FERPA WIRED: NEW LEGAL ISSUES SURROUNDING THE PRIVACY OF ELECTRONIC STUDENT RECORDS

by

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Introduction: There have been many recent developments regarding student records, especially with regard to electronic information. The U.S. Department of Education has made substantial revisions to the federal regulations that implement the Family Education Rights and Privacy Act, 20 USC § 1232g. In general, FERPA and its regulations grant parents the right to inspect their child's education records; prohibit the disclosure of a student's education records without parental consent (subject to many exceptions); and allow parents the right to ask the school district to amend their child's records. One significant point of recent focus has been the issue of electronic records and, especially, e-mail. It is far from clear whether e-mail is an education record and when an electronic record might become an educational record. It is also important to understand that included within the scope of electronic information is information stored on cell phones, PDAs, databases, instant messages and voice-mail recordings. The following discussion reviews the legal issues regarding student education records with a focus on electronic records.

Applicable Legal Provisions

34 CFR Section 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

…

Biometric record, as used in the definition of personally identifiable information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

…

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance;

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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.

…

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written or electronic means, to any party except the party identified as the party that provided or created the record.

…

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

…

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

...

Personally Identifiable Information

The term includes, but is not limited to —

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's Social Security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school

community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; …

…

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, videotape or audiotape, film, microfilm and microfiche.

34 CFR Section 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under Sec. 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's educational records.

…

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall –

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

…

34 CFR Section 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

34 CFR Section 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

34 CFR Section 300.623 Safeguards.

(a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Sec. 300.123 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

Rule 26 of the Federal Rules of Civil Procedure. Duty to Disclose; General Provisions Governing Discovery.

(a) Required Disclosures.

…

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

Rule 34 of the Federal Rules of Civil Procedure. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land for Inspection and Other Purposes.

…

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

…

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information.

Rule 37 of the Federal Rules of Civil Procedure. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

…

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

…

(e) *Failure to Provide Electronically Stored Information*. — Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

What Is the Current Status of E-mail as an Educational Record?

Washoe County Sch. Dist., 109 LRP 78026 (SEA NV 2009). Parents alleged that they were not provided all educational records regarding their child, specifically all e-mail records. The parents were advised that all e-mails were routinely purged after 60 days unless archived. The parents filed a state complaint. The Nevada State Department of Education investigated and noted that the IDEA incorporates the FERPA definition of records at 34 CFR § 300.611(b). The state concluded that because e-mail records were purged, the school district "… did not comply with federal and state requirements to permit the parents to inspect and review the student's education records, including e-mails, prior to the 4/6/09 IEP meeting." Because the e-mails were found to be education records and no notice of their destruction was provided to the parents, this failure provided an additional violation of the IDEA.

School District U-46, 45 IDELR 74 (SEA IL 2005). School district represented to hearing officer that all e-mails had been produced to parents following their request. This request was made in connection with a due process hearing. The hearing officer commented without analysis that, "There is certainly no reason why these records would not be 'education records' relating to the student and thus available to the parents and their attorney under 34 CFR § 300.562."

S.A. v. Tulare County Office of Education, 53 IDELR 111 (E.D. Cal. 2009) (Related cases at 51 IDELR 244, 52 IDELR 10, 53 IDELR 143 and 53 IDELR 218). Parents requested a copy "of any and all electronic mail" that personally identified their child. The school district produced all e-mail that had been printed and placed in the student's file. All other e-mails had been purged. The parents filed a state complaint under the IDEA's state complaint procedure alleging that they were denied access to their child's educational records and that some educational records were destroyed without notice to them. The state held that e-mail is not an educational record unless it is officially maintained in the student's file and that because the e-mails were not officially maintained, there was no obligation to give notice prior to their destruction. The parents argued on appeal to the federal District Court that the school district was required to "maintain all e-mails that identify him." Citing *Owasso*, the court rejected this position and concluded that there is no requirement "to maintain a record that identifies Student." The e-mails would only be education records if they specifically identify the student and were officially maintained. As a result, e-mails that are not kept in the student's permanent record were found

not to be education records and the purging of the e-mail was not an improper destruction of education records.

Other Cases of Interest to the Issue of Defining Educational Records

Owasso Indep. S.D. No. I-011, v. Falvo, 36 IDELR 62, 534 U.S. 426 (2002). It does not violate FERPA for one student to grade another student's paper. Student class work does contain information specifically related to a student; however, in order to be considered an education record, the record would have to be officially maintained. "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." To hold otherwise, "… every teacher would have an obligation to keep a separate record of access for each student's assignments." "For these reasons, even assuming a teacher's grade book is an education record, the Court of Appeals erred, for in all events the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act."

Gonzaga University v. Doe, 37 IDELR 32, 536 U.S. 273 (2002). Information about a student, who was seeking to become a teacher, was released without the student's consent to the state agency overseeing teacher certification. The U.S. Supreme Court held that no enforceable cause of action arose under FERPA in the situation where there was a violation of FERPA's nondisclosure requirements. "In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms — no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. … FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983."

K.C. v. Fulton Co. S.D., 46 IDELR 39 (N.D. Ga. 2006). Parents did not prevail in their allegations that they were denied access to student records "…including writing samples, evaluations, written assignments and worksheets. …" "The Supreme Court has thus made clear that parental access to 'education records' does not extend so far as to allow access to each individual piece of student work. The Plaintiffs were provided with the material when they subpoenaed it for the due process hearing. There was no IDEA violation by the school district in not providing the material earlier."

Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 2010 WL 290515 (Mich.App. Jan 26, 2010). The mere possession of a record by a public agency does not make it subject to FOIA. The document must be related to an official function. Personal emails are not subject to FOIA.

Ky. Op. Atty. Gen. 10-ORD-069, 2010 WL 1437143 (Ky.A.G., April 8, 2010). Communications among school staff about a student are educational records which must be made available to the parents for their review and inspection.

Pens. Comm. of the Univ. of Montreal Pens. Plan, et. al., v. Banc of Am. Sec. LLC, 685 F.Supp.2d 456 (S.D.N.Y., Jan 15, 2010). Three elements for proof of spoliation: 1.) the party had control over the material and an obligation to preserve at the time of the destruction; 2.) the party acted with a "culpable state of mind"; and 3.) the destroyed record is "relevant" to claim or defense. Penalties for spoliation include additional discovery, cost-shifting, monetary sanctions, special jury instructions, precluding evidence from introduction, default judgment or dismissal. The failure to preserve can be considered gross negligence.

Some Important Issues about Electronic Information

Generally, electronic records that directly relate to a student and are officially maintained are considered to be educational records.

Do not assume there is no disclosure of a student name if an identification number is used instead. A student number can be considered as a personal identifier.

Information that is not an educational record may still be subject to being produced through a subpoena.

It is important to check state laws as the definition of education record may vary from the federal definition and be more encompassing.

IDEA requires that student's confidentiality be protected at "collection, storage, disclosure and destruction stages." One official shall assume responsibility for insuring confidentiality. There must be training of those who use personally identifiable information. A listing of those who have access to personally identifiable information must be maintained. 34 CFR § 300.123.

If electronic information is found to be included within the scope of FERPA's definition of education records, it must be securely maintained. *Letter re: St. Tammany Parish Sch. Bd.*, 105 LRP 6995 (FPCO 2004).

- A record of access must be maintained.

- Notice must be provided to parents before destruction.

Records that may not be available for review by parents under the scope of education records, may still be subject to discovery through subpoenas in connection with litigation.

It is very expensive to locate, review, classify, redact and produce electronic information.

The content of e-mails may prove to be very embarrassing and provide information that can be used against the school district.

Consider a policy that prohibits maintaining personally identifiable information on an employee's personal electronic devices.

Have a policy that notifies students and staff that all electronic devices owned by the school district are subject to search at any time.

There is an obligation to preserve electronic information in the event of litigation or threatened litigation. See sample document retention letter (Exhibit A).

Other Legal Issues Regarding Electronic Records and Records Generally

It is not required that a request for records be in writing. *Letter to Chief State Sch. Officers*, 108 LRP 47461 (FPCO 2008).

There is no obligation to supply records on an ongoing basis. Records are supplied only following a request. *Letter to Anonymous*, 107 LRP 64188 (FPCO 2007).

It is reasonable to request that parental review of records occur during the school day and during school hours, provided that the practice will not prevent the parents' right of access to records. *Letter to LEA Superintendents*, 108 LRP 47595 (FPCO 2008).

A right of access to records is not the same as a right to obtain copies of records. *Letter to Schuster*, 108 LRP 2302 (OSEP 2007).

Consideration must be given, however, to whether the failure to supply copies effectively prevents the parents from having access to the records. *Letter to Kincaid*, 213 IDELR 271 (OSEP 1989).

Fees may not be charged for searching for records or for retrieval of records. 34 CFR 99.11(b) and 34 CFR 300.617(b).

Fees may be charged for copies of records unless the fee would prevent right of access to records. 34 CFR 99.10(d)(1) and 99.11(a).

If a record contains information about more than one student, the information about one student may not be disclosed to another student and redaction would be required. 34 CFR 99.12(a). This redaction can be time-consuming.

Records must be produced within a period of time not to exceed forty-five days. 34 CFR 99.10(b). State laws may impose shorter periods of time.

Failure to comply with FERPA's provisions regarding the protection of records could result in a cut off of federal funds. 20 USC §1232g(b)(1).

State requirements regarding disclosure of records must be consistent with FERPA's provisions. *Rim of the World Unified Sch. Dist.*, 103 LRP 6168 (Cal. Ct. App. 2002).

HIPAA requirements apply to protected health information. Student education records subject to FERPA are not subject to HIPAA.

Medicaid records that are filed electronically and not covered by FERPA are subject to HIPAA.

Some Practical Issues Regarding Electronic Records

1. Check the status of computer policies within a school district as electronic records generally are not exempt from review by the employer.

2. Be careful about the content of e-mail. Assume that all e-mail may be published in the newspaper or may be reviewable by parents.

3. Be professional in all communications.

4. Be aware that the Web sites that are visited via school district devices can be tracked by the school district.

5. Limit the use of e-mail in order to minimize time, expense and exposure of having to produce copies of the communications if determined to be educational records.

6. Remember that even if e-mail is not an educational record, it may be discoverable pursuant to a subpoena.

7. School districts must take reasonable steps to protect the security of electronic records. *Letter re: St. Tammany Parish School Board*, 105 LRP 6995 (FCPO 2004) (School districts should check the security of a fax machine or a parent's e-mail address before using it to send educational records.)

8. Be careful to limit who can view an employee's computer screen. *Union County (NC) Public Schools*, 44 IDELR 198, 105 LRP 47495 (OCR 2005) (School district did not impermissibly disclose student's records on computer screen at teacher's desk because it was not established that any students gained access to the information maintained on the teacher's computer located behind her desk in an area to which students were not permitted access.)

9. Do not mention more than one student in an e-mail if possible.

10. Always assume that an e-mail will be viewed by the individual or the parent of the individual who is the subject of the e-mail. View the content of the e-mail from the perspective that it may be disclosed.

11. Consider naming a custodian of records to whom requests for records must be directed in order to protect against requests for records during the summer months and requests directed to multiple personnel. *B.F., a minor by and through P.F. and R.F. v. Fulton County S.D.*, 51 IDELR 76 (N.D. Ga. 2008).

Recent Changes to FERPA Definitions

1. The definition of the term "student" has been expanded to include those students in "attendance in person or by paper correspondence, videoconference, satellite, Internet, or electronic information and telecommunications technologies for students who are not physically present in the classroom."

2. The definition of "personally identifiable information" has been expanded to include a student's "biometric record." The term "biometric record" is further defined as "a record of one or more measureable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patters; voiceprints; DNA sequence; facial characteristics; and handwriting." The other additions to "personally identifiable information" are: "indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name"; "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty"; and "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 CFR Section 99.3.

Changes to FERPA Exceptions

1. FERPA allows schools to disclose "directory information" without parental consent. The statutory and regulatory lists of what directory information includes remain the same, but the new regulation goes further to describe what cannot be included in directory information. Directory information cannot contain a student's Social Security number, and may not contain a student's identification number if someone else can electronically access the student's records with the identification number alone.

2. Additional restrictions on the disclosure of directory information have been added. The old regulations required that prior to the disclosure of directory information, the school had to provide notice to the parents of the information that would be disclosed and allow the parents to opt out of the release of directory information. These two requirements remain, but the new regulations also provide three more conditions regarding directory information. First, if a parent opts out of the disclosure of directory information, then the opt-out remains effective until or unless the *student* rescinds the opt-out request. Second, an opt-out may not prevent a school from disclosing or requiring a student to release the student's name or identifier or institutional e-mail address in a class in which the student is enrolled. (FERPA does not give a student the right to anonymity in class.) Third, the school may not disclose or confirm directory information "if a student's Social Security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records."

3. A school division may still make a student's records accessible to "school officials with a legitimate educational interest" without parental consent, but now the school must use reasonable methods to ensure that the school officials only have access to those education records in which they have legitimate educational interests. If the school does not use physical or technological access controls, then the school must ensure that its administrative policy for controlling access to education records is effective.

4. Outside contractors may be treated as school officials if the following three conditions are met. First, the outside contractor "performs an institutional service or function for which the agency or institution would otherwise use employees." Second the outside contactor is under the direct control of the agency or institution with respect to the use and maintenance of education records. Third, the outside contractor "is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records." Additionally, the use of outside contractors should be mentioned in a school division's annual FERPA notice.

5. The new regulations significantly expanded the exception for health and safety emergencies. The new regulations state that a school may disclose information to "any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals," when there is "an articulable and significant threat to the health or safety of the student or other individuals." The school must have a rational basis for making the disclosure, and it must document the threat and the parties to whom information was disclosed.

Changes to Recordkeeping Procedures

1. A school must maintain a log in the student's record that identifies each request and disclosure of student records. The new regulations add the requirement that the log must document the names of local, state, and/or federal authorities and officials that may make further disclosures of the information.

2. Schools must use "reasonable methods" to identify and authenticate the identity of parents, student, school officials, and any other parties to whom the school discloses education records.

Changes to Record Complaint Procedures

1. The Family Policy Compliance Office is the arm of the U.S. Department of Education that is primarily responsible for enforcing FERPA. Under the new regulations, FPCO's jurisdiction is not limited to "policies and practices" that violate FERPA. FPCO may now investigate and order corrective action when schools commit isolated violations.

Other resources:

Federal Register, Vol. 73, No. 237, pages 74806-51, Dec. 9, 2008.
http://www.ed.gov/policy/gen/guid/fpco/index.html

EXHIBIT A

DATE

SPED DIRECTOR

Re: Mandatory Document Retention

Dear SPED DIRECTOR:

(PARENT OR PARENTS NAME(S)) ("the parent**(S)**") initiated a due process hearing request on behalf of **(HIS/HER/THEIR) (SON/DAUGHTER)**, **(STUDENT'S NAME)**, by submitting on **(DATE DUE PROCESS REQUEST WAS REQUESTED)** a due process request to **(SCHOOL DISTRICT) ("SCHOOL DISTRICT")**. In **(HIS/HER/THEIR)** due process hearing request, the parent**(S)** allege**(S)** that **SCHOOL DISTRICT** violated state and federal laws and regulations related to a free appropriate public education.
Due to this pending litigation, **SCHOOL DISTRICT** must take immediate steps to identify, preserve and collect all relevant information. Failure to preserve relevant information could provide significant obstacles to our defense and could result in serious sanctions or other penalties for the school division due to spoliation of evidence and other possible claims. This letter is intended to serve as a guide to help **SCHOOL DISTRICT** ensure the preservation of relevant information.

Any and all information, materials and documents that relate to any of the facts or allegations contained in the hearing request must be preserved. This information includes all paper and electronic data related to the parent**'s'** claims. Electronic data includes, but is not limited to, the following: e-mails, word processing files, voicemails, instant messages, pictures, databases, data files, and archive files, regardless of whether the information is contained on servers, laptop and desktop computers, backup tapes, home and personal computers, disks, CDs, zip drives, and handheld devices like Palm Pilots and Blackberries.

SCHOOL DISTRICT must also immediately suspend its document retention/destruction policy and put in place a "Litigation Hold" for the relevant information. This Litigation Hold is designed to ensure that relevant electronic evidence is preserved and not destroyed, altered, modified, disposed of, or in any way compromised. Thus, any routine document destruction programs should be discontinued immediately, and all documents that may be relevant, whether stored on-site or off-site, should be secured. Additionally, it is important to preserve relevant materials whether they are in **SCHOOL DISTRICT**'S possession or in the possession of a third party under **SCHOOL DISTRICT'** control (e.g., employee or outside vendor). **SCHOOL DISTRICT** must also monitor compliance with the Litigation Hold, including periodic follow-ups with employees and notices to new employees regarding the Litigation Hold.

Over the course of the hearing, the school division will be asked to produce documents relating to the hearing request. It is critical that all documents related to the student be retained and preserved and not be destroyed or discarded. This obligation is ongoing. Thus, all documents regarding the student that are created or received in the future must also be preserved.

If you have any doubt about whether a document is relevant or not, please retain it. For any potentially relevant documents, you should preserve the original and all nonidentical copies and drafts of the same documents. You should preserve the documents in the files in which they would be normally stored and should not segregate them in response to this letter.

It is important to point out that you need not create any records that do not currently exist. You must simply preserve all documents in the categories described above that have already been created or that are created in the future as part of normal school business.

We are aware of the magnitude of this request, but your cooperation in ensuring that all of these records are preserved is vitally important. So that I can assist you with this task, please provide me with the following information:

1. Please identify the key personnel involved in this matter;

2. Please identify the person(s) responsible for document retention/destruction;

3. Please identify the person(s) who has/have the best knowledge of **SCHOOL DISTRICT**'S information management systems and who has/have the ability to facilitate retrieval and production of relevant information; and

4. Please provide us with a copy of any written policy regarding document or electronic data retrieval/retention/destruction.

Please let me know if you have any questions.

Very truly yours,