

FERPA: GUIDELINES FOR STUDENT ADVOCACY



NMSBA
Annual Convention
December 7 – 8, 2018

Presented by:

*John F. Kennedy
Andrew M. Sanchez
Cuddy & McCarthy, LLP*



CUDDY & McCARTHY, LLP

Attorneys at Law

EXAMPLES OF ABUSE FROM THE 1974 CONGRESSIONAL RECORD LEADING TO ADOPTION OF FERPA

A secretary at a private tutoring agency calls a public junior high school to inquire about a child's reading level. The principal opens the child's record and gratuitously informs the unseen caller that the child has a history of bedwetting, his mother is an alcoholic, and a different man sleeps at the home every night. When the disclosures are reported to the board of education, the principal denies the incident and his immediate superiors back him up.

A teacher of a child entering a new school gets this summary of the student's past academic year: "A real sickie - absent, truant, stubborn and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was huge accomplishment to get this far). Have fun."

A father who works for the school system has a friendly teacher show him his bright daughter's "confidential" record. In it is a five-page critique of how his own community activities as a "black militant" are causing his daughter to be "too challenging" in class."

SO, WHAT IS FERPA EXACTLY?

The Family Education Rights and Privacy Act of 1974, a federal law that protects the privacy of student educational records
– 20 USC Section 1232g.

- FERPA applies to all schools and colleges that receive federal funds (i.e. all of you). Implementing regulations are in the Code of Federal Regulations at 34 C.F.R. Part 99.

WHAT RIGHTS DOES IT PROVIDE?

FERPA provides for:

- Parental rights, or the rights of eligible students, to inspect and review Educational Records within 45 days of request
- The non-disclosure of the Educational Records without parent consent, with some exceptions
- The right to request an amendment of Educational Records and a right to hearing if amendments are refused
- Right to receive annual notification about FERPA rights
- A right to file a complaint with the Family Policy Compliance Office (FPCO) of the U.S. Department of Education

WHO IS THE “PARENT”?

- A natural parent, a legal guardian or an individual acting as a parent in the absence of a parent or guardian
 - Unless a formal order of a competent court terminates parental rights.

WHAT IS AN “ELIGIBLE STUDENT”?

- A student who has reached 18 years of age or is attending an institution of post-secondary education.
34 CFR Section 99.3

WHO IS THE “PARENT”?

HYPOTHETICAL:

- Parents of a second grade girl are divorced. Father moves out of state and mother remarries. Mother adds new husband’s name to school’s official contact list for the daughter.
- Father calls the Principal and requests a copy of the daughter’s educational records for the last year, because he believes she is struggling at school. Principal calls mom who freaks out and tells the Principal not to release anything to the dad.
- The divorce decree does not terminate the father’s parental rights and mandates that the natural parents make joint decisions about the daughter’s welfare and education until she turns 18.

WHO IS THE “PARENT”?

HYPOTHETICAL (continued):

- Nevertheless, Principal tells father he cannot have the daughter’s records because the mother refuses to consent.
- FERPA Violation?
- How should principals and School staff handle such disputes?
How can the District stay out of the middle?

WHAT IS AN “EDUCATIONAL RECORD”?

Those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution.

This includes:

- Date and place of birth, parent(s) and/or guardian address, and where parents can be contacted in emergency situations.
- Grades, test scores, courses taken, academic specializations and activities, and official letters regarding a student’s status in schools;
- Special education records;
- Discipline records;
- Medical and health records that the school creates or collects and maintains;
- Record of attendance, schools attended, courses taken, awards conferred, and degrees earned; and
- Personally identifiable information, such as a student’s identification code, social security number, picture, or other information that would make it easy to identify or locate a student.

WHAT IS AN “EDUCATIONAL RECORD”?

A record is broadly defined to include any information recorded in any way, which includes handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche, and, of course, EMAIL, TEXT OR ON SOCIAL MEDIA!!

The record doesn't have to be maintained in a centralized file to be an Educational Record. It is enough that it is “maintained by” the school and is “related to” a student, whether or not it identifies the student specifically by name.

WHAT IS NOT AN EDUCATIONAL RECORD?

The following records are excluded from the definition of Educational Record:

- "Sole possession" records made by faculty and staff for their own use, as a reference or memory aid, and not shared with others
- Personal observations
- Law enforcement unit records
- Medical and mental health records used only for the treatment of the student
- Alumni records
- Peer graded papers and exams prior to the grade being recorded in the instructor's grade book
- There is no requirement that a school "create" a record that doesn't already exist, in response to a request

RELEASE OF RECORDS AND RULES FOR DISCLOSURE

Schools must have written permission from the parent or eligible student in order to release any information from a student's Educational Records (unless there is an exception) ...

RELEASE OF RECORDS AND RULES FOR DISCLOSURE – EXCEPTIONS:

Exceptions:

- To other school officials or authorized agents & contractors, with legitimate educational interest;
 - To other schools to which a student is transferring;
 - To specified officials for audit or evaluation purposes;
 - To appropriate parties in connection with financial aid to a student;
 - To organizations conducting certain studies for or on behalf of the school;
 - To accrediting organizations;
 - To comply with a judicial order, or lawfully-issued subpoena;
 - To appropriate officials in cases of health and safety emergencies; and
 - To state and local authorities, within a juvenile justice system, pursuant to specific state law;
- "Directory information" .

WHAT IS A “LEGITIMATE EDUCATIONAL INTEREST”

Not mere curiosity

Just because you have access, doesn't mean you have authority to view educational records

“Legitimate Educational Interest” means that having access to the information is necessary for performing OFFICIAL responsibilities in support of the school's educational mission

LEGITIMATE EDUCATIONAL INTEREST

Q: DO BOARD MEMBERS HAVE A LEGITIMATE EDUCATIONAL INTEREST IN ACCESSING STUDENT EDUCATIONAL RECORDS?

HYPOTHETICAL: Newly-Elected Board Member campaigned on a platform of improving student safety and more consistent discipline at the high school.

- The first week after she is sworn in, she demands to review the disciplinary records of all student fights for the last year:

LEGITIMATE?

LEGITIMATE EDUCATIONAL INTEREST

- What if the Board Member's daughter had been in a fight, and she feels the Principal mishandled it?
- What if the Board Member is suing or threatening to sue the parents of the other student involved (but not the School District – yet)?

WHAT TYPE OF CONSENT IS REQUIRED TO RELEASE EDUCATIONAL RECORDS?

Prior written consent must:

- Specify records to be released
- State the purpose of the disclosure
- Identify parties to whom disclosure may be made
- Be signed and dated by the parent or eligible student

ANNUAL NOTIFICATION OF RIGHTS

Under FERPA, a school must annually notify parents and eligible students of their rights under FERPA. The annual notification must include information regarding the right to inspect and review the student's Educational Records, the right to seek to amend the records, if desired, the right to consent to disclosure of personally-identifiable information from the records (except in certain circumstances), and the right to file a complaint with the FPCO regarding an alleged failure by a school to comply with FERPA. It must also inform eligible students of the school's definitions of the terms "School Official," "Legitimate Educational Interest," and "Directory Information."

This Notice is normally in the packet provided to parents and students upon enrollment or at orientation at start of a new school year.

WHAT IS “DIRECTORY INFORMATION”?

Directory information is information contained in a student's Educational Record that would not generally be considered harmful, or an invasion of privacy, if disclosed.

Directory Information could include information, such as the student's name, address, e-mail address, telephone listing, photograph, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended, grade level or year (such as freshman or junior), and enrollment status (undergraduate or graduate; full-time or part-time).

Directory Information may be disclosed without consent, if, after notice of what the district considers Directory Information, the parent or eligible student does not OPT-OUT.

FAQ'S: WHAT CAN THE SCHOOL DISCLOSE FROM VIDEO?

If video footage is “maintained” by the school, and is “directly related” to a student, it is an Educational Record for that student.

FPCO’s current position is that a video is an Educational Record of the student or students who are the “focus” of the video, and, therefore, the parents of students who are the “focus” may view the video.

If multiple students are the “focus,” their parents may view the video, but the school can’t provide copies to any parents without the consent of the other parents.

FAQ'S: WHAT ABOUT DISCUSSION OF STUDENTS AT BOARD MEETINGS?

HYPOTHETICAL: High School Science Teacher is facing a School Board hearing to challenge discharge for calling a student a “Stupid F _ _ _ _ _ Idiot.”

- Teacher requests an **OPEN** hearing
- Teacher maintains his comment was justified because student challenged the human impact on climate change/global warming on religious grounds.
- Student had previously been warned about his aggressive advocacy of religious views and efforts to recruit others to his religious group.
- Teacher lists the student as his first witness and his discipline records as an exhibit.

FAQ'S: WHAT ABOUT DISCUSSION OF STUDENTS AT BOARD MEETINGS?

- Teacher claims violation of Due Process if not permitted to prove his defenses to discharge.
- Can the Board permit the student's name and records to be disclosed?
- How do they deal with the issue?

FAQ'S: ARE EMAILS PROTECTED EDUCATION RECORDS UNDER FERPA?

Yes, if they are “directly related” to a student and “maintained by” the school.

But what is “maintained by”? Conflicting opinions:

- E.D. Cal. 2009: found district did not “maintain” emails, unless they were printed out, and placed in a student’s permanent file. No violation for failing to produce all emails which might name the student. **This is probably no longer a valid position.**
- Ohio 2012: Ohio State maintained emails on a central server, and, therefore, those emails were protected by FERPA from ESPN’s public records request.
- Safest bet is to start with the position that an email to/from a District email address that directly relates to a student is an Educational Record.

FAQ'S: WHAT CAN THE SCHOOL GIVE WHEN POLICE, SRO'S, CHILD PROTECTIVE AGENCIES, ETC., ASK FOR RECORDS?

Disclose Educational Records of students in foster care to welfare agency reps, agency caseworkers, or a tribal organization, when they are legally responsible for the student.

The New Mexico Children's Code requires school employees to notify proper authorities when they know or have reason to suspect that a child has been or is likely to be abused or neglected. NMSA 1978 Section 32A-4-3.

Subsection E of this section gives law enforcement access to any records pertaining to a child abuse or neglect case maintained by those who have a duty to report.

FAQ'S: WHAT CAN THE SCHOOL GIVE WHEN POLICE, SRO'S, CHILD PROTECTIVE AGENCIES, ETC. ASK FOR RECORDS? CONT'D

- Police/SRO's/Law Enforcement Units also may have access to educational records in a health or safety emergency, i.e. if necessary to protect from an articulable and significant threat, like an epidemic outbreak or imminent threat of violence;
- School officials must respond to service of a court order, search warrant or arrest warrant;
- When a subpoena is served, the school must first notify the parent or eligible student to allow them to challenge the subpoena , if desired.
- If the SRO is designated a "School Official" in the annual notice to parents and has a "legitimate educational interest"

FAQ'S: WHAT CAN THE SCHOOL GIVE WHEN POLICE, SRO'S, CHILD PROTECTIVE AGENCIES, ETC. ASK FOR RECORDS? CONT'D

- SRO might be a School Official, even if not directly employed by the school, if he or she performs a function for which the school would otherwise use employees, and is under the control of the school with respect to the use of Educational Records.
- Discipline and enforcement of laws and policies (codes of conduct) at school are “legitimate educational interests.”
- Even if a School Official, SRO cannot view records for law enforcement purposes, and cannot re-disclose to law enforcement, unless an exception applies.

FAQ'S: CAN THE SCHOOL CHARGE A FEE FOR COPIES OF EDUCATIONAL RECORDS?

Yes. If a parent or eligible student requests copies of Education Records, then the school may charge a reasonable fee. But, if the fee effectively prevents the person from inspecting or reviewing the records, then the school must provide an alternative or waive the fee.

FAQ'S: WHAT IF THE RECORD CONTAINS INFORMATION ABOUT MORE THAN ONE STUDENT?

Parents only allowed to view records containing information
about their child/student

May require redaction

FAQ'S: WHAT ARE THE PENALTIES FOR NON-COMPLIANCE?

“Private right of action”: Parents or eligible students can't generally sue for damages caused by improper release of Educational Records, but some courts have allowed such claims to go forward.

Parents and eligible students may be able to sue for injunctive relief to prevent the disclosure of Educational Records.

School can be denied all federal funding if FPCO determines it has a practice of violating FERPA and compliance cannot be secured by voluntary means.

EMERGING ISSUES

Google sued for data mining: California students claim FERPA violation.

- Accuses Google of scanning emails sent and received by students using Apps for Education, and using information in these emails to build profiles of the students and target them with advertising.
- Could have major implications for how FERPA is interpreted and enforced, in an era of ever expanding digital technology, and “big data” generated and maintained by schools.

SHARING EDUCATIONAL RECORDS WITH CONTRACTORS

HYPOTHETICAL: School Board issues an RFP to contract for new software program, which will establish a database of student educational records, including grades, attendance, discipline and health records.

The proposed vendor's contract assures that it will keep personally-identifiable information confidential, but the contractor provides no information on how it will do so and refuses to agree to indemnify the School Board if there is a security breach.

SHARING EDUCATIONAL RECORDS WITH CONTRACTORS

Q: What obligation does the School Board have to perform additional “due diligence” in order to be confident that the contractor will satisfy its confidentiality commitment?

CONTACT INFORMATION:

Cuddy & McCarthy, LLP

John F. Kennedy

jkennedy@cuddymccarthy.com

(505) 988-4476

Andrew M. Sanchez

asanchez@cuddymccarthy.com

(505) 888-1335