Is Big Brother (Really) Watching? Evolving Legal Standards Regarding Video/Email Use in Schools

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Technology, case law, and federal guidance are slowly changing how we define “education record.” With an update to the Family Educational Rights and Privacy Act expected in the near future, NSBA published recommendations to Congress regarding how the law defines “education record.” But while the law struggles, and fails, to keep up with innovations in technology, public schools are stuck in the middle of the tug of war between privacy protection requirements and sunshine laws. As schools continue to produce prodigious amounts of email messages and increasingly use video in school buildings, the law’s snail pace has become all too clear. Join three school attorneys struggling with challenges indicative of the technology – law schism regarding video in school buildings and retention of email. Come away with sample guidelines on retention of video and electronic data, and a checklist for understanding formal and informal FERPA guidance on the use of video and email.

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“For it is mutual trust, even more than mutual interest, that holds human associations together.”

— H. L. Mencken
I. INTRODUCTION

For some families with nonverbal autistic children, the best way to ensure their protection in the classroom is to install video cameras that monitor their interaction with adults. That’s the request of two parents whose children attend [an] Elementary School, where [ ] County School District police last month arrested [a] special education teacher . . . on charges that he physically abused one student several times since joining the campus in August 2014. . . . The student’s mother . . . urged the district to install video cameras in every special education classroom — as it has done on some special needs buses — in order to protect students who cannot speak for themselves.¹

A digital camera hangs over every classroom here, silently recording students’ and teachers’ every move. The surveillance system is at the leading edge of a trend to outfit public schools with the same cameras used in Wal-Marts to catch thieves. Fearful of violence, particularly in light of the nation’s experience with schoolhouse shootings, educators across the country are rushing to install ceiling-mounted cameras in hallways, libraries and cafeterias. But no other district has gone as far as this Gulf Coast community, which, flush with casino revenue, has hung the cameras not only in corridors and other common areas but also in all of its 500 classrooms.²

Stories of violence and abuse in schools continue to shock. What many consider as unthinkable behavior towards students in school — heretofore considered the safest of havens — have become reality for some, and loom as an ever-present threat for all, school districts. So what is a school/school district to do in response?

Video surveillance on school campuses has become increasingly more prevalent in response to both actualized and contemplated threats to safety and security of staff and students. Between the 1999-2000 and the 2007-08 school years, the percentage of public schools in the United States that used security cameras increased from 19 percent to 55 percent.³ There has been extensive discussion of the complex issues surrounding surveillance placed in non-classroom areas of school buildings, but more requests are being made—by school administration and parents—

for surveillance systems to be placed in classrooms, and specifically, those classrooms that are structured to educate students with complex needs who are often nonverbal. The argument is that students who, by virtue of their exceptionalities, cannot advocate for themselves are likely at a greater risk of harm given their inability to report inappropriate conduct. Advocates for these students posit that an extra measure of protection via video surveillance cameras is therefore necessary to monitor staff involvement with these students.

A. **The Fourth Amendment**

Individual reactions to the possibility of being recorded undoubtedly vary, but a common concern is whether such recordings violate the Fourth Amendment right to be free from unlawful searches. The United States Supreme Court has not addressed the applicability of the Fourth Amendment’s prohibition against unreasonable searches to video surveillance. However, in addressing the Fourth Amendment in general, the Court has held that the “ultimate measure of the constitutionality of such searches is one of ‘reasonableness.’”

> “Thus, we held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one which has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’”

> “The Fourth Amendment guarantees: ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized....’” But the extent to which the Fourth Amendment protects people may depend upon where those people are. We have held that ‘capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.’”

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The applicability of the Fourth Amendment to public school students has been addressed by the United States Supreme Court: “[W]e have acknowledged that for many purposes, ‘school authorities act[t] in loco parentis.’”6 While children “assuredly do not ‘shed their constitutional rights at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”7

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.8 Students within the school environment have a lesser expectation of privacy than members of the population generally.8

B. Recording and Surveillance and the Reasonable Expectation of Privacy

Courts that have considered the constitutional implications of mechanical recording and surveillance have held that such practices are subject to the Fourth Amendment’s parameters.9 The Fourth Amendment does not protect all expectations of privacy, but only those that “society is prepared to recognize as legitimate” and reasonable.10 The Supreme Court has acknowledged that generally, students have a less robust expectation of privacy than is afforded the general population.11

In the public school setting, the courts that have addressed the reasonableness of video camera surveillance and audio recordings have scrutinized both the scope and manner in which such recordings were conducted. Notwithstanding the application of individual State statutes, the

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7 Vernonia, 515 U.S. at 655-56 (internal citations omitted).
8 Id. at 656.
9 See, e.g., Brannum, 516 F.3d at 489 (“Video surveillance is inherently intrusive. As one authority has put it, a video camera ‘sees all, and forgets nothing.’”) (internal citations omitted); United States v. Gonzalez, 328 F.3d 543, 548 (9th Cir. 2003) (“Video surveillance does not in itself violate a reasonable expectation of privacy.”).
11 Id. at 348.
application of the Fourth Amendment in the resulting jurisprudence yields differing outcomes depending on the case-specific facts.

1. **Video recording a classroom**

Arguments against recording in a classroom will, based on existing authority, predominantly be struck down. The courts are in consensus that classrooms—excluding bathrooms, changing rooms, or other areas within the classroom where privacy is still strictly enforced—are public places. As such, there is no reasonable expectation of privacy in the classroom.

In *Plock v. Board of Education of Freeport School District*, the School District sought to respond to allegations of abuse in special education classrooms by proposing to place audio/visual recording equipment in these classrooms.\(^{12}\) "The audio/visual equipment was to be installed in an open and obvious manner in these classrooms, ‘where the most vulnerable children, both physically and emotionally challenged, were assigned.’"\(^{13}\) The special education teachers filed a lawsuit, challenging only the audio component of the surveillance. Among their arguments, the plaintiffs claimed that the audio recording would violate their Fourth Amendment right to be free from unreasonable searches and seizures.\(^{14}\) The court held that the teachers did not have a reasonable expectation of privacy in their classrooms.\(^{15}\) It reasoned as follows:

A classroom in a public school is not the private property of any teacher. A classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting. Any expectations of privacy concerning communications taking place in . . . classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable and beyond the protection of the Fourth Amendment.\(^{16}\)

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\(^{12}\) 545 F. Supp. 2d 755 (N.D. Ill. 2007).
\(^{13}\) *Id.* at 756.
\(^{14}\) *Id.*
\(^{15}\) *Id.* at 758.
\(^{16}\) *Id.*
In Evens et al. v. Superior Court of L.A. County, two students in a high school science class secretly video recorded the teacher and her class.\textsuperscript{17} Although their actions violated the State’s Education Code, the court found that the State’s privacy laws did not prohibit the use of the illegal recording: “Communications and activities on the part of a teacher will virtually never be confined to the classroom. Students will, and usually do, discuss a teacher’s communications and activities with their parents, other students, other teachers, and administrators. This is especially true when a student believes that the teacher is guilty of misconduct. A teacher must always expect ‘public dissemination’ of his or her classroom ‘communications and activities.’”\textsuperscript{18}

In State v. McLellan, a video recorder was placed in a classroom to record the nighttime activities of head custodian McLellan.\textsuperscript{19} Theft had been a recurring event, and McLellan was under suspicion. He was ultimately caught on videotape taking money from a desk drawer, and he was subsequently charged. McLellan sought to suppress the videotape evidence, arguing that it constituted an unconstitutional search.\textsuperscript{20}

“The employee’s expectation of privacy must be assessed in the context of the employment relation.”\textsuperscript{21} “[A] reasonable expectation of privacy ... exist[s] in an area given over to an employee’s exclusive use.” (internal citations omitted)). The more open and public the work area, the less likely is any reasonable expectation of privacy.\textsuperscript{22}

The classroom in this case was not an area over which the defendant enjoyed exclusive use and control. Not only was the classroom open to students and staff, but other custodians had access

\textsuperscript{17} 91 Cal. Rptr. 2d 497, 77 Cal. App. 4th 320 (Cal. App. 2 Dist. 1999).
\textsuperscript{18} Id.
\textsuperscript{19} 744 A.2d 611 (N.H. 1999).
\textsuperscript{20} Id.
\textsuperscript{21} Id. (quoting O’Connor v. Ortega, 480 U.S. 709, 717 (1987)).
\textsuperscript{22} O’Connor, 480 U.S. at 718.
to the classroom. That he, as head custodian supervising the work of others, was the only person who would have entered the classroom during the time that the video camera was set to record did not diminish the public nature of the classroom. Therefore, McLellan did not have a reasonable expectation of privacy in the classroom.

2. **Recording on a bus**

School bus drivers withstand a similarly diminished expectation of privacy inside the school buses they operate. In *Goodwin v. Moyer*, the plaintiff-bus driver filed a lawsuit alleging, among other claims, that the video camera installed on the bus constituted an unreasonable invasion of privacy. The court applied three factors to determine the reasonableness of the surveillance: (1) whether the plaintiff’s privacy interest is objectively legitimate as recognized by society; (2) the nature and extent of the intrusion; and (3) whether the government has a compelling interest in intruding upon the plaintiff’s privacy. In conducting its analysis, the court found that the plaintiff’s allegations failed to state a claim for invasion of privacy in violation of the Fourth Amendment.

As a school bus driver, Plaintiff enjoyed a diminished expectation of privacy. Plaintiff drove children, for whom society has a special interest to protect from any misdeeds by the bus driver and from whose misdeeds society likewise has a special interest to protect the bus driver. In addition, we find an onboard video camera to be an insignificant intrusion upon Plaintiff’s privacy. Plaintiff was not located in a private area; he was in a public conveyance surrounded by others and in view of the public through the bus’s windows. Moreover, the video camera captures the entire activity of the bus as it shuttles children to and from school, it does not capture Plaintiff engaged in acts of a private nature. Finally, the government has a compelling interest in protecting children entrusted to it, as well as in protecting the bus driver from the children. Accordingly, Plaintiff has not suffered an unreasonable deprivation of his Fourth Amendment right to privacy.

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23 *McLellan*, 744 A.2d 611.
25 *Id.* at 633.
26 *Id.*
Similarly, in *State v. Duchow*, a student on the bus had an activated audio recorder in his backpack that recorded the bus driver’s oral threats and physical abuse of the child.\(^{27}\) The court rejected the argument that the bus driver’s recorded statements were protected by the Fourth Amendment because of the driver’s diminished expectation of privacy. Looking at the totality of circumstances to determine whether the driver had a reasonable expectation of privacy, the court applied a non-exclusive list of factors to discern whether an individual’s expectation of privacy in his oral statements is objectively reasonable. The factors include the following: “(1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker’s statements; and (6) the place or location where the statements are made.”\(^{28}\)

In its conclusion, the court reasoned that the driver’s statements were made on a public school bus being used for the public purpose of transporting school children; they were threats to harm the students for which the driver assumed the risk that the student would report, and therefore, the driver had no reasonable expectation of privacy in his statements.\(^{29}\)

3. **Recording in a teacher’s office**

In *Chadwell v. Brewer*, special education teacher Kelly Chadwell filed a lawsuit claiming that his constitutional rights were violated when school administration procured the surreptitious installation of a video camera in Chadwell’s office.\(^{30}\) The video surveillance was initiated after the school principal suspected that Chadwell was drinking alcohol in his office during school hours. Footage from the video recordings revealed one occasion when Chadwell did indeed drink

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\(^{27}\) 749 N.W.2d 913 (Wis. 2008).
\(^{28}\) *Id.* at 920-21.
\(^{29}\) *Id.* at 925.
alcohol in his office during the school day. Chadwell argued that the surveillance constituted an unreasonable search, as he had a reasonable expectation of privacy in his office.

“Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.” The court first upheld that Chadwell had “at least some expectation of privacy” in his office. It then engaged in an extensive analysis on the issue of the reasonableness of the surveillance.

The Chadwell court upheld the reasonableness of a hidden video camera in Chadwell’s office. Specifically, the court highlighted that the recording was conducted over a limited period of time for the purpose of confirming or denying the suspicion of Chadwell drinking alcohol on the job. Given Chadwell’s “significant responsibilities’ as a special education teacher and the correspondingly ‘severe’ consequences that could result from his misconduct,” the court concluded that the surveillance was nonviolative of his constitutional rights.

4. Nonconsensual recording of a student with special needs in public

In proceedings instigated by the student to challenge his educational placement under the Individuals with Disabilities Education Act, the school presented to the hearing officer a videotape of the student’s behavior. The recording of the student’s behavior at school was allegedly nonconsensual, and the student objected to its admission into evidence. The court summarily

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31 Id. at 762 (quoting O’Connor, 480 U.S. at 717).
32 Chadwell, 59 F. Supp. 3d at 763.
33 Citing Brannen v. Kings Local Sch. Dist. Bd. of Educ., 761 N.E.2d 84, 91 (Ohio Ct. App. 2001) (finding that video surveillance of school custodians used to confirm allegations of excessive breaks was reasonable in scope when the camera recorded only what the supervisor could have seen with the naked eye); Thompson v. Johnson County Cnty. Bd. Educ., 930 F. Supp. 501, 507 (D. Kan. 1996) (finding that video surveillance of an employee locker area was reasonable in scope as a matter of law, because the employer “established the video surveillance for a limited time period to confirm or dismiss . . . allegations [of employee misconduct]”).
34 Chadwell, 59 F. Supp. 3d at 765.
rejected this argument, stating forthright, “[V]ideotaping in public areas does not violate any constitutional right of privacy nor constitute an illegal search or seizure.”

5. Audio-recording meetings

18 U.S.C. § 2510 prohibits the intentional interception of any wire, oral or electronic communication. Oral communication is defined as “any oral communication, uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” Typically, private conversations are not to be recorded, or, conversations where participants have a reasonable expectation of privacy.

Factors to determine whether an individual’s expectation of privacy is reasonable:

a) The volume of the statements;

b) The proximity of other individuals to the speaker, or the potential for others to overhear the speaker;

c) The potential for the communications to be reported;

d) The actions taken by the speaker to ensure his or her privacy;

e) The need to employ technological enhancements to hear the speaker; and

f) The place/location where the statements are made.

Recommendations from most sources advise not to record sound, but note that Texas’s new law does allow recording of audio from all areas of the classroom or other special education settings. Under Indiana law, only one party to the conversation needs to consent to the recording. The person doing the recording can provide the necessary consent if part of the conversation. This usually means the other party to the conversation has no idea they are being recorded. Conversely,

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36 Id.
37 TEX. STAT. § 29.022.
it is a crime under an Indiana statute to record a conversation without the consent of at least one party.\textsuperscript{38}

Despite Indiana law, employees do not have a right to record conversations in the workplace. Based on the status of the law, you have two options when it comes to responding to an employee’s request to record a conversation. You can deny the request, or you can allow the recording of the conversation.

If you choose to prohibit the employee from recording, there are a few additional legal concerns to be aware of and some best practices which may make the denial easier in the future. If any of the scenarios below are present, involve legal counsel in the decision:

a) Whistleblower Status – If a violation of work safety is involved.

b) Discrimination – If the employee is part of an ongoing discrimination investigation, such as an EEOC investigation.

c) National Labor Relations Act – You may not prevent employees from partaking in concerted activity.

d) First Amendment – Especially for public entities.

Whether it is a video or audio recording, the next step will be to determine the preservation of that recording.

\section*{II. IDENTIFICATION OF RECORDINGS FOR PURPOSES OF DISCLOSURE, MAINTENANCE, AND RETENTION}

The existing authority demonstrates that although individuals in public school buildings retain their rights to an expectation of privacy, the time, place, and manner, and the extent to which that right is upheld is dependent on the facts of the situation. Importantly, classrooms constitute public areas, negating most arguments of a reasonable expectation of privacy therein. Returning

\textsuperscript{38} IC 35-33.5-5-5.
now to the initial premise of this paper: given the likely constitutionality of video camera
surveillance in classrooms, if a school district is contemplating the installation of video cameras
in special education classrooms to prevent harm to a population of vulnerable students,
privacy/confidentiality requirements must be considered, as well as the legal mandates
surrounding the videotapes’ maintenance, retention, and disclosure.

Ultimately, these questions can be addressed for the most part if the school district can
discern whether the videotape is a public, student, law enforcement, or personnel record. The
school district can anticipate at some point a request from a non-employee for the opportunity to
review the recordings. Whether the request is from a parent, the media, an advocate, or any other
entity is of no moment. The question is whether such a request can be honored without violating
the myriad confidentiality laws that school districts must frequently follow, depending on the type
of record that the videotape is classified.

Of import, the school district should examine its purpose for the installation of video
surveillance. For example, is the purpose to monitor staff misconduct? Is the surveillance created
and maintained by the law enforcement unit of the school district for the purpose of enforcing the
law? Are the recordings to monitor the safety of the students—in any situation, not just at the
hands of staff? Appropriate identification as to the purpose for the recording and the type of record
being created will then facilitate the school district’s adherence to proper and lawful disclosure
and retention procedures.

A. Education Record

The Family Educational Rights and Privacy Act (“FERPA” or “the Act”) is a federal law
that protects the privacy of student education records. The law applies to all schools that receive
funds under an applicable program of the U.S. Department of Education. Specifically, school districts are prohibited from disclosing personally identifiable information from a student’s education records without first obtaining parental consent, unless certain exceptions apply. FERPA defines records as “any information recorded in any way, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” In turn, the Act defines education records to be records that are: (1) directly related to the student; and are (2) maintained by an education agency or institution or by a party acting for the agency or institution.

Given that the Act specifically considers audio and video recordings, when is video camera surveillance of students considered an education record subject to the confidentiality and maintenance requirements of FERPA? The authority is confusing. Several courts have conducted the analysis of whether a videotape is an education record by examining the purpose of the school district’s surveillance system. But the guidance from the Family Policy Compliance Office appears to rely on the FERPA definitions to discern whether videotapes constitute FERPA-protected education records.

1. **Look at the purpose for the recording**

In 2005, the New York Supreme Court addressed the issue of whether FERPA prohibited the release of a school-recorded videotape of students engaged in an altercation. Defendant student was one of the students engaged in the recorded dispute, and he sought to obtain the production of the tape. The school district argued in opposition that the videotape was an education record.”

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40 34 C.F.R. § 99.30.
41 34 C.F.R. § 99.3.
42 34 C.F.R. § 99.3.
record under FERPA, and thus was prohibited from disclosure. In its analysis, the court noted that the school district had previously disclosed the videotape to multiple individuals, including school district officials, members of the police department, and the defendant’s prior counsel.44

In its analysis of FERPA, the court distinguished “education records” from “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.”45 Although not specifically clarifying whether it considered the school district’s video recording at issue to constitute a law enforcement record, the court rejected the school district’s FERPA argument:

This Federal statute is intended to protect records relating to an individual student’s performance. FERPA is not meant to apply to records, such as the videotape in question which was recorded to maintain the physical security and safety of the school building and which does not pertain to the educational performance of the students captured on this tape.... Clearly, the videotape in question is not an “educational record” within the meaning of FERPA.46

The New York court’s reliance on the purpose of the surveillance to discern its classification under FERPA was emulated by the Washington Supreme Court. In Lindeman v. Kelso Sch. Dist. No. 458, the court, relying on FERPA-similar state statutes, sought to determine whether a school bus video recording of a fight on the bus should have been disclosed under the state’s public disclosure act.47 Both parties agreed that the videotape constituted a public record under the state’s legislation. However, the school district argued that the recording was exempt from public disclosure under a statutory exemption for “personal information in any files maintained for students in public schools.”48

44 Id.
45 Id.
46 Id.
48 Id.
The court disagreed, finding that the school district’s purpose for the installation of the bus cameras was to maintain safety and security on the buses. Taking a very strong stance in its reliance on the initial purpose for the video surveillance, the court appears adamant that the tape could not be anything other than a recording to monitor safety:

[T]his tape is not in a file maintained for students. It’s not a student record. It’s a surveillance tape.... *Even if the district ultimately used the videotape as the basis for disciplining the student who committed the assault, the videotape itself would not thereby be converted into personal information in files maintained for students, since the videotape does not reveal whether discipline was or was not imposed.* The District cannot change the inherent character of the record by simply placing the videotape in the student’s file or by using the videotape as an evidentiary basis for disciplining the student.\(^{49}\)

Given the date of this case, one might pause before following this court’s rationale in light of the guidance — pre-dating this case — issued by the Family Policy Compliance Office discussed more fully below.

2. **Look at FERPA’s purpose and definitions**

Rather than focus on the purpose of the recording, a different analysis was conducted by the Family Policy Compliance Office (“FPCO”).\(^{50}\) Two specific FPCO letters comprise the agency’s ‘official’ and ‘unofficial’ guidance on the discernment of videotapes as education records. An important distinction between the FPCO guidance and the previous cases is the admonition by FPCO that the nature of the record can change depending on the use of the videotape.

In what is deemed to be the FPCO’s official guidance, the agency responded to a parental complaint involving a scenario of a school-recorded altercation between students, *Letter re: Berkeley County School District.*\(^{51}\) Rather than analyze the purpose of the surveillance system,

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\(^{49}\) *Id.* (emphasis added).

\(^{50}\) The FPCO is an agency within the United States Department of Education with the authority to investigate, process, and review complaints of violations of FERPA. 34 C.F.R. § 99.60.

\(^{51}\) *Letter re: Berkeley County Sch. Dist.*, 7 FERPA Answer Book 40 (Feb. 10, 2004).
the FPCO focused its analysis on FERPA’s parental right to have access to their children’s educational records. The presumption in the official guidance is that the videotape at issue is an education record, and the agency’s subsequent analysis focused on the parameters for its release.

If the education records of a student contain information on more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child. If our understanding of the information in your complaint is accurate, your son is the only student pictured fighting in the videotape. If this is the case, you would generally have the right under FERPA to inspect and review the videotape. If, on the other hand, another student is pictured fighting in the videotape, you would not have the right to inspect and review that portion of the videotape. If more than one student is recorded, would require as a prerequisite the consent from the parents of any other student in the recording.

Later, in 2006, the FPCO issued unofficial guidance that further broke down the nuances of video recordings and their status under FERPA. The presenting issue in the complaint filed with the agency in 2006 was that a school district abused FERPA by refusing to disclose a videoconference in which multiple students are identifiable. The FPCO first reviewed the definition of “education record,” which can be a written document, videotape, or other information that is “directly related to” the student. The agency emphasized that an education record had to include more than simply identifying the student; the information also had to be directly related to the student. While most written documents that contain personally identifiable information are “directly related” to the student, further analysis is needed when discerning whether videotapes and other recorded images constitute education records subject to FERPA’s protections and mandates. The FPCO specifically stated that “this Office does not consider a videotape of routine

52 Id.
54 Id.
activities by students riding a school bus to be ‘directly related to’ any particular student, and therefore not an ‘education record’ under FERPA, even though those students may be ‘personally identifiable.’”  \(^{55}\) In this unofficial guidance, the FPCO explained that FERPA would not prevent an educational agency from releasing, without parental consent, an unredacted videotape of routine activities even if the students are personally identifiable, because that videotape is not directly related to any student.

However, if the videotape recorded two students engaged in an altercation, then the videotape would be “directly related” to the two students. The personally identifiable information contained therein would not be allowed to be disclosed without prior parental consent, or the redaction of the students’ images.  \(^{56}\)

**B. Law Enforcement Record**

The cases cited above that examined the purpose of the surveillance system and required disclosure of the videotapes due to their nature as monitors of safety and security should likely have included an analysis of the law enforcement records exception to FERPA confidentiality. In July 1992, FERPA was amended to allow the release of records created and maintained by a school’s law enforcement unit for the purpose of law enforcement. The FERPA regulations define law enforcement records as “those records, files, documents, and other materials that are—(i) created by a law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit.”  \(^{57}\) “Law enforcement unit” is defined as an individual or a division of an educational agency that is officially authorized by that agency to

- enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) 34 C.F.R. § 99.8.
(ii) maintain the physical security and safety of the agency or institution.\textsuperscript{58}

Therefore, if video surveillance is conducted by a designated law enforcement unit of the educational agency—even if that security unit/individual has a dual role for enforcing institutional rules of conduct—and the records of that unit were created for a law enforcement purpose, they are still considered records of a law enforcement unit.\textsuperscript{59} The recordings are excepted from the definition of education records and can be disclosed to third parties without parental consent.

Be mindful, however: in pretty much direct contrast to the \textit{Lindeman} decision cited above, the FPCO clarified that the same record could take on a different status depending on a change in its purpose and depending on the official to whom it was disclosed. In a letter to Bresler and Molinaro, February 2006, the agency responded to an inquiry of when statements and reports made by school security staff should be considered law enforcement records and when they should be considered education records under FERPA.\textsuperscript{60}

The FPCO responded by providing an illustrative reference to the Federal Register:

[I]f a campus security unit initiates an investigation into an incident on campus relating to a possible violation of law or the student conduct code, the record created and maintained by the unit in connection with this investigation is a law enforcement unit record, whether or not it is ever referred to the local police authorities. If, however, the same unit or individual responsible for law enforcement investigates an incident for the purposes of internal disciplinary actions and created a record \textit{exclusively} for the purpose of a possible disciplinary action against the student, that record would not be considered a record of a law enforcement unit and would be an “education record” subject to FERPA. It should be stressed that the Secretary expects such occasions to be very rare, especially when incidents involving criminal conduct by students at postsecondary institutions. \textsuperscript{61}

\textsuperscript{58} 34 C.F.R. § 99.8.
\textsuperscript{60} See http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/montcounty0215.html.
School districts contemplating video surveillance should be clear in their articulated purpose for such surveillance, and must be vigilant in monitoring the possible metamorphoses in purpose and thus classification that these records could sustain. As the FPCO has demonstrated, that a law enforcement unit creates a record does not exempt it automatically from FERPA protections. The inquiry should extend to whether the enforcement unit created the record for a purpose other than for law enforcement, which could likely make the record an educational record requiring parental consent prior to disclosure.

C. Personnel Record

In the event that the school district installs video surveillance for the purpose of monitoring staff conduct, the onus is then on that district to comply with state legislation addressing the confidentiality of personnel files. For example, in North Carolina, personnel files shall not be subject to inspection and examination, with statutory exceptions.\(^{62}\) The personnel file is deemed to consist of any information gathered by the local board of education that relates to that individual’s application, (non)selection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment.\(^{63}\) If the video recording captures staff misconduct and is used in subsequent personnel disciplinary actions, any disclosure of the recording in North Carolina would be prohibited.

D. Texas: Video Surveillance of Special Education Settings

On June 19, 2015, Texas enacted a law that made it the first state in the nation to require school districts and charter schools — upon request of a parent, trustee, or staff member — to

\(^{62}\) N.C. GEN. STAT. § 115C-319 (2014).

\(^{63}\) N.C. GEN. STAT. § 115C-319.
install video camera surveillance in special education settings. This unfunded mandate obliges the educational agency to include an audio component to its surveillance.

The purpose of the legislation is to “promote student safety.” Upon request, the school shall “place, operate, and maintain one or more video cameras in each self-contained classroom or other special education setting in which a majority of the students are: (1) provided special education and related services; and (2) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day.” The recordings from the surveillance must be maintained “for at least six months after the date the video was recorded.”

However, the recordings are not to be “regular[ly] or continual[ly]” monitored, and they are not to be used for teacher evaluation purposes. In fact, the recordings are only allowed to be used “for the promotion of safety of students” receiving special education services in special education settings.

The statute mandates that the recordings are confidential and may only be disclosed under itemized exceptions. Importantly, the statute allows for the recording to be viewed by parents of students involved in a documented incident, and it allows for the recording to be used in school personnel disciplinary actions. If staff misconduct is involved, the statute explicitly states that the student’s parent retains the right to access the record under FERPA.

It appears that this statute creates a new hybrid of a record not fitting neatly within any of the analyses presented thus far. For example, all of the recordings are automatically deemed confidential, thereby precluding them from being public records, even if the videotape documents only “routine activities” not “directly related” to any particular student. In addition, the purpose of the surveillance is to promote safety of the students, but there is no indication that a law

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64 See S.B. 507, 2015 Leg. 84th Sess. (Tx. 2015).
enforcement unit or individual is charged with the installation and maintenance of the recordings. And finally, the statute references FERPA’s parental right to access the videotapes of their children involved in an incident, even those tapes of personnel misconduct. Those recordings that are “believed to document a possible violation of district or school policy may be used as part of a disciplinary action against district or school personnel and shall be released at the request of the student’s parent or guardian in a legal proceeding.” Presumably, the reference to FERPA’s parental access to those recordings of staff misconduct towards students converts the videotape into an education record subject to FERPA’s protections. The confusion is whether the tape’s use in personnel disciplinary actions requires the prerequisite consent of the parents. That the tape could be disclosed to parents even if considered in personnel matters should be examined in light of any competing personnel confidentiality statutes.

Given that the Texas statute takes effect in 2016, there will undoubtedly be much national attention focused on the law’s implementation and all subsequent practical and legal effects of its application.

III. TASH (FORMERLY, “THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS”)

Educational agencies faced with the severity of allegations of abusive staff behavior towards students with severe needs and diminished capacities for self-advocacy are often in the public spotlight with demands for action via both remedial and preventative measures. While surveillance is one option, not everyone finds this option to be ideal. This paper is not intended to persuade or dissuade anyone from the use of video cameras in school districts, but offers as consideration the issues and questions surrounding this topic.

In so doing, the discussion herein would be remiss in not acknowledging the position taken on this very topic by a prominent advocacy group for individuals with severe disabilities. As an
Ostensible foreshadowing of the new Texas legislation, TASH authored, just six months before the Texas enactment of its classroom surveillance statute, a position statement arguing against video cameras in self-contained classrooms. Their main points are summarized as follows:

1) “Installing video cameras only in ‘special education classrooms’ creates or strengthens a bias toward restrictive settings.” The concern is that parents will be coerced into placing their children in more restrictive settings, thinking that their children are safer there.

2) “Installing video cameras only in ‘special education classrooms’ encourages abuse to go underground.”

3) “Using video camera surveillance as ‘evidence’ of harmful staff behavior can be unreliable and/or easy to circumvent.” Technology can malfunction, which precludes completely successful documentation of misconduct. More importantly, surveillance does not prevent the abuse, which should be the paramount goal.

4) “Installing video cameras only in ‘special education classrooms’ presents the risk that students with disabilities themselves may become the targets of surveillance.” The video recordings can be used for other purposes than to document teacher abuse, such as to demonstrate student behavior in IEP meetings and hearings. The problem is that an isolated segment of film does not present the entire picture of a student.

5) “Installing video cameras in ‘special education classrooms’ raises questions about rights to privacy.”

6) “Purchasing, installing, and maintaining video cameras is costly and uses scarce educational resources.”

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7) “Relying on video cameras in special education classrooms does not build trust with either students or teachers.” TASH is concerned that the installation of surveillance in schools will “create a climate of fear, mistrust, and victimization among students and teachers.”

As alternatives to technological surveillance, TASH recommends the implementation of strategies and practices that serve to improve student behavior, foster inclusion in the classroom among all students, and incorporate vigilant screening of personnel. These proactive measures serve to change behavior and attitudes, rather than merely documenting them. Thus, TASH suggests that schools would be better served via the inclusion of students with special needs in regular classrooms and throughout the building, implementing Positive Behavior Interventions and Supports (“PBIS”), and supporting cultural differences.

In addition, they recommend integrating PBIS with “trauma-informed practices.” The focus would be to incorporate training to help everyone in the school building understand that many adults and students have experienced traumatic events in their lives. The training would also help individuals to understand triggers and the reactions to trauma in themselves and others. Importantly, if the culture became more tolerant and understanding, individuals could learn to articulate their own triggers and seek permission to be excused from assignments or situations that contain those triggers.

IV. NOT THE DRONES YOU WERE LOOKING FOR?

The Federal Aviation Administration has been actively looking at both the private and public use of drones. On February 15, 2015, the FAA released its Notice of Proposed Rulemaking for the unmanned aircraft systems (UAS). Gary Wickett wrote an article for Claims Journal in July 2015, describing the controversy associated with the UAS. As Mr. Wickett
described, “The right of a landowner to control the low-altitude space immediately over his private property appears to be in conflict with the right of a drone owner to operate a drone in the same airspace” and “Drone use may seem like something out of science fiction movie, but they are here to stay, together with all of the interesting legal issues and conundrums they create.”

The UAS are able to record high-definition video of sporting events and other school activities. School Athletic Directors across the country are scratching their heads about how to protect the integrity of outdoor practices taking place when a UAS flies overhead.

According to the FAA website, there are varying standards when it comes to Governmental use, Civil/Non-Governmental use, and Hobby/Recreational use. Each type may require compliance with different standards, certifications, and restrictions. There is even a “no drone” logo developed to give notice of unauthorized use.

The FAA is responsible for enforcing its regulations applicable to the use of UAS. For now though, state and local Law Enforcement Agencies should be notified to assist with immediately investigating unauthorized use. The FAA plans to finalize regulations for Government and Civil/Non-Governmental use in June 2016.

V. USE OF AN EMAIL TO RECORD

In the day-to-day function of a teacher’s job, the old version of the teacher’s lounge has now morphed into sending a quick weekend text or email to a co-worker. If teachers decide to use their employee email account, or even their private email account, to discuss public business, then the question becomes the status of that electronic document. Is it a student record? Is it a public record?

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68 https://www.faa.gov/uas/.
69 https://www.faa.gov/uas/no_drone_zone/.
A point of confusion is that there is no universal approach to a “permanent” file/record and the “temporary” file. We rely instead on our local policies and procedures. For instance, is an email that exists only in electronic form in a teacher’s inbox considered “maintained” by a district? In May 2015, the Indiana Department of Education issued a letter from the Office of Special Education indicating that emails do not meet the definition of a student record under FERPA. If that is the case, should Indiana schools consider defining locally whether emails are an educational record or a public record? The distinction will carry significant repercussions for disclosure.

The Nevada Education Department (ED) seems to agree. In a recent state complaint decision, the Nevada ED found that emails not printed or stored in a student’s permanent file are not considered “maintained” by FERPA’s definition. As such, the Nevada ED determined there was no violation when a district did not provide emails that existed only electronically when a parent requested to see them before an IEP meeting.70

So, is the parent not entitled to emails unless they are part of the student’s educational record?

“Education Records” means, those records, files, documents, and other materials which-

(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.71

Even though an email may refer to a particular student, it is not an educational record where it is not “maintained” by the District, as is required by 20 U.S.C. § 1232g(a)(4)(A)(ii). The United States Supreme Court has interpreted the definition of the word “maintain” in the educational context, and specifically within the context of FERPA, to mean that documents as fleeting as e-

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70 Washoe County Sch. Dist., 114 LRP 25728 (SEA NV May 23, 2014).
mails are not educational records if they are not maintained in the student’s educational file. In *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, the Supreme Court determined whether student grades were “maintained” by the District, within the meaning of FERPA, where the assignments were peer-graded and called out by those students in the classroom. The Court said:

> The ordinary meaning of the word “maintain” is “to keep in existence or continuance; preserve; retain.” Random House Dictionary of the English Language 1160 (2d ed. 1987). Even assuming the teacher’s grade book is an education record - a point the parties contest and one we do not decide here - the score on a student-graded assignment is not “contained therein,” § 1232g(b)(1), until the teacher records it. The teacher does not maintain the grades while students correct their peers’ assignments or call out their own marks. Nor do the student graders maintain the grades within the meaning of § 1232g(a)(4)(A). 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. The student graders only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student’s folder in a permanent file.\(^{72}\)

The Supreme Court also addressed the meaning of “maintained” as it is used in the context of the statute generally:

FERPA, for example, requires educational institutions to “maintain a record, kept with the education records of each student.” § 1232g(b)(4)(A). This record must list those who have requested access to a student’s education records and their reasons for doing so. Ibid. The record of access “shall be available only to parents, [and] to the school official and his assistants who are responsible for the custody of such records.” Ibid.

Under the Court of Appeals’ broad interpretation of education records, every teacher would have an obligation to keep a separate record of access for each student’s assignments. Indeed, by that court’s logic, even students who grade their own papers would bear the burden of maintaining records of access until they turned in the assignments. We doubt Congress would have imposed such a weighty administrative burden on every teacher, and certainly it would not have extended the mandate to students.

Also FERPA requires “a record” of access for each pupil. This single record must be kept “with the education records.” This suggests Congress contemplated that *education records would be kept in one place with a single record of access*. By describing a “school official” and “his assistants” as the personnel responsible for

the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms.73

Like the assignments analyzed by the Supreme Court, some emails are not currently “maintained” by school districts.74 In S.A. v. Tulare County Office of Educ., the court was asked to determine whether emails that were not stored or included in the student’s file were “maintained” by the district. The court explained that they are not:

Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student’s assertion—that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained “in the same way the registrar maintains a student’s folder in a permanent file”—is “fanciful.” Owasso, 534 U.S. at 433. Like individual assignments that are handled by many student graders, emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places. As the Court set forth above, “Congress contemplated that education records would be kept in one place with a single record of access.” Id. at 434 (emphasis added). Thus, California DOE’s position that emails that are printed and placed in Student’s file are “maintained” is accordant with the case law interpreting the meaning of FERPA and the IDEA. Id. (“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.”).75

Relying upon the Supreme Court’s ruling in Owasso, a federal district court held that schools are not required to provide school employees’ emails referencing students, as they are not educational records.76

Make no mistake that parents do have a right to review documents that are educational records. In Jaccari J. v. Bd. of Educ. of the City of Chicago Dist. 299, the court’s decision did not stand for the proposition that parents are not entitled to documents that are educational records;

73 Id. at 434-45 (emphasis added).
75 Id. at *7.
instead, it merely reiterates that parents have a right to review documents that are educational records.\textsuperscript{77} In \textit{Jaccari}, the parents requested that the court order the district to provide all records regarding the use of physical restraints on the student; the district, which had provided only some of those records, opposed the motion by arguing that any such information would be duplicative or irrelevant where witnesses already testified as to what occurred. The court granted the parent’s request. It did not do so simply because the documents referred to the student; instead, it ordered the district to provide the documents because they were “educational records” by definition where they both contained information directly related to a student and were maintained by the district within the meaning of 20 U.S.C. § 1232g(a)(4)(A).\textsuperscript{78}

Consequently, if the records are not kept in the student’s file, then they would not be educational records. Caution however, that the reach of a discovery request could seek to disclose the documents whether they are educational records or not.

\textbf{VI. UNITED STATES DEPARTMENT OF EDUCATION FEEDBACK}

While some of the U.S. Department of Education’s letters on these topics are dated, the Department has issued more recent “best practices” guidance relevant to both email and video. The letters generally address when a videotape is an “education record” under FERPA, and how a school may release those records to parents for inspection and review.

\textit{Letter re: Magnolia Independent School District} (2006) addresses when the Department considers a videotape to be an “education record” under FERPA. A videotape is not an education record simply because it contains personally identifiable information. Rather, as with other types of records, videotapes must contain information that is “directly related to” the student. For example, the Department does not consider a videotape of a routine school bus ride to be an

\textsuperscript{77} \textit{Jaccari J. v. Bd. of Educ. of the City of Chicago Dist.} 299, 42 IDELR 280 (N.D. Ill. 2009).
\textsuperscript{78} \textit{Id.}
education record: although students can be personally identified by the video images, the videotape is not “directly related” to any particular student. If, however, one student assaults another during that bus ride, then that part of the videotape would be considered an education record directly related to those two students.

Letter re: Berkeley County School District (2004) responded to a parent seeking access to a videotape of an altercation between their son and a police officer. The Department interpreted FERPA to mean that if education records contained information on more than one student, the requesting parent had a right to inspect and review only the information directly related to his or her child. This interpretation of FERPA meant, for example, that the parent could not have access if the videotape also contained footage of a second student fighting.

This guidance was superseded by Letter re: Pleasant Grove High School (2006). Pleasant Grove involved the education record of an altercation between two students. The record contained information directly related to both students that could not be separated easily while remaining intelligible to a parent. The Department evolved its interpretation of FERPA to suggest that in these circumstances, every parent would have a right to inspect and review the information. FERPA would not, however, permit schools to provide a copy of the record to any parent without written consent from the other parents.

While these letters are dated, the Department has issued more recent best practices guidance that touches on these issues. For example, the 2014 guidance “Protecting Student Privacy While Using Online Educational Services” addresses both FERPA compliance and privacy best practices to help schools evaluate the use of online educational services. Additional guidance on identity authentication, and a checklist for data security provide additional helpful information.
• **Protecting Student Privacy While Using Online Educational Services**
  Link: [http://ptac.ed.gov/sites/default/files/Student Privacy and Online Educational Services (February 2014).pdf](http://ptac.ed.gov/sites/default/files/Student Privacy and Online Educational Services (February 2014).pdf)

• **Identity Authentication Best Practices**

• **Checklist: Data Security**

Additional resources can be found at [http://ptac.ed.gov/toolkit](http://ptac.ed.gov/toolkit).

Finally, it should be noted that FERPA is not the only statute that the Department administers relevant to these topics. The Individuals with Disabilities Education Act (IDEA) allows parents to elect to receive prior written notices, procedural safeguard notices, and due process complaint notices by electronic mail, if the agency makes that option available. 34 C.F.R. § 300.505. The Department has stated that States may “permit the use of electronic mail to distribute IEPs, and related documents, such as progress reports, to parents provided the parents and the school district agree to use the electronic mail option, and the States take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process.” *Letter re: Maine Department of Education* (2014).

**VII. CONCLUSION**

Any school district contemplating the use of surveillance cameras in its special education classrooms would benefit from (1) reviewing TASH’s concerns, (2) addressing in advance the issues that have been presented herein, and (3) preparing for the logistics that operating a surveillance system will incur. Careful attention to developing sound and robust school board policies will serve the district well in its implementation of a surveillance system and in responding to requests for disclosure of the recorded material. The policies should address the notice to the public of the recording, maintenance of the equipment, retention of the videotapes, access to and
use of the video cameras, areas of the classroom/school building that are/are not recorded, the
review process for the videotapes (including who and how often the review will take place), and
the disclosure policies and protection of recorded information. Clarity of the policies to garner the
public’s trust in the surveillance procedures is essential. Ultimately, the goal is for a school/school
district to have trust as the foundational bedrock of the community, which, in a positive and ironic
twist, would eliminate the need for surveillance systems altogether.

With respect to emails, public schools may need to clarify whether emails are “maintained”
as educational records. The National School Boards Association has written to Congress urging a
review of FERPA based on advances in technology. Until the FERPA reauthorization is complete,
schools will need to pay attention to the affirmative retention of emails and what result that creates
for a records request.

Remember, in our public education world, Big Brother is always watching!