is a specific IDEA regulation. (34 C.F.R. §300.529.) The IDEA regulation permits reporting a crime committed by a child with a disability to law enforcement. The school reporting a crime is also required to provide copies of the special education and disciplinary records of the child for consideration by the appropriate authorities to whom it reports the crime. However, the transmittal of the child’s special education and disciplinary records is specifically controlled by FERPA and the duty to secure parental consent.

The requirements of FERPA are also involved if there are questions about disclosure of information from the student’s educational records in cases of student-on-student harassment. The Office of Civil Rights has published *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties* (www.ed.gov/legislation/federal_register/other/2000-4/110200b.html). The revised *Guidance* clarifies that DOE interprets FERPA to permit a student who filed a harassment complaint to learn the outcome of his or her complaint, *“that is, to learn whether the complaint was investigated and whether harassment was found - because the information directly relates to the victim.”* However, it remains DOE’s position that FERPA prevents a school from disclosing to a victim the sanction or discipline imposed upon the student found to have harassed the victim unless the sanction is directly related to the victim or there is a statutory exception. An order that the harasser stay away from the victim is considered by DOE to be disclosable. DOE has acknowledged that information about the sanction is important to the victim’s remedy because this information enables the victim to determine whether the school responded appropriately. As a result, DOE is supporting a statutory amendment to FERPA to permit the harasser’s discipline to be disclosed to the victim. (NOTE – this would be an exception to the general rule that if two or more students violate the code of conduct, parents of a fellow perpetrator or the victim are not entitled to know what specific discipline was imposed.)

Special Education, IDEA Regulations

The separate Pennsylvania special education regulations on confidentiality of information and student records were repealed as part of the reenactment of Chapter 14. The records of special education students are now controlled by reference to the IDEA regulations on the subject of “Confidentiality of Information.” (34 CFR § 300.560 - 300.577.) The IDEA definition of education records incorporates by reference the definition from FERPA. The topics covered by this subpart are comprehensive, including access rights, record of access, procedures for amendment, safeguards and destruction. Unique to the special education regulations is the requirement to provide upon parental request, a list of the types and locations of education records. (§ 300.565.) The time period in which to respond to a request for access is “within a reasonable period of time” under FERPA and “without unnecessary delay and before any meeting regarding an IEP or any hearing” under IDEA. (Section 99.10 and § 300.562.) Section 300.564 warns that if an education record includes information on more than one child, parents have the right to review only the information related to their child or to be informed of that specific information. It should be noted that under both laws,

the right to a copy of the records requested is triggered if the circumstances effectively prevent the parent from exercising the right to inspect and review the student's educational records. The Family Policy Compliance Office ("FPCO"), in one of its guidance documents, states, "Schools are not required to provide copies unless, for reason such as great distance, it is impossible for parents to review the records." Another possible reason would be unavailability because of a work schedule.

In addition to the IDEA specific provisions that repeat FERPA requirements, this subpart includes some additional protections tailored to confidentiality concerns for children with disabilities. Schools must inform parents of children with disabilities when information is no longer needed to provide services and, except for certain permanent record information, that information must be destroyed at the request of the parents. (34 C.F.R. § 300.573.) Each district must have one official who is responsible for ensuring the confidentiality of any personally identifiable information; must train all persons who are collecting or using personally identifiable information regarding the state's policies regarding confidentiality and FERPA; and must maintain, for public inspection, a current listing of the names and positions of individuals within the agency who have access to personally identifiable information. (34 C.F.R. § 300.572.)

Terrorist Attacks on the United States

As a result of Section 507 of the USA Patriot Act, FERPA was amended to permit school districts, without consent or knowledge of the student or parent, to disclose personally identifiable information from the student's records to the Attorney General of the United States or his designee in response to an *ex parte* order in connection with the investigation or prosecution of terrorism crimes. (18 U.S. Code § 2332b (g)(5)(B).) An *ex parte* order is an order issued by a court without notice to the adverse party. In addition to allowing disclosure without prior written consent or prior notification, this provision amends FERPA's recordkeeping requirements so that a school official is not required to record a disclosure of information from a student's educational record if the disclosure is pursuant to an *ex parte* order. Further, a school district that in good faith produces information in compliance with an *ex parte* order "shall not be liable to any person for that production." This language is similar to disclosures without consent to comply with lawfully issued subpoenas or orders in two contexts:

- A grand jury subpoena in which the court orders the district not to disclose to anyone the existence or contents of the subpoena or the district's response;
- Any subpoena issued by a court, which includes an order for the school district not to disclose to anyone the existence or contents of the subpoena or the district's response.

With all other subpoenas, there is both a notification requirement and a recordkeeping requirement. It is the general rule that the school district may disclose information pursuant to most court orders or subpoenas only if the school makes a reasonable effort to notify the parent of the order or subpoena in advance of compliance so that the parent may seek protective action. In addition, the school districts must comply with FERPA's recordkeeping requirements when disclosing information pursuant to a standard court order or subpoena.

Disclosure Without Parental Consent

Exceptions to the release without consent, discussed more fully below, may be made to the following parties under the following conditions:

- Ø Other schools, including postsecondary, to which a student is transferring;
- Ø Specified officials for audit or evaluation purposes;
- Ø Appropriate parties in connection with financial aid to a student;
- Ø Organizations conducting certain educational studies for, or on behalf of, the school;
- Ø Accrediting organizations to carry out accrediting functions;
- Ø Appropriate officials in cases of health and safety emergencies; and
- Ø State and local authorities, connected with the juvenile justice system, if permitted under state law. No Pennsylvania statute grants special permission.

The right to disclose to other schools is conditioned upon making a reasonable attempt to notify the parents or eligible student unless the disclosure is initiated by the parent/student or your annual notice includes the fact that your school will do this without individual notice. Upon request, the parent/student must be given a copy of the disclosed record and a right to a hearing to seek amendment. (34 CFR Sec 99.34.)

The health and safety exception permits nonconsensual disclosure "to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student

or other individuals.” This exception by regulation is to be strictly, that is narrowly, construed. DOE consistently has limited this exception to a specific situation that presents imminent danger to a student or other individuals. The examples given in a recent advice letter were a case of smallpox, anthrax, bioterrorism attack or other terrorist attack. DOE added that what was released must be narrowly tailored to the immediacy, magnitude and specificity of information related to the emergency.

With regard to a health emergency, Section 1409 of the School Code specifically provides that any health records established and maintained by the district shall be confidential and their contents only revealed when necessary for the health of the child or at the request of the parent to a physician. Under Section 1409, Pennsylvania schools must request from the sending districts such medical records of newly enrolled students and sending districts must surrender these records. The federal DOE recently provided a Pennsylvania school district with permission to release information to the Pennsylvania Department of Health (PDOH) under the health emergency exception, in order for PDOH to perform an epidemiological study because of several student deaths in the district.

Primary Sources of Information

Chapter 12 of the State Board of Education regulations (available on the PDE web site) is the primary source for Pennsylvania’s general requirements for pupil records (22 Pa Code Sec 12.31 and 12.33). Each school district must develop a plan to conform with Section 12.33, which sets forth exhaustive requirements on collection of data, classification and maintenance of data, administration of security and dissemination of information. Unless the district has received special approval for local amendments from the secretary of PDE, the plan rules. Sample forms are provided related to notice of testing, permission to collect personal data, record of inspection of education records, notice of transfer of records to another district and permission to release to third party.

The other primary source for information is the Family Policy Compliance Office (FPCO). They advertise that school officials may contact FPCO for a quick informal response to routine questions about FERPA by e-mail (ferpa@ed.gov). The web site address for reams of helpful guidance is www.ed.gov/offices/OM/fpcon.