



Student Privacy, Technology, and the FERPA Framework

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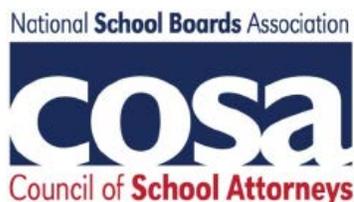
Top ~~Ten~~ Eleven FERPA Questions -- Asked and (Hopefully) Answered

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For the 2014 School Law Seminar (April 3-5, 2014)

Updated by: Mary Kay Klimesh, Seyfarth Shaw LLP, Chicago, Illinois
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“Student Privacy, Technology, and the FERPA Framework”
Presented by: Kathleen M. Styles, Chief Privacy Officer
at the U.S. Department of Education
Moderated by: Mary Kay Klimesh, Seyfarth Shaw LLP, Chicago, Illinois

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Abstract: This presentation paper discusses challenging situations school districts typically face regarding access to student records, maintaining compliance with FERPA, and advising school districts to avoid liability. It was originally authored by Thomas E. Myers for the 2014 School Law Seminar. It has been updated, with permission of Mr. Myers, to share as a presentation paper to support the General Session Presentation at the 2017 School Law Practice Seminar entitled “Student Privacy, Technology, and the FERPA Framework” presented by Kathleen M. Styles, Chief Privacy Officer at the U.S. Department of Education and moderated by Mary Kay Klimesh, a school law practitioner.

Your Top ~~Ten~~ Eleven FERPA Questions - Asked and (Hopefully) Answered

Thomas E. Myers, Brackett & Ellis, P. C., Fort Worth, Texas

Updated for the 2017 School Law Practice Seminar (October 19-21, 2017)

General Session Program: “Student Privacy, Technology, and the FERPA Framework”

presented by Kathleen M. Styles, Chief Privacy Officer at the U.S. Department of Education

and moderated by Mary Kay Klimesh, Seyfarth Shaw LLP, Chicago, Illinois

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For attorneys who practice school law, one of the big questions that they will encounter on almost a daily basis involves the Family Educational Rights and Privacy Act, commonly known as FERPA, 20 U.S.C. § 1232g, and its accompanying regulations, 34 C.F.R. pt. 99. While FERPA serves the laudatory purpose of protecting the privacy of student records, it is intricate enough that numerous questions arise for school districts and the attorneys who advise them. The “Top Ten” questions and answers originally authored by Thomas E. Myers, Brackett & Ellis, Fort Worth, Texas has been updated and the list of “Top Ten” questions and answers has been expanded to include an additional topic addressing student privacy and the use of online educational services and integrated data systems. The list of top FERPA legal issues will likely continue to evolve over time. Presently, for the October 2017 School Law Practice Seminar, the presentation paper includes those “Top Ten FERPA Questions” that Mr. Myers thoughtfully and thoroughly discussed in his 2014 presentation paper, and updates responses, as applicable, with recent case law, agency opinions, and/or analysis. The paper is also updated to include relevant information provided by the U.S. Department of Education relating to the protection of student privacy when schools use online data management systems and educational services. The update therefore adds a question and answer -- thus the title is now: “Your Top ~~Ten~~ Eleven FERPA Questions -- Asked and (Hopefully) Answered.” Many of these questions continue to be discussed repeatedly on the Council of School Attorneys eGroup; apparently, these questions continue to be raised with many of us. So, here we go again (as updated)

1. What Can the School Disclose From Videos (Including Bus Videos And Hallway Monitor Videos)?

Even when we do not like an answer, a clear answer is helpful. For many years, the Family Policy Compliance Office (FPCO), the division of the U.S. Department of Education that administers FERPA, had applied the strict wording of 20 USC § 1232g(a)(1)(A), which says, in part:

If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.

FPCO also relied on 34 C.F.R. § 99.12(a), which states that “[i]f 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.”

FPCO followed this literal language in its *Letter of Technical Assistance to School District re: Disclosure of education records containing information on multiple students (10/31/03)* (which did not specifically refer to videos) and *Letter re: Berkley School District, 7 FERPA Answer Book 40, 104 LRP Publications 44490 (Feb. 10, 2004)* (which did specifically involve videos).¹

Accordingly, school attorneys for years informed their clients that if two students got into a fight which was caught on a school video, neither of the parents of the two students had a right to inspect the video, at least unless the video could be digitally altered or redacted in some way so that the identity of the other student was not disclosed.

Some courts did not agree with that interpretation. In *Rome City School District v. Grifasi*, 806 N.Y.S. 2d 381 (N.Y. Sup. Ct. 2005), the court determined FERPA did not apply to videotapes which were recorded to maintain the physical security and safety of a school building and which did not pertain to the educational performance of the students captured on the tape. Likewise, in *Lindeman v. Kilso School District*, 172 P.3d 329 (Wash. 2007), that court agreed that videotapes were not student records, but were surveillance tapes.

In 2006, FPCO began to reconsider its position regarding videotapes. In two Texas Attorney General opinions, OR 2006-00484, 2006 WL 208275 (Tex. Att’y Gen. Jan. 13, 2006) and OR 2006-07701, 2006 WL 2140988 (Tex. Att’y Gen. July 18, 2006), the Attorney General noted, without citation to any FPCO opinion letter or guidance, that FPCO had determined that videotapes which captured two students in an altercation in front of other student witnesses did not constitute education records of the students who did not participate in the altercation, but did constitute education records of the students involved in the altercation. The Attorney General went on to say that the students involved in the altercation were directly related to each other because of the altercation and that parents requesting a right of access to the video were entitled to such access. Shortly thereafter, FPCO provided an informal letter to Ron Harder,

¹ It should be noted that although the 2003 letter is found on the FPCO website at “Online Library”, no reference to the 2004 letter to the Berkley School District can be found on the website, including the new “Protecting Student Privacy” site, which combines resources from FPCO and the Privacy Technical Assistance Center, <https://studentprivacy.ed.gov/>. The difficulty in finding all relevant opinion letters compounds the difficulties encountered by school attorneys when conducting FERPA research. Please contact the author for any documents referenced in this article that cannot be accessed online.

Policy Service and Advocacy Director, Arkansas School Board Association, May 2007, which provided such advice.

It appears that FPCO's current position is that where a video (or other picture image) of one or more students is taken, the video is "directly related" to and thus the "education record" of the student or students who are the focus of the video (such as two students in an altercation). Therefore, students (or their parents) who are the "focus" of the video may view the video since it is their "education record." If multiple students are the "focus" of the video, all students and their parents may view the video, although the school may not give copies of the video to any of the parents without the consent of the other students' parents. The video would not be a FERPA-protected education record for those students who are "set dressing" (walking down the hall, sitting on the bus, eating lunch, etc.), and not the focus of the video. However, if the school uses the video to find witnesses to the altercation, and the students are named or used as witnesses, the video is the witnessing student's education record also. Schools will be initially required to make a determination as to whether or not video images of students are "directly related" to those students.

What if the video is of a school sporting event or school choir/band performance? The video is not the education record of the audience members, unless some of the students commit some act (like fighting) that would make the video an education record. The video is probably an education record of the players or performers. (Did they sign a consent or release form when they signed up for the class, or return their FERPA "opt out" forms?) Such videos would routinely be released or broadcast, but few would consider those FERPA-protected education records that could not be shown without getting consent from all participants or their parents.

FPCO's informal position is applicable in cases where video footage is "maintained" by the school, since the definition of "education records" applies to those records that are "maintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. If the cameras which capture the video image of students do not belong to the school or by a party acting on the behalf of the school, FERPA may not be applicable to the footage. It also will not apply if the video cameras and footage are operated or maintained by a school's "law enforcement unit." (See discussion of "law enforcement unit" in Section 3 below.)

The "answer" to this question has primarily dealt with a school's disclosure to parents or students. However, other parties, such as law enforcement agencies, may also wish to obtain such footage. That situation will be addressed in Section 3.

FPCO has stated that updated formal guidance will be released on school video records under FERPA in the future. Since no official guidance has yet been released, this informal position could change. While awaiting final guidance, questions concerning FPCO's current interpretation can (should?) be directed to FPCO for its answers.

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 1

FPCO has not issued updated formal guidance since April, 2014. The issue of whether surveillance videos are subject to FERPA continues to be an issue confronted by schools and has been addressed in court decisions since 2014. The cases discussed below illustrate the complexities of the issues presented when surveillance videos are requested by parents, through a State's Freedom of Information Act, or through discovery. Of significance to the analysis are the obligations a school district may have if a surveillance video is deemed to be subject to FERPA; and alternatively, the legal issues presented when analyzing for

potential disclosure obligations under a State's Freedom of Information Act (FOIA) or discovery rules. It is possible, for some school districts and their attorneys, that applicable State law may provide some helpful guidance on the issue of whether video surveillance tapes are subject to disclosure as "education records." For example, in Illinois, the State's administrative procedures implementing the Illinois School Student Records Act specifically exempts "video or other electronic recordings created and maintained by law enforcement professionals working in the school or for security or safety reasons or purposes, provided the information was created at least in part for law enforcement or security or safety reasons or purposes." See Ill. Admin. Code tit. 23 § 375.10. Consistent with FPCO's position discussed above, the Illinois regulations further provide:

The content of a video or other electronic recording may become part of a student's school student record to the extent school officials use and maintain this content for a particular reason (e.g., disciplinary action, compliance with a student's Individualized Education Program) regarding that specific student. Video or other electronic recordings that become part of a student's school record shall not be a public record and shall be released only in conformance with Section 6(a) of the Act and the federal Family Educational Rights and Privacy Act.

Id.

In *Bryner v. Canyons School Dist.*, 2015 UT 131, 351 P.3d 852 (Utah App. 2015), a student was involved in an altercation with other students outside of a classroom and a surveillance camera recorded the incident. The student's parent filed a request under the State's Government Records Access and Management Act (GRAMA) for a copy of the video. The school district declined to produce the video under GRAMA, informing the parent that the video was subject to FERPA and that it would only release the video if and when it obtained the consent from all other parents of the other students shown in the video. After the school district denied parent's reconsideration request for the video, the parent filed a lawsuit asserting entitlement to the video under GRAMA and a court ruling that the video was not covered by FERPA. The parent further asserted that if the court found that the video did contain personally identifiable student information of other students that the court "should order the redaction or blurring [of] the faces . . . and full disclosure with those 'reactions.'" *Bryner*, 351 P.2d at 855. The trial court found that the video was a student record, but after further briefing, ordered the parent's request for a redacted video, redaction costs of which were to be paid by the parent. The Utah Court of Appeals affirmed, holding that the video was a student record since it contained personally identifiable information of students and was maintained by the district. The court acknowledged that the parent had the right to "inspect and review" the part of the video relating to his child, but he did not "have the right to inspect and review" the part of the Video in which other students are pictured." *Id.* In its decision, the Court of Appeals acknowledged FPCO's guidance that "a parent may only inspect a school videotape showing his or her own child engaged in misbehavior if no other students are pictured" and FPCO's other guidance "suggest[ing] that video recordings may constitute education records only for those students who are 'directly related' to the focus of subject of the video." *Bryner*, 351 P.2d at 858. Noting that since the parent could only receive a copy of the video if it was redacted and that the school district could charge a reasonable fee for the redaction process, the Court of Appeals upheld the trial court's ruling ordering the District to produce a redacted copy of the video with redaction costs paid by the parent.

Goldberg v. Regional School Dist. #18, No. KNLCV146020037S, 2014 WL 6476823, 59 Conn. L. Rept. 232 (2014) (unpub.), came before the Superior Court of Connecticut on the parents' petition for a bill of discovery to obtain copies of school district videotapes. The parents alleged that the videos of activities on the school district's school bus would show bullying of their child and would assist them in identifying those responsible for the bullying behavior. This case also illustrates the interplay between a State's FOIA and FERPA, and the potential for parties to bring equitable proceedings in their pursuit of access to school

videos. In *Goldberg*, the court denied the school district's motion to dismiss the petition for a bill of discovery, which was based on its assertion that petitioners should have exhausted administrative remedies under the state's Freedom of Information Act. Petitioners, held the court, were not required to exhaust administrative remedies under the State's FOIA for four reasons, one of which was that the State's FOIA excepted education records from disclosure. Citing to FERPA's definition of education record, the court held that the "videos are, as respondent claims, 'education records' within the meaning of FERPA." *Goldberg*, 2014 WL 6476823, at *4. The *Goldberg* court articulated the issues presented as follows:

[W]hat appears to be going on in this case is that, because of FERPA, the respondent cannot acquiesce to---must oppose---requests of the present nature. The respondent is, in law and reason, bound to withhold education records, including the videos, until the requirements of 20 U.S.C. § 1232g(b)(2)(B) have been met. Because the petitioners challenge that withholding and pursue the records the petitioners must bring a petition such as this for a "judicial order" of disclosure, upon which FERPA permits disclosure without risk to respondent's federal funding or other sanctions, provided the affected "parents and the students are notified in advance of the compliance therewith." 20 U.S.C. § 1232g(b)(2)(B); see 34 C.F.R. §99.31(a)(9).

Goldberg, 2014 WL 6476823, at *7.

In *Jacobson v. Ithaca City School Dist.*, 53 Misc.3d 1091, 39 N.Y.S.3d 904, 336 Ed. Law Rep. 1070 (2016), a New York trial court court addressed the issue of whether the videos of a speaker who appeared before third graders was subject to disclosure under the State's Freedom of Information Law (FOIL). The videos were requested pursuant to FOIL and the school district responded by asserting that the videos were exempt from disclosure by federal law, namely FERPA. The court held that the videos were not subject to FERPA, noting that the school district "had not alleged that the video recordings are related in any way to the educational performance of the students depicted, nor that the copies of the video recordings are maintained with, referenced in, or indexed to, any individual student files maintained by the central registrar or custodian of student records." *Jacobson*, 53 Misc.3d at 1094. Furthermore, the court noted that the school district had produced a redacted transcript of the videos. *Id.* In the case, the journalist had consented to the redaction of the video recordings to protect the identity of the students involved. Even though the court determined that FERPA did not apply to protect disclosure of the videos, it found "the redaction is necessary and appropriate in this case, regardless of the applicability of FERPA, to protect the identities of the students involved in the event." *Jacobson*, 53 Misc.3d at 1095.

These recent cases illustrate that the videos-as- education records issue remains a "top question" under FERPA. As schools continue to use recording technology, school attorneys will continue to be presented with questions about when FERPA applies to recordings, and when and how they can be disclosed. Manna, Morris, Smith and Styles presented this topic at the 2016 School Law Seminar. Their paper, "Is Big Brother (Really) Watching? Evolving Legal Standards Regarding Video/Email Use in Schools" provides additional guidance on this topic.²

² Andrew Manna, Michele Morris, Deb Smith, and Kathleen Styles, Presentation at National School Boards Association 2016 School Law Seminar, Is Big Brother (Really) Watching? Evolving Legal Standards Regarding Video/Email Use in Schools (April 2016) available to COSA members at <https://www.nsba.org/big-brother-really-watching-evolving-legal-standards-regarding-videoemail-use-schools>.

2. Are E-Mails Protected Education Records Under FERPA?

FERPA's expansive definitions of "education records" and "record" potentially could draw in almost any document in any type of media. " 'Record' means any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3. As long as the records are "directly related to a student and ... are maintained by an educational agency or institution or a party acting for the agency or institution," 34 C.F.R. § 99.3, the document would be covered by FERPA. Accordingly, there is nothing about the medium of e-mail that would exempt it from FERPA coverage. However, a particular dispute concerning e-mails may be whether or not such e-mails are "maintained" by an educational agency or institution. In *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002), the Supreme Court discussed maintenance of education records and stated: "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." *Owasso*, 534 U.S. at 433. If indeed the meaning of the word "maintain" is that limited, there could be a substantial question as to whether or not schools maintain e-mails to the degree that they are covered under FERPA.

There are, of course, conflicting court decisions on this question. In *S.A. v. Tulare Cnty. Office of Educ.*, 2009 WL 3296653, 2009 U.S. Dist. LEXIS 88007 (E.D. Cal. Sept. 24, 2009), the court held that the school district did not "maintain" e-mails sought by parents unless they were printed out and placed in a student's permanent file. Relying on the *Owasso* decision, the court noted that e-mails, like assignments passing through the hands of students, have a fleeting nature and can be sent, received, read, and deleted easily. Because there was no maintenance of all e-mails on a central district server (or at least no evidence of such maintenance), the school district had not violated FERPA by failing to produce all e-mails which might name the student. In contrast, in *State ex rel. ESPN, Inc. v. Ohio State University*, 970 N.E.2d 939 (Ohio 2012), the Ohio Supreme Court found that the school's e-mails were protected by FERPA if they contained information directly related to a student and were maintained by the university. Ohio State retained all e-mails sent by its staff on a central server. Once a staff person sent an e-mail, it could not be deleted. It also maintained all e-mails in two secure files. Therefore, the Ohio State e-mails were protected by FERPA, although the university was required to provide access to the e-mails after redaction of personally identifiable information.

Such conflicting decisions, without any guidance from your state's controlling courts, leave schools with some options for how they treat e-mails. Whichever option(s) a school chooses, the school must comply with state law, which may have retention requirements separate and apart from FERPA. If a school "maintains" all e-mails, its records are covered by FERPA, and schools must comply with its administrative requirements. If the school does not maintain such e-mails, the documents, even if retrievable from a school's computer system, may have lost the protections of FERPA and production may be required under other laws.³ It is doubtful FPCO would agree with that position if asked.

Until further guidance is available from FPCO or the courts, it is best to realize that e-mails are not categorically excluded under the definition of "records" under FERPA, but such records must still be directly related to a student and maintained by the school in order to be covered under FERPA.

³ For a very thorough analysis of these options, see Lawrence J. Altman, "Do Parents Have the Right to Access Staff Emails Under FERPA? It Depends," *Inquiry and Analysis* (NSBA/COSA Oct. 2012).

One additional resource in the e-mail question which makes for interesting reading is Letter to Anonymous, 113 LRP 35711, 16 FAB 41 (FPCO 06/11/13). FPCO was asked to review an allegation of a FERPA violation raised by a school board member. During a Board meeting, Board Member No. 1 (the alleged violator) made comments to a fellow Board Member No. 2 (the complainant) during the open session of a Board meeting. Board Member No. 1 made a comment concerning Board Member No. 2's e-mails to Board Member No. 1 when Board Member No. 2's son was a student in Board Member No. 1's class. (Apparently Board Member No. 2 was a teacher at the time of the alleged conduct, and was a Board member at the time of the alleged FERPA violation). Violator said " ... and [you] when your son, [] was in my class you wrote a very negative e-mail about [] situation on the bike trip because there were no bathrooms for him."

The Complainant took offense to this comment and complained to FPCO about this alleged violation of FERPA. However, FPCO stated that if a school official disclosed information that was a result of the official's personal knowledge or observation, such information was not protected under FERPA. Accordingly, FPCO would not take further action on the complaint. We suppose that FPCO could not determine if the stated information came from personal knowledge or from the e-mail. However, since we are not sure yet if e-mails are protected by FERPA, this interesting letter might be used to argue that the e-mail was not an education record.

It is worth remembering that FERPA is intended to prohibit the unauthorized disclosure of personally identifiable information from education records. This principle will apply without regard to the format of the record. If your school is communicating about students through e-mail or any other form of electronic media, appropriate care must be taken not to make an unauthorized disclosure of such information. If e-mails are maintained in a central server, there is little question that they are being "maintained" by the school, and that the school must protect against unauthorized disclosures. If e-mails are printed out and placed in a student file, FERPA's protection and regulations will apply. If the school chooses not to maintain its e-mails in a centralized database, it must still be concerned with the disclosure, or deletion, of important educational information about students without supervision, limitation, or control.

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 2

The issue of whether an email regarding a student is an "education record" within the meaning of FERPA was recently presented by Manna, Morris, Smith and Styles at the 2016 School Law Seminar. Their paper, "Is Big Brother (Really) Watching? Evolving Legal Standards Regarding Video/Email Use in Schools" provides guidance on this topic and discusses a May, 2015 Indiana Department of Education letter from its Office of Special Education indicating that emails do not meet the definition of student record under FERPA and a May, 2014 Nevada Education Department decision found at *Washoe County Sch. Dist.*, 114 LRP 25728 (SEA NV May 23, 2014) which found that emails not printed or stored in a student's permanent file are not considered "maintained" by FERPA's definition.⁴

⁴Andrew Manna, Michele Morris, Deb Smith, and Kathleen Styles, Presentation at National School Boards Association 2016 School Law Seminar, *Is Big Brother (Really) Watching? Evolving Legal Standards Regarding Video/Email Use in Schools* (April 2016) available to COSA members at <https://www.nsba.org/big-brother-really-watching-evolving-legal-standards-regarding-videoemail-use-schools>.

3. What Can the School Give When Police (SROs, School Law Enforcement Units, Outside Law Enforcement Agencies, Child Protective Entities) Ask for Student Records?

One of the most frequent, and most confusing, FERPA questions encountered by schools is what information can be provided to law enforcement officials when they seek information on students and student records. Schools always want to be cooperative with law enforcement when possible. Schools want to develop and build strong relationships with law enforcement, not only to help their communities but to obtain assistance from law enforcement agencies when necessary. The issue of what FERPA allows or restricts schools from giving to law enforcement is therefore a question that requires advanced thought, careful planning, and careful implementation. Several sub-questions are included in this question for easier discussion.

Child Welfare Agencies or Tribal Organizations

In January 2013, Congress passed the “Uninterrupted Scholars Act” (“USA”) which amended FERPA to permit educational agencies and institutions to disclose education records of students in foster care to state and county social service agencies or child welfare agencies. Tribal organizations are also included, as defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450b). Further information links on this subject can be found under the “Hot Topics” link on the FPCO homepage. Further guidance from FPCO is anticipated at some point.

Child Protective Services Agencies

The Child Abuse Prevention and Treatment Act (“CAPTA”) was enacted in 1974. CAPTA provides that a state must meet certain requirements if the state is to receive a grant for child abuse prevention or treatment programs. Under this program, a state must have in effect a state law providing for the reporting of known or suspected instances of child abuse and neglect. 42 U.S.C. § 5106a(b)(1)(A). FERPA generally prohibits a school from releasing education records or personally identifiable information from those records without the consent of the parent, yet CAPTA and state laws enacted pursuant to it require that school employees notify the proper authorities when they know or have cause to suspect that a child has been or is likely to be abused or neglected.

A conflict exists between those two federal statutes. Numerous inquiries were made to FPCO concerning this conflict. In a number of letter opinions, FPCO has determined that CAPTA prevails to the extent that it requires reporting by school authorities of such known or suspected abuse, even if such reporting requires a disclosure of education records. Four FPCO guidance letters of note in this regard are *Letter to Mr. Steven J. Sibner*, March 14, 1994; *Letter to Ms. Stacy Ferguson*, October 10, 1997; *Letter to University of New Mexico re Applicability of FERPA to Health and Other State Reporting Requirements*, November 29, 2004 (available on the FPCO “Online Library”); and *Letter to Ms. Barbara Jondahl, Minnesota Department of Children, Families, and Learning*, November 21, 2006. These letters from FPCO have concluded that CAPTA prevails over FERPA if the two are in conflict. However, they also note that there are still some portions of FERPA which are applicable to such reporting. First, all agree that the health or safety emergency exception is not generally an acceptable basis for reporting known or suspected child abuse. While in some cases a clear health or safety emergency may exist which would justify a report, that does not provide a blanket authorization under FERPA for always reporting. Second, there remains an issue concerning requests for access to child abuse reports which are contained in the education records of the school. The *Sibner* and *Ferguson* letters address the school’s obligation to comply with FERPA when a request for such records is made by parents. Although the parents might have a right

to review such records under FERPA, redaction is appropriate if necessary to maintain the confidentiality of the party who reported child abuse to authorities, since the identity of the reporting individual is confidential under state laws enacted pursuant to CAPTA. HOWEVER, be sure that any redaction or withholding of such records also complies with your state's open records laws. Despite an earlier opinion saying FERPA materials should not be submitted to him for review, two Texas Attorney General opinions (OR 2001-0194 and OR 2012-13951) have addressed issues relating to the proper redaction or withholding of such records. If the requestor is a non-parent, withholding of all such records under FERPA and state open records laws may be appropriate. If the requestor is a parent, and the parent has not been named as a suspect, redactions under state laws governing confidentiality of materials in a child abuse report may require submission to the Attorney General for pre-approval to make redactions or withhold documents.

Police/SROs/School Law Enforcement Units/School Security Officers

Generally, law enforcement agencies unconnected to the school (other than Child Protective Services or similar agencies discussed above) have no authority under FERPA to receive student records. FERPA provides no automatic exception to law enforcement agencies and, as a federal law, would preempt state laws which require schools to give all education records to police. Schools can obviously provide student information to police with consent or if any of the exceptions provided in 34 C.F.R. § 99.31 apply to the request. If directory information is all that has been requested, assuming that the school has properly designated certain items as directory information and that the parents or the eligible student have not opted out of the disclosure of such directory information, the school can comply with the request. If there is a health or safety emergency (as discussed in the next section) such records can be released although there are many restrictions on such releases of information.

Perhaps the most important exception is the subpoena or court order exception found in 34 C.F.R. § 99.31(a)(9). However, it has been our experience that law enforcement agencies do not like to be told that records cannot be released without a subpoena, court order, or search warrant. Some agencies do not believe they should have to get such subpoenas or warrants, believe that a school is stonewalling police efforts or obstructing justice, have never heard of or do not understand what FERPA is or requires, and become upset with schools that refuse to comply with their requests. Whenever possible, it would be best for school officials to proactively meet with law enforcement agencies within their jurisdictions to plan ahead on how schools can attempt to cooperate with police during police investigations, so that police will understand the school's desire to cooperate yet remain in compliance with federal laws. Some police agencies are obviously more willing to cooperate and are more understanding than others. However, it should be the school's goal to not create an antagonistic relationship that will result in harsh enforcement of any subpoena or warrant that the police agency does obtain.

Although there is little legal precedent on this issue, one recent example is an opinion from the Attorney General for the Commonwealth of Virginia, May 3, 2013, to the Honorable Kenneth L. Alger, II, the Commonwealth's Attorney for Page County, Luray, Virginia. In that opinion, the Attorney General upheld the school superintendent's actions in relying upon FERPA to deny access to a law enforcement officer's request for a student's records. FPCO has also provided helpful guidance on this topic. (See *"Balancing Student Privacy and School Safety,"* FPCO Guidance (Oct. 2007); *A Guide to The Family Educational Rights and Privacy Act for Elementary and Secondary Schools;* *Letter to Montgomery County, Public Schools (MD) re: Law Enforcement Unit Records, (2/15/06);* and *Letter to Dr. Jene Watkins, Indian Creek Local School District, Wintersville, Ohio, Feb. 21, 2008,* which responds to a complaint raised to the

FPCO concerning an alleged FERPA violation for delivery of student information to law enforcement officers).

The Watkins letter contains FPCO findings in response to a complaint from a parent in the Indian Creek Local School District that the school had violated FERPA when it disclosed personally identifiable information from a student's education records to a school resource officer ("SRO"), who then re-disclosed the information to the student's parents and the county's prosecuting attorney. Although the school attempted to justify this disclosure by claiming that the SRO was a "school official" or "law enforcement unit", FPCO did not find in that case a sufficient relationship to have authorized the release. FPCO went on to find that even if the SRO had qualified as a school official or law enforcement unit, he would not have been entitled to re-disclose the education records he had received from the school. Therefore, FPCO, in order to close its investigation, required the district, within four weeks of the opinion letter, to provide documentation that the district had procedures in place to ensure that SROs and other non-employees of the district did not obtain access to education records without parental consent unless they qualified as "school officials" and unless the district could show that it had direct control over those contractors in accordance with the FERPA requirements. Since the issuance of that letter, the U.S. Department of Education issued regulations codifying the 2008 FERPA Amendments (73 Fed. Reg. 74,806, 74,813 (Dec. 9, 2008) (final rule)) that provided guidance on "outsourcing" of institutional services and functions, including security services under FERPA's "school official" exception in 34 C.F.R. § 99.31(a)(1).

A. *SRO abilities to review education records are limited, even as "school officials."*

In some situations, an SRO may be considered a "school official" with a "legitimate educational interest," if certain conditions are met. If a school does not have a law enforcement unit (or a school official such as a vice principal who is designated as a law enforcement unit official), then FERPA permits schools to outsource the function of providing school security to an outside party, such as an SRO or off-duty police officer. However, the outside party to whom the school has outsourced the institutional function or service may be considered a school official under 34 C.F.R. § 99.31(a)(1)(i)(B) only if that party:

1. Performs an institutional service or function for which the agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
3. Is subject to the requirements in 34 C.F.R. § 99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

Additionally, the outside party must also meet the criteria specified in the school or school district's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.⁵

⁵ FPCO has a model notification on its website that provides sample language for who is considered a school official and what is considered a legitimate educational interest. The model language notes that a school official has a "legitimate educational interest" if the official needs to review an education record in order to fulfill his or her professional responsibility. This is a general suggestion and schools may make more specific criteria should they wish.

If an SRO is designated as a “school official,” (and that designation, if made, must also be made in the school’s annual FERPA notification so that parents will know that SROs have access to their children’s education records), the SRO’s ability to review student records is still limited to whether or not they have a “legitimate educational interest” in the records. Therefore, if an SRO wishes to look at student records merely for external law enforcement purposes, the SRO will still be prevented by FERPA from reviewing student records.

FPCO issued *Letter to Montgomery County Public Schools (MD) re: Law Enforcement Unit Records (2/15/06)*, which addressed many of these issues (available on the FPCO “Online Library”). In that opinion, FPCO stated:

With regard to the MOU between the District and the Police Department, please note that an educational agency or institution may not disclose education records without prior written consent merely because it enters into a contract with an outside party. Rather, the agency or institution must be able to show that: 1) the outside party provides a service that the agency or institution would otherwise provide for itself using employees; 2) the outside party would have “legitimate educational interest” in the information disclosed if the service were performed by employees, for example, employed security staff; and 3) the outside party is an agent under the direct control of the educational agency or institution with respect to the use and maintenance of information from education records.

One common situation in which SROs would wish to review education records might arise in a student discipline issue. Discipline is a “legitimate educational interest.” However, most school discipline matters are resolved without the involvement of SROs. If the SRO is not involved in the student discipline matter as a “school official,” there would be no “legitimate educational interest” for the SRO to review the records. If instead the SRO has been designated as the school’s law enforcement unit official, as well as a school official with legitimate educational interest and needs to review student statements maintained as education records for law enforcement purposes, such as determining whether or not a student committed a crime on campus, the SRO could be provided access. However, the SRO is not authorized to re-disclose any personally identifiable information from students’ education records unless the disclosure meets an exception to FERPA’s general consent requirement.

If the school has designated the SRO as a “school official” with a “legitimate educational interest”, which allows the SRO to review student statements about an incident, such review does not allow the SRO to use those student records for any other purpose. FPCO expressly addresses this issue in the Montgomery County opinion letter. Below are relevant quotations from the opinion. (In these quotations, the SROs are called Educational Facility Officers (“EFOs”).

“We note that, in your letter, you stated that EFOs and the District’s security staff worked very closely in investigating a possible violation of criminal laws. Accordingly, should the District believe that in order for the District to carry out its law enforcement unit functions and responsibilities the EFOs must have access to students’ education records, the District could designate EFOs as “school officials” with a “legitimate educational interest.” However, EFOs may not disclose information they have obtained from students’ education records to the Police Department, unless the disclosure meets one of the exceptions to consent specified in § 99.31 of FERPA

“Again, please note that these law enforcement unit officials - whether part of the school system or an officer(s) under special arrangements with the school - are not permitted to disclose education records to local police authorities, unless a disclosure meets one of the exceptions in § 99.31 of the FERPA regulations

“Based on our understanding of the current status of the EFOs, they are not school officials with legitimate educational interest.

“... [E]ducation records that are shared with the school’s law enforcement unit do not lose their status as “education records” and must be protected as such in the possession of the law enforcement unit Accordingly, when a school’s law enforcement unit receives personally identifiable information from a student’s education records, that information must be protected under FERPA and not disclosed unless authorized by FERPA

“Further, under § 99.33(a) of the regulations, any party, including a “school official,” that receives education records may use the information only for the purposes for which the disclosure was made and may not re-disclose the information to any other party without prior written consent, except as authorized under § 99.33(b). Education records maintained by a party acting for or on behalf of an educational agency or institution, including record (sic) created by that party, are subject to all FERPA requirements.”

Under the rules laid out in this FPCO opinion, any education records which are shared with an SRO cannot be re-disclosed to other law enforcement officials. That is generally the very reason for which SROs seek to review student records – so that they can disclose them to the police department for purposes of making a criminal case. Therefore, they will still be restricted in what they can do with any student information they obtain. Schools should not designate SROs as “school officials” without an express understanding from the SROs and the police department that they will be so limited.

B. *What is a school “law enforcement unit?”*

Under FERPA and its implementing regulations, law enforcement unit records are not protected by FERPA from use and disclosure. Under 34 C.F.R. § 99.8(a)(1), a law enforcement unit means:

“any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to –

- (i) Enforce any local, State, 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
- (ii) Maintain the physical security and safety of the agency or institution.”

A law enforcement unit is authorized to perform other, non-law enforcement functions for the educational agency or institution, including incidents that lead to disciplinary actions against students. Records that are created by a law enforcement unit for a law enforcement purpose and are maintained by the law enforcement unit are, therefore, not covered by FERPA. Most schools do not have their own police forces, and many or most have also not designated any other group of persons or entities as a “law

enforcement unit.” There is some question as to whether a school could legally designate a police department or SROs to be a “law enforcement unit” because they are not a “component” of the school under the definition above, but there is no definitive answer to that question. However, even if the school did so, the police would still have the legal limitations discussed above on their use of student records. It is doubtful an entire department would be designated, but an SRO might qualify if subject to the disclosure restrictions and the “outsourcing” requirements discussed above.

In the *Montgomery County* opinion, that school district employed approximately 180 school security staff and that group of employees was designated as its “law enforcement unit.” That unit also handled student discipline matters, as well as maintaining security. When those student discipline matters also constituted violations of law, the security staff wanted to share those student records with the Montgomery County Police Department or its EFOs. However, under this opinion, it could not share such student information with the police department.

Many, if not most, student discipline matters are handled by school administrators, and should not ordinarily need to involve the use of SROs. SROs can be called upon to perform any law enforcement duties which arise on a campus. If the SROs are performing a law enforcement purpose, their records are law enforcement records which are theirs to use as they see fit, and the records are not covered under FERPA. That was the position of FPCO in the *Montgomery County* opinion. Since their records are not covered by FERPA, it also means their records may be disclosable under some other law. (However, under some open records laws, they may be protected under the law enforcement or other exceptions.) If such records are not protected by FERPA, be aware that the records might be available to the press, other parents, or to a student’s or teacher’s attorney. Thus, if the school’s FERPA protections are lost, access to this information by the general public will likely be greater.

Further, under the *Montgomery County* opinion, FPCO stated that law enforcement officials may disclose a copy of their law enforcement records to a school official responsible for student discipline and the record would not lose its status as a law enforcement record. However, if a copy of the record is provided to the school, the school’s copy becomes an “education record” subject to FERPA. Therefore, any police records which the school obtains may be the school’s to use as a school record. If law enforcement officials take statements of students during their investigations and provide those to the school, the school’s copy will be protected for school purposes, but the police officer’s copy will retain its law enforcement purpose. However, the opposite is not true – school records which are given to law enforcement remain school records, and cannot be disclosed to others for law enforcement purposes.

Records requested by law enforcement agencies

When student statements are taken regarding student discipline issues, they are clearly “education records” covered by FERPA even if they reveal criminal conduct. However, if students give statements concerning criminal conduct for another purpose, such as in a school’s investigation of employee misconduct, the law is less certain. The definition of “education records” would seem to include such statements because there is no limitation of the subject or purpose for which the records were created. Courts in some states (Washington, Oregon, Missouri, Michigan, Ohio, New York) have found such records not to be covered by FERPA, but at least one state (Florida) found they were. One indication that Texas might find the statements to be protected by FERPA is a Texas Open Record Decision which held that handwritten statements by students created to evaluate teachers were excepted from production under an open records request, in part, because they were protected student records. Open Record Decision No. 224 (1979).

It can be argued that such records are not “education records” because they were not created or obtained for an educational purpose, are not kept or maintained with the student’s records, and were obtained solely for administrative purposes in connection with an investigation of possible employee misconduct. However, it is not certain that such an argument would be successful if legally challenged in all states. Although an argument can be made that such statements are not covered by FERPA, the legally safest course of action, at least in states without legal precedent to the contrary, is to consider such records as covered by FERPA and to not disclose them to law enforcement agencies unless one of the exceptions noted herein exists.

When police ask for access to student records, look carefully at what the records are and whether or not they qualify as “education records” under FERPA. In *Commonwealth v. Buccella*, 434 Mass. 473, 751 N.E.2d 373, 155 Ed. Law Rep 799 (2001), the court held that a student’s homework assignments and tests did not come within the definition of protected “school records” and that the student had no expectation of privacy in his handwriting. In *U.S. v. Bunnell*, 2002 WL 981457 (D. Me. 2002), a student accused of knowingly possessing child pornography attempted to exclude evidence which had allegedly been retrieved from the University of Maine’s computer network in violation of FERPA. The court found nothing to support the claim that it was a violation of FERPA or that the violation of FERPA would have justified exclusion of the evidence. (See also the related discussion of this topic under Question 5 below).

Video Recordings

As noted in Section 1 above, video evidence is often sought to assist law enforcement agencies in the enforcement of criminal laws. One question which has arisen is whether allowing law enforcement agencies to have access to “live feed” from school cameras would violate FERPA. Given the current guidance from FPCO about the use of video evidence, one theory is that such video would not amount to an education record unless and until some type of activity which became the subject of a school disciplinary issue occurred. At that point, the video might become an education record of the school related to the students shown in the video committing misconduct. If that video was an education record, it follows that FERPA might prohibit releasing the video to law enforcement agencies. However, if the agency has a “live feed,” there would be little or no way to prevent the unauthorized release. (There may be no such thing as a “live” feed – some delay in transmission is inherent in the transmission process and will occur.)

One possible solution, which was worked out to resolve some of these concerns, might be worth noting for some schools. A local police department asked a school for live access to their school security cameras. However, because the school is able to control the access, an agreement was worked out that the school would only provide access in the event of a health or safety emergency which was occurring at the school, so that police could become familiar with the conditions at the school before sending out their tactical forces. If your school has that technical capability, such a solution might provide the police with the safety and security information they need, while not compromising the students’ education records.

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 3

Disclosures to Child Welfare Agencies and Tribal Organizations

The Department of Education’s Family Compliance Office (FPCO) and Privacy Technical Assistance Center (PTAC) recently launched a Student Privacy website located at: <https://studentprivacy.ed.gov>. The website provides answers to frequently asked questions (FAQs) on FERPA, including with respect to child welfare agencies and tribal organizations:

Does FERPA permit schools to disclose a student's education records to the state or local Child Welfare Agency (CWA) or tribal organization?

There are exceptions to consent in FERPA that permit, but do not require, local educational agencies (LEAs) and schools to disclose personally identifiable information (PII) from education records under certain conditions without the written consent of the parent or eligible student. FERPA permits LEAs and schools to disclose education records of students placed in foster care, without consent of the parent or eligible student, to an agency caseworker or other representative of a state or local child welfare agency (CWA) or tribal organization authorized to access a student's case plan, when such agency or organization is legally responsible, in accordance with state or tribal law, for the care and protection of the student.

* * * * *

This exception to FERPA only applies to those children for whom the CWA or tribal organization is legally responsible, in accordance with state or tribal law, for the care and protection of a child in foster care placement. FERPA would not permit LEAs and schools and to disclose PII from education records to the CWA or tribal organization for children who are not in foster care placement, even if those children are receiving other services through the CWA or tribal organization (e.g., vocational and skill assessments, training, tutoring, educational services, family services, and community enrichment activities).

Does FERPA Permit Schools to Disclose a Student's Education Records to the State or Local Child Welfare Agency (CWA) or Tribal Organization?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa-permit-schools-disclose-student%E2%80%99s-education-records-state-or-local-child-welfare> (last visited August 18, 2017).

Must educational agencies and institutions record any disclosure of personally identifiable information (PII) from education records to the Child Welfare Agencies (CWAs) or tribal organization?

Yes. FERPA requires recordkeeping on requests for access to and disclosures of education records. See § 99.32. Thus, if a school discloses education records to the Child Welfare Agency (CWA) or tribal organization under this exception, the school must be compliant with the recordation requirements under FERPA and also must include: (1) the parties who have requested or received PII from the education records, and (2) the legitimate interests the parties had in requesting or obtaining the information. If an educational agency or institution discloses PII from education records with the understanding that further disclosures will be made, the educational agency's or institution's record of disclosure must include the names and legitimate interests of the additional parties.

Must Educational Agencies and Institutions Record Any Disclosure of Personally Identifiable Information (PII) from Education Records to the Child Welfare Agencies (CWAs) or Tribal Organization? U.S. Department of Education, <https://studentprivacy.ed.gov/faq/must-educational-agencies-and-institutions-record-any-disclosure-personally-identifiable> (last visited August 18, 2017).

Does FERPA require educational agencies and institutions to disclose personally identifiable information (PII) from education records to Child Welfare Agencies (CWAs) or tribal organizations whenever requested?

No. Under 20 U.S.C. § 1232g(b)(1)(L), FERPA permits, but does not require, LEAs and schools to disclose PII from the education records of a student who is in foster care placement to CWAs or tribal organizations. Further, under FERPA, an LEA or school may choose to disclose all or part of the education records it maintains on a student who is in foster care placement. We encourage LEAs and schools to disclose the information from education records that a child's welfare caseworker would need to effectively implement a child's case plan and to ensure the child's education needs are met.

Does FERPA Require Educational Agencies and Institutions to Disclose Personally Identifiable Information (PII) from Education Records to Child Welfare Agencies (CWAs) or Tribal Organizations Whenever Requested?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa-require-educational-agencies-and-institutions-disclose-personally-identifiable> (last visited August 18, 2017).

Would a Child Welfare Agency (CWA) or tribal organization be subject to FERPA's "five-year rule" if it improperly redisclosed personally identifiable information (PII) from education records?

Yes. FERPA requires that entities to which educational agencies and institutions disclose PII from education records protect that information from further disclosure. See § 99.33. Additionally, § 99.67(e) of the FERPA regulations provides that if the Family Policy Compliance Office (FPCO) determines that a third party outside the LEA or school improperly redisclosed PII from education records in violation of § 99.33 of the FERPA regulations, then the educational agency or institution may not provide that third party access to education records for a minimum period of five years. Thus, if FPCO determines that a CWA or tribal organization improperly redisclosed PII from the education records that it had received from the school or LEA, the school or LEA then would be banned from providing the CWA or tribal organization with access to education records for a minimum of five years.

Would a Child Welfare Agency (CWA) or Tribal Organization be Subject to FERPA's "Five-Year Rule" if it Improperly Redisclosed Personally Identifiable Information (PII) from Educational Records?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/would-child-welfare-agency-cwa-or-tribal-organization-be-subject-ferpa%E2%80%99s-%E2%80%9Cfive-year-rule%E2%80%9D-if-it> (last visited August 18, 2017).

Disclosures to Police/SROs/School Law Enforcement Units/School Security Officers

The Department's Student Privacy website FAQs confirm that SROs could be considered school officials under FERPA "if certain conditions are met:

FERPA (§ 99.31(a)(1)(i)(B)) permits schools to outsource institutional services or functions that involve the disclosure of education records to contractors, consultants, volunteers, or other third parties provided that the outside party:

1. Performs an institutional service or function for which the agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records;

3. Is subject to the requirements in § 99.33(a) that the personally identifiable information (PII) from education records may be used only for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of students, and governing the redisclosure of PII from education records; and
4. Meets the criteria specified in the school or local educational agency's (LEA's) annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.

When Can Law Enforcement Unit Officials Serve as "School Officials?", U.S. Department of Education, <https://studentprivacy.ed.gov/faq/when-can-law-enforcement-unit-officials-serve-%E2%80%9Cschool-officials%E2%80%9D> (last visited August 18, 2017). The FAQs also clarify, however, that SROs are not automatically considered school officials. They may only be considered "school officials" with "legitimate educational interests" if they meet the four criteria contained in FERPA at Section 99.31(a)(1)(i)(B) (and stated above). *See Are School Resource Officers (SROs) or Other Outside Local Law Enforcement Officials Who Serve as a School's Law Enforcement Unit Automatically Considered School Officials?*, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/are-school-resource-officers-sros-or-other-outside-local-law-enforcement-officials-who-serve> (last visited August 21, 2017). Additionally, in its FAQs, FPCO clearly explains that FERPA does not distinguish between SROs and other local police officers who work in a school. Its FAQ on this point states as follows:

Does FERPA distinguish between School Resource Officers (SROs) and other local police officers who work in a school?

No. An SRO typically serves as an on-site law enforcement officer and as a liaison with the local police or sheriff's department. An SRO also works with teachers and school administrators to promote school safety and to help ensure physical security. An SRO may be designated by the school as a "law enforcement unit" official under FERPA (§ 99.8). However, in order for a school to disclose personally identifiable information (PII) from education records to an SRO, the SRO must be considered a "school official" under FERPA in accordance with § 99.31(a)(1)(i)(B) concerning outsourcing. A school may only non-consensually disclose PII from students' education records to its law enforcement unit if those individuals in the law enforcement unit meet the requirements set forth in FERPA's school official exception or if some other FERPA exception to the general consent rule applies.

A school must have direct control over an SRO's maintenance and use of education records in providing SRO services in order for the SRO to be considered a school official. Further, under the school official exception (as well as any FERPA exception to consent), SROs may only use the PII from education records for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of the students. See §§ 99.31(a)(1)(i)(B)(3) and 99.33(a)(2). In addition, SROs are subject to the redisclosure requirements of § 99.33(a). This means that an SRO who is serving as a "school official" under FERPA may not disclose PII from education records to others, including other employees of his or her local police department who are not acting as school officials, without consent unless the redisclosure fits within one of the exceptions to FERPA's consent requirement.

Does FERPA Distinguish Between School Resource Officers (SRPs) and Other Local Police Officers who Work in a School?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa->

[distinguish-between-school-resource-officers-sros-and-other-local-police-officers-who](#) (last visited August 18, 2017).

The Meaning of “Law Enforcement Unit” Under FERPA

The Department’s FAQs also provide guidance on what is a “law enforcement unit” within the meaning of FERPA:

What is a “law enforcement unit”?

Under FERPA, “law enforcement unit” means any individual, office, department, division, or other component of a school, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that school or school district to (1) 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 (2) maintain the physical security and safety of the agency or institution. See 34 CFR § 99.8(a)(1).

Schools vary in who they authorize or designate to be their law enforcement unit, usually depending upon their size and resources. Some larger school districts have their own fully equipped police units, while others have smaller security offices. Other schools designate a vice principal or other school official to act as the law enforcement unit officer. And other schools may utilize local police officers and SROs as their law enforcement officials.

What Is a “Law Enforcement Unit?”, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/what-%E2%80%9Claw-enforcement-unit%E2%80%9D> (last visited August 18, 2017).

Are law enforcement records considered education records?

“Law enforcement unit records” (i.e., records created by the law enforcement unit, created for a law enforcement purpose, and maintained by the law enforcement unit) are not “education records” subject to the privacy protections of FERPA. As such, the law enforcement unit may refuse to provide a parent or eligible student with an opportunity to inspect and review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent or eligible student’s prior written consent. However, education records, or personally identifiable information from education records, which the school shares with the law enforcement unit, do not lose their protected status as education records just because they are shared with the law enforcement unit.

Are Law Enforcement Records Considered Education Records?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records> (last visited August 18, 2017).

Disclosure to Juvenile Justice Authorities

The Department's Student Privacy website FAQs address whether FERPA permits the non-consensual disclosure of personally identifiable information (PII) from education records to officials of a state's juvenile justice system:

FERPA permits schools to non-consensually disclose PII from education records to state and local officials or other authorities if the disclosure is allowed by a state law adopted after November 19, 1974, and if the disclosure concerns the juvenile justice system and its ability to serve, prior to adjudication, the student whose records are disclosed. See §§ 99.31(a)(5) and 99.38. The officials and authorities to whom such information is disclosed must certify in writing to the school that the information will not be provided to any other party, except as provided for under state law without written consent.

Does FERPA Permit the Disclosure of Personally Identifiable Information (PII) from Education Records to Officials of a State's Juvenile Justice System?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa-permit-disclosure-personally-identifiable-information-piii-education-records> (last visited August 21, 2017).

4. What Can Be Released, and to Whom, In a Health or Safety Situation? (Hit Lists, For Example)

The "Health or Safety" exception was added to FERPA when it was first amended in 1974. The legislative history regarding that amendment illustrated Congress' intent to limit the application of the exception to exceptional circumstances:

"... [U]nder certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In case of the outbreak of an epidemic, it was unrealistic to expect an educational official to seek consent from every parent before a health warning could be issued. On the other hand, a blanket exception for 'health or safety' could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards from this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will limit the applicability of this exception."

Joint Statement: An explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974. These amendments added Subsection (b)(1)(I) to 20 U.S.C. § 1232g for the first time. Subsequently, 34 C.F.R. § 99.31(a)(10) and 34 C.F.R. § 99.36 were enacted to govern the health or safety emergency exceptions.

Section 99.31(a)(10) authorizes disclosure of personally identifiable information from an education record of a student without consent if the disclosure is in connection with a health or safety emergency, under the conditions described in Section 99.36. Section 99.36, following revisions in 2008, provides that an educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. Subsection (c) provides that in making its determination, an educational agency may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency determines that there is an "articulable and

significant threat” to such health or safety, it may disclose information from education records to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” Further, this subsection provides that if, based on the information available at the time of the determination, there was a rational basis for that determination, the Department of Education will not substitute its judgment for that of the educational agency evaluating the circumstances making this determination. Those 2008 amendments gave schools significant protections from enforcement actions if they actually have an articulable basis for believing that disclosure is immediately necessary.

For an example of FPCO guidance prior to the 2008 amendments, see the *Letter to Strayer University Finding re: School Official Using Access to Education Records Without Legitimate Educational Interest; Limits of Health or Safety Emergency Exception (3/11/05)* (available on the FPCO “Online Library”). Although superseded in part by the 2008 amendments, the FPCO analysis in that letter is quite instructive. In the letter, FPCO noted that it had consistently interpreted the health or safety exception narrowly by limiting its application to a specific situation that presents imminent danger to students or other members of the community, or that requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. A Strayer employee “felt threatened” following a disagreement with a student. However, the disagreement was protracted over a two- to three-day period and was not reported to police until the fourth day. When the report was made, the employee accessed the student’s education records to provide identifying information to the police. FPCO found that the employee had no legitimate educational interest in accessing the records or releasing the information and that the health or safety exception did not apply to such facts.

Under the 2008 amendments to the FERPA regulations, an institution need not have absolute certainty that there is an imminent crisis before invoking the exception. It is sufficient that, based on the totality of circumstances and on the basis of the facts that are available at the time, there is a rational basis for concluding that there is a threat to health or safety. While that standard is lower than that applied to the Strayer University situation, the new regulations still require a rational basis and an articulable threat. It should also be noted that often the articulable threat may be based in part on education records, but also in part on personal observations or knowledge of the education personnel involved in the decision. While personal observations or knowledge may be provided to law enforcement or others without violating FERPA, care should be taken concerning release of information which could have been acquired both from personal knowledge and from education records. If the information provided was contained in an education record, school officials should be careful to ensure that they have properly documented the disclosure of such information, whether under the health or safety exception or under any other basis for disclosure.

The educational agency has the same good faith discretion to determine to whom the disclosure should be made. When possible, it is advisable that disclosures be made to professionals trained to evaluate and handle such emergencies, such as campus mental health personnel or school law enforcement personnel, who could then determine whether further and broader disclosures are appropriate. Depending upon the facts, disclosure might also be appropriate to parents, threat assessments teams, individuals who may have information needed to determine the extent of the potential threat, and potential victims and their families. If it is believed that the threat is urgent and imminent, campus officials and local police should always be included.

Some of the examples provided in the legislative history for FERPA, and even in the Strayer University letter, focus on serious health issues. In today’s school environment, health or safety emergencies are more likely to arise involving threats of imminent student violence. Two recent

publications from FPCO⁶ provide slightly more up-to-date analyses of making these determinations on the basis of potential violence.

When school officials discover “hit lists” or other documents which seem to contain threats towards particular individuals, the evaluation of whether disclosure should be made to potential victims or their parents must be based upon an assessment of the facts surrounding the discovery. For example, some hit lists will have no indication of a time at which the violence is proposed, the capability of the student to actually carry out the threat, or other information which would help school officials determine how imminent the threat is. If the threat contains specific information, such as a student’s threat to come to school on a particular day, and if that date is sufficiently far away that intervention can be made without full disclosure to all students and their parents, the school may have a more difficult decision as to what should be done and how imminent the emergency might be. Such judgment calls can be difficult because no school official wants to put any student at risk at any time. However, if there is an indication that planned violence will not occur for some period of time, that must be taken into account. Schools will ordinarily want to err on the side of caution and provide appropriate notice so that students and their parents can make informed decisions about the risks involved and what they should do to protect themselves. However, such an unknown threat also requires that school security personnel or law enforcement be involved as soon as possible so that adequate protection can be instituted. If the school has a threat assessment team, the information should be provided to them as soon as possible so that the potential threat can be carefully evaluated by trained professionals. It is important that the school be able to articulate its reasons for thinking that disclosure is necessary to prevent possible imminent violence and that they be able to articulate the reasons which they have used to make that determination. If a school is unable to do that, the school’s decision, at least, has the potential for being challenged in any complaint or investigation which follows.

It is also important to remember that within a reasonable period of time after disclosure is made under this exception, an educational agency or institution must record, in the student’s education records, the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. 34 C.F.R. § 99.32(a)(5).

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 4

The Student Privacy website FAQs share several questions and answers related to FERPA’s health or safety emergency exception, including the following:

When is it permissible to utilize FERPA’s health or safety emergency exception for disclosures?

In some situations, school administrators may determine that it is necessary to disclose personally identifiable information (PII) from a student’s education records to appropriate parties in order to address a health or safety emergency. FERPA’s health or safety emergency provision permits such disclosures when the disclosure is necessary to protect the health or safety of the student or other individuals. See 34 CFR §§ 99.31(a)(10) and 99.36. This exception to FERPA’s general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student’s education records. Rather, these disclosures must be related to an actual, impending, or

⁶ See <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf>, and <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>.

imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.

When is it Permissible To Utilize FERPA's Health or Safety Emergency Exception for Disclosures?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures> (last visited August 21, 2017).

Who are considered “appropriate parties” that may receive information under the health or safety emergency exception?

Typically, local or state law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom schools may disclose information under this FERPA exception. An appropriate party under the health or safety emergency exception to FERPA's general consent requirement is a party whose knowledge of such information is necessary to protect the health or safety of the student or other persons.

Who Are Considered “Appropriate Parties” that May Receive Information Under the Health or Safety Emergency Exception?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/who-are-considered-%E2%80%9CAppropriate-parties%E2%80%9D-may-receive-information-under-health-or-safety> (last visited August 21, 2017).

How does a school know when a health or safety emergency exists so that a disclosure may be made under this exception to consent?

An educational agency or institution must make this determination on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of a student or others. If the school determines that there is an articulable and significant threat to the health or safety of a student or other individuals and that a third party needs personally identifiable information (PII) from education records to protect the health or safety of the student or other individuals, it may disclose that information to appropriate parties without consent.

How Does a School Know When a Health or Safety Emergency Exists so that a Disclosure May Be Made Under this Exception to Consent?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/how-does-school-know-when-health-or-safety-emergency-exists-so-disclosure-may-be-made-under> (last visited August 21, 2017).

Does a school have to record disclosures made under FERPA's health or safety emergency exception?

Yes. When an educational agency or institution makes a disclosure under the health or safety exception, it must record in the student's education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed. See § 99.32(a)(5).

Does a School Have to Record Disclosures Made Under FERPA's Health or Safety Emergency Exception?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-school-have-record-disclosures-made-under-ferpa%E2%80%99s-health-or-safety-emergency-exception> (last visited August 21, 2017).

Does FERPA permit the sharing of education records with outside law enforcement officials, mental health officials, and other experts in the community who serve on a school’s threat assessment team?

Yes. Under FERPA, a school or school district may disclose personally identifiable information (PII) from education records without consent to threat assessment team members who are not employees of the school or school district if they qualify as “school officials” with “legitimate educational interests.”

In establishing a threat assessment team, the school must follow the FERPA provisions in § 99.31(a)(1)(i)(B) concerning outsourcing this function if team members will be privy to PII from students’ education records. While not a requirement of FERPA, one way to ensure that members of the team do not redisclose PII obtained from education records would be to have a written agreement with each of the team members specifying their requirements and responsibilities.

Schools are reminded that members of the threat assessment team may only use PII from education records for the purposes for which the disclosure was made, i.e., to conduct threat assessments, and must be subject to FERPA’s redisclosure requirements in § 99.33(a). For example, a representative from the city police who serves on a school’s threat assessment team generally could not give the police department any PII from a student’s education records to which he or she was privy as a member of the team. However, if the threat assessment team determines that a health or safety emergency exists, then the police officer may disclose, on behalf of the school, PII from a student’s education records to appropriate officials under the health or safety emergency exception under §§ 99.31(a)(10) and 99.36, as discussed below.

Does FERPA Permit the Sharing of Education Records with Outside Law Enforcement Officials, Mental Health Officials, and Other Experts in the Community who Serve on a School’s Threat Assessment Team?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa-permit-sharing-education-records-outside-law-enforcement-officials-mental-health> (last visited August 21, 2017).

What does “articulable and significant threat” mean?

The phrase “articulable and significant threat” means that a school official is able to explain, based on all the information available at the time, what the significant threat is under § 99.36 when he or she makes and records the disclosure. For instance, if a school official believes that a student poses a significant threat, such as a threat of substantial bodily harm to any person, including to the student, then, under FERPA, the school official may disclose personally identifiable information (PII) from the student’s education records without consent to any person whose knowledge of the information will assist in protecting a person from that threat. This is a flexible standard under which school administrators may bring appropriate resources to bear on the situation. If, based on the information available at the time of the determination, there is a rational basis for the educational agency’s or institution’s decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed, the Department will not substitute its judgment for that of the school in evaluating the circumstances and making its determination.

What Does “Articulable and Significant Threat” Mean?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/what-does-%E2%80%9CArticulable-and-significant-threat%E2%80%9D-mean> (last visited August 21, 2017).

Consistent with the FAQs above, Kathleen M. Styles, Chief Privacy Officer, sent a *Dear Colleague Letter to School Officials at Institutions of Higher Education* on August 24, 2016 which addressed disclosure of student medical records in the context of a health or safety emergency. This DCL is instructive for K-12 school attorneys and notes that “FERPA does not require the student’s consent before an institution may disclose the student’s education records, including medical records, to appropriate parties if that student poses an articulable and significant threat to self or the health or safety of other individuals.” The letter points out that the standard in determining whether a health or safety emergency exists “is a flexible standard under which the Department generally defers to school officials so that they might bring appropriate resources to bear on the situation.” The DCL cautions that the “exception to consent generally does not allow for the blanket release of PII from a student’s education records, including medical records.” Rather, the DCL counsels that:

The information that may be disclosed is limited to that which is necessary to protect the health or safety of the student or other individuals. 34 CFR § 99.36(a). In many cases, providing actual records, such as counselor’s session notes, is not necessary or critical in determining a health and safety emergency or to protect the student or others. In most cases, a counselor’s summative statement of the relevant and necessary information from those records will suffice.

See *Dear Colleague Letter to School Officials at Institutions of Higher Education*, U.S. Department of Education (August 24, 2016), <https://studentprivacy.ed.gov/resources/dear-colleague-letter-school-officials-institutions-higher-education>

5. What Use Can Be Made of Student Information In Litigation and Complaint Proceedings – Grievances, Bullying Investigations, Licensing Investigations, Discovery Requests, and Personnel Investigations, Whether Subpoenaed or Not?

School lawyers frequently become involved in litigation, complaints, grievances, and other contested matters which involve, directly or tangentially, student information. Although school lawyers are presumably well-versed in FERPA, they are also well-versed in rules of trial procedure, rules of evidence, discovery, administrative procedures, and school grievance proceedings. There are numerous ways for FERPA and litigation and complaint proceedings to be at cross-purposes.⁷

Mark Blom wrote an article for *Inquiry and Analysis* in June 2008, entitled “Confidentiality of Investigative Reports of Alleged Teacher-to-Student Sexual Harassment,” which provided a list of the many parties that might be interested in getting investigative reports, student records, or personnel files when there have been investigations and litigation arising out of school activities. He lists: the media; individual parents; parent-teacher groups; the victim’s parents; the victim’s attorney, who may be contemplating a civil suit against the employee or the school; the police department; the employee; interested public citizens; and other school district employees. There may be many people that want to see the school’s records concerning investigations and allegations, and those school records will most likely be filled with personally identifiable information and education records. Obviously, a school can release those documents with parental consent. However, that consent will likely not be given in many cases. Subpoenas or warrants might be issued, which would allow the production of some of these reports and records. However, FERPA must still be considered in each request for such information.

⁷ For an excellent analysis of these issues, see Lisa Brown, “Student Privacy on Trial: Compliance With FERPA During Litigation and Other Adversarial Contexts,” *Inquiry and Analysis* (NSBA/COSA May 2005).

There has not been a great deal of FPCO comment on such situations. One is *Letter of Technical Assistance to School District re: Disclosure of education records containing information on multiple students* (10/31/03) (available on the FPCO "Online Library"). In this letter, FPCO discussed the questions of a school attorney about the release of unredacted student records during a special education hearing.

The hearing officer had required production of unredacted records but the school district had objected because of FERPA. The hearing officer and the attorneys sent the matter to FPCO for review. Among other arguments, the hearing officer believed that the due process rights of the student were implicated, as well as a denial of the student's full FERPA rights because he could not see his full and complete education records, which included statements of other students contained in the investigative files. However, FPCO noted due process was not violated because IDEA incorporated compliance with FERPA and agreed with the school district that FERPA required the redaction of information about other students.

Another FPCO opinion involving litigation is *Letter re: status of education records and transcripts from public due process hearings* (12/23/04) (available on the FPCO "Online Library"). Parents who had initiated a due process hearing exercised their right to open the hearing to the public. The school's attorney cited New York common law that having waived their right to a closed hearing, the parents had forever waived those rights and thus all testimony and documents had become public record. In light of the waiver, the school attorney asked what a public school district must do regarding further disclosure of the testimony and evidence. FPCO held that the common law standards identified by the school, while applicable to public courts and judicial proceedings, did not override FERPA and its requirements of no public release of such information without consent. Accordingly, FPCO found there was no basis in FERPA to allow for public release of such student information despite the holding of an open hearing.

Although not issued by FPCO, the Department's Office for Civil Rights issued a guidance letter on April 4, 2011, regarding Title IX investigations and hearings which also addressed a number of FERPA issues. This guidance letter attempts to account for a complainant's request for confidentiality, an alleged perpetrator's right to due process, and the applicability of FERPA in such conflicting positions. Although a victim may request confidentiality or may object to having his or her identity revealed to the alleged perpetrator, for example, the alleged perpetrator would have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her and the school must redact the complainant's name and other identifying information before allowing the perpetrator to inspect the records. As discussed elsewhere in this paper, it would be quite likely in many situations for the perpetrator to be completely aware of who the victim was even before reviewing redacted records. However, the right to examine the records seems to remain because of the perpetrator's due process and FERPA rights.

The guidance letter also notes that throughout a Title IX investigation, or a hearing resulting from that investigation, both the complainant and the perpetrator must be afforded similar and timely access to any information that would be used at the hearing. Nevertheless, the information must be provided consistent with FERPA. For example, if a school introduces the alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records, but the perpetrator would be entitled to that. Access would not be given regarding privileged or confidential information. For example, the alleged perpetrator would not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history. (See OCR Guidance Letter, n.29.) The guidance also notes that a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement. (See OCR Guidance Letter, pp. 11-12.) The guidance letter

makes no note as to whether either should be able to review statements of the other without consent, but the guidance letter emphasizes the importance of due process in such a proceeding. (See OCR Guidance Letter, p. 12.)

Significantly, the OCR guidance letter notes that there may be conflicts between Title IX and FERPA, but the requirements of Title IX would override any conflicting FERPA provisions. (See OCR Guidance Letter, p. 13 n.32.)

One interesting court decision found no FERPA violation when a high school principal notified parents of another student regarding what had been done in response to a harassment complaint that had been filed against a perpetrator. The court concluded that the contemporaneous disclosure to parents of a victimized child of the results of any investigation and resulting disciplinary action taken against an alleged child perpetrator did not constitute a release of an “education record” under the meaning of FERPA, and that reading such disclosures to fall within the ambit of FERPA would place educators in the untenable position of not being able to adequately convey to the parents of affected student that adequate steps were being undertaken to assure the safety of the student. Even further, the court found there was no FERPA violation in sending a memo concerning the disciplinary action to the parents of other students who claimed to have been hit or touched by the offending student, as well as student witnesses, because the memoranda merely disclosed information known to the principal and nothing from an education record. See *Jensen v. Reeves*, 45 F. Supp. 2d 1265 (D. Utah, 1999), *aff’d*, 3 Fed. Appx. 905, 910-11 (10th Cir. 2001).

In determining what use can be made of student information in any type of litigation or grievance proceeding, first consider the source of the information. If the information was gained solely through personal observation, common knowledge, or sources other than actual student records, FERPA should not apply and its restrictions should not be applicable to the use of the information. *Jensen*, 45 F. Supp. 2d 1265; *Frasca v. Andres*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979); *Daniel S. v. Bd. of Educ.*, 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001); *Jennings v. Univ. of N.C. at Chapel Hill*, 340 F. Supp. 2d 679 (N.D.N.C. 2004), *aff’g.*, 444 F.3d 255 (4th Cir. 2006), *rev’d en banc*, 482 F.3d 686 (4th Cir. 2007). Directory information under FERPA can be used subject to the requirements of FERPA. FERPA information for which consent has been properly obtained from the parent or student can also be used without restriction.

There are a number of statutory exceptions which allow the disclosure of student information. The most important of these exceptions would be the subpoena or court order exception provided by 34 C.F.R. § 99.31(a)(9). The school is ordinarily required to make reasonable efforts to notify the parent or eligible student of the order or subpoena in advance of compliance so that the parent or student may seek protective action. However, such advance notice is not required if a federal grand jury subpoena or court has ordered the existence of the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; if any other subpoena was issued for law enforcement purpose and the court or other issuing agency has ordered that the existence of the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or the court order is an ex parte court order obtained by the U.S. Attorney General or an Assistant Attorney General concerning prosecutions for domestic or international terrorism.

Our office also received informal guidance from the FPCO that a warrant should be treated like a court order or subpoena issued for law enforcement purposes which justifies the disclosure of FERPA-protected materials. Presumably, no advance notice needs to be given to parents or eligible students if a

warrant is presented, since the warrant ordinarily requires an immediate search for, or production of, such materials and thus would not provide time for such advance notice.

Although subpoena powers do not exist in every type of adversarial proceeding in which a school might find itself, the parties should always, when possible, take advantage of the subpoena exception in order to provide clear statutory authorization for the production of records and the opportunity for parties to the proceedings to obtain appropriate protective orders to protect further disclosure of the information. For example, in a contested teacher termination hearing, the parties can work out agreed protective orders concerning the use of such information as exhibits in the trial (including the redaction of identifying student information in such exhibits which might be later reviewed by reviewing administrative agencies or courts, or the agreed redaction of the trial transcription by the court reporter to remove any more information than student initials in order to further protect the disclosure of identifying student information).

Another important exception is the authorized disclosure of student information when a parent or student initiates legal action against the school, or when the school initiates legal action against the parent or student. In such cases, the school may disclose to the court, without a court order or subpoena, the education records of the student that are relevant to proceed with the legal action as plaintiff or to defend itself as a defendant. However, it should be noted that this exception does not necessarily allow the release of other students' information which may be relevant to the prosecution or defense of the suit. In such cases, consent, subpoena, or some other exception must still be invoked in order to get the other student's records properly before the court and in evidence.

Section 99.31(a)(9) does not address whether student information can be produced subject to discovery requests. Requests for production, interrogatories, or depositions may be treated in some regards as court orders, but they are usually initiated by the parties and not by the court. There has been no definitive answer as to whether discovery requests can constitute a court order under the court order exception. In the absence of such a definitive decision, attorneys are advised to object to discovery requests on the basis of FERPA and to seek the ruling of the court before releasing student information in response to such a request. Again, if a subpoena is issued for the records, that will avoid the possibly unauthorized production and response to discovery requests and it may be possible to work out agreed protective orders with opposing counsel after the court has ruled on the discovery objections or after subpoenas have been issued.

When the adversarial proceeding is an employee termination or disciplinary proceeding, the student information will frequently be part of the evidence to be used against the employee. If a parent has filed the complaint which led to the action against the employee, the parent will probably be more than happy to consent to the use of that student information in the termination or disciplinary hearing. If the hearing is a full due process hearing which provides procedures for subpoenas, a subpoena can be used to ensure the release of the information. However, before or after adversarial proceedings are initiated, it is common for schools and employees to discuss allegations and perhaps to negotiate a resignation, reassignment, or other appropriate discipline. Before or after adversarial proceedings have been initiated, providing redacted records to illustrate or inform the employee or the employee's attorney about the allegations may be sufficient. Note that as in many other circumstances discussed in this paper, it may be very obvious who the student is, such that production of redacted records might not be adequate to avoid FERPA concerns. It is doubtful that the release could be justified under Section 99.31(a)(1) because the disclosure would not be for legitimate educational purposes in that circumstance.

Therefore, the school and its attorney may need to be careful how student information is used in any kind of preliminary negotiations before the adversarial proceeding is initiated.

After adversarial proceedings have been initiated, discovery proceedings or subpoenas may be used in an effort to get student information that would be relevant to the disciplinary or termination proceedings. Not surprisingly, there has been some split of opinion as to whether student information in employee investigation records constitutes an education record protected by FERPA. In *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004), the parents sought disciplinary and investigative information on substitute teachers who allegedly harmed students. The information sought included student witness statements and employee witness statements in which students were identified. The court held that FERPA was not applicable, and did not apply to employee records. In *David Douglas Educ. Assoc. v. David Douglas Sch. Dist.*, UP-43-07, 23 PECBR 333, 411 (2009), the Oregon Employment Relations Board determined that employee investigatory files which included student names were not “student records” and therefore did not fall under FERPA coverage. See also *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991); *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526, 533 (1990); *Board of Ed. of Colonial Sch. Dist. v. Colonial Educ. Ass’n*, 1996 WL 104231, at *5-6 (Del. Ch. 1996); *Staub v. East Greenbank School Dist. No. 1*, 491 N.Y.S.2d 87, 88 (N.Y. Sup. Ct. 1985). See also discussion at Question 3 above.

In contrast, in *Rhea v. District Bd. of Trustees of Santa Fe College*, 109 So. 3d 851 (Fla. App. 1st Dist. 2013), a professor sought disclosure of an unredacted copy of an e-mail sent by a student which complained of, among other things, the professor’s classroom behavior. However, the court held under FERPA that “education records” included the e-mail since it was directly related to a student and that it was irrelevant that the record also contained information directly related to the teacher. A similar holding was rendered by the Texas Attorney General in Open Record Decision No. 224 (1979), which held that handwritten statements by students that were created to evaluate teachers were excepted from production under an open records request, in part, because they were student records protected by FERPA.

While it can be argued that such records are not “education records” because they were not created or obtained for an educational purposes, were not kept or maintained with the student’s records, and were obtained solely for administrative purposes in connection with an investigation of possible employee misconduct, it is not certain that that argument would be successful in all jurisdictions. Unless your state’s courts have made a definitive ruling on whether such records constitute student records, the legally safest course of action is to consider such records to be covered by FERPA.

One other related scenario involves investigations of employees by state educational agencies. If an employee or teacher is being considered for discipline because of actions involving students, the state educational agency will frequently request or require production of the student’s information from the school which employed the employee. For example, Texas Education Code § 21.006(h) requires that the name of a student or minor, who is the victim of abuse or unlawful conduct by an educator, be included in a report filed with the Texas Education Agency, but also states that the name of the student or minor will not constitute public information which must be produced under the Texas Public Information Act. Despite a state statutory requirement, disclosure of such student information does not fall within any of the stated exceptions in 34 C.F.R. § 99.31. Again, consent from the eligible student or that student’s parents may be obtained in many circumstances. When consent has not been obtained, it has been common to object to production of the information without a subpoena. Since the state has subpoena

power in disciplinary proceedings, the state has thus far been willing to issue subpoenas in order to avoid this FERPA/preemption issue.

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 5

Disclosure of Education Records Pursuant to a Lawfully Issued Subpoena or Court Order

The Department, through the Student Privacy website, restates FERPA’s regulatory authorization allowing school districts to release personally identifiable student information without parental or student consent if a lawfully issued subpoena or court order directs such a disclosure.⁸ The relevant Q and A provides:

May schools comply with a subpoena or court order for education records without the consent of the parent or eligible student?

Yes. FERPA permits disclosure of education records without consent in compliance with a lawfully issued subpoena or judicial order. See § 99.31(a)(9)(i) and (ii).

Procedures Required Prior to Disclosure of Education Regards Related to a Lawfully Issued Subpoena or Court Order

In *Browning v. University of Findlay Bd. of Trustees*, No: 3:15-cv-02687, 2016 WL 4079128 (N.D. Ohio, July 30, 2016), the court interpreted FERPA’s requirements for disclosure of information pursuant to a court order. The case arose in the context of discovery and the court addressed FERPA’s notice requirement found at 34 C.F.R. § 99.31(a)(9)(i), (ii). In this case, the court interpreted the “reasonable notice” provision found in FERPA’s regulations by setting up the following procedures:

As reasonable efforts to provide notice to students pursuant to FERPA and this Order, the Court, through Defendants’ counsel, shall provide notice to students currently enrolled at the University of Findlay by sending email correspondence to their assigned “Findlay.edu” email address. The Court, through Defendants’ counsel, shall provide notice to former students by sending email correspondence to their assigned “Findlay.edu” email address, if any; by sending email correspondence to any other known email address(es) maintained in the University of Findlay’s database; or by sending regular mail to the former student’s last known address. This Court finds that these steps satisfy the “reasonable effort” requirement of 34 C.F.R. § 99.31(a)(9)(ii).

Browning, 2016 WL 4079128, at *1. The court also built in a fourteen-day period of time from the date the notice is sent for a student to object to the production of the student records. *Id.* This decision suggests that notice of a school district’s receipt of a subpoena or court order could be sent via email and should be sent with sufficient time for a student/parent to enter an objection or take other action.

Disclosure of Information from Education Records to Third Parties in Title IX Complaints and/or Related to Complaints of Harassment or Bullying

In its *Letter to Soukup*, FPCO explains that FERPA’s confidentiality requirements are not violated when a school notifies a parent of a harassed student of the outcome of an investigation. In *Letter to Soukup*

⁸ Note, however, that applicable state law addressing school student records may be more restrictive. Applicable state law should be carefully reviewed to ascertain requisite procedures and mandates when school’s respond to lawfully issued subpoenas and court orders.

dated February 9, 2015, at 115 LRP 18668, FPCO explains that, while FERPA does generally prohibit the disclosure of a student's personally identifiable information to a third party, there is an exception for cases involving discriminatory harassment. Accordingly, a school district may inform the parents of a harassment victim of the disciplinary sanctions imposed on the perpetrator(s) of the harassment when the sanctions directly relate to the victim. This would include, for example, an order that the harasser stay away from the harassed student. School districts, however, should be careful not to disclose sanctions that do not relate to the harassment victim as this may constitute a FERPA violation.

In its *Letter to Soukup*, FPCO referred to the Department's Office for Civil Rights' January 2001 guidance entitled *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* and reiterated that it has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to that student if over the age of 18) information about the disciplinary penalties imposed upon a student that was found to have perpetrated the harassment to the extent it directly relates to the harassed student. The DOE, in relevant part, noted in its 2001 guidance that:

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim.

Furthermore, in its 2015 *Letter to Soukup*, FPCO states that it "does not interpret FERPA as prohibiting the District from complying with the notice of outcome provisions ...in any other case involving discriminatory harassment."

6. Is a Parental Release Needed to Display Student Artwork? If So, Specific or General?

This is another question which arises from the expansive definition of "education records" under FERPA. Obviously, student artwork is directly related to a student. The greater question is whether the artwork is maintained by an educational agency or institution or a party acting for the agency or educational institution, particularly after the restrictive description of how to "maintain" education records in Falvo.

Particularly in elementary schools, it has been a long-standing practice to display students' artwork, either in the classroom or in the hallways of the school. Some of this artwork may have been graded, but even if it was, grades were usually not displayed on the artwork. In most cases, the artwork was probably sent home with the student and not kept by the teacher in any kind of a portfolio or file. Accordingly, it is very arguable that the student artwork would not have constituted an "education record" under FERPA.

This appears to have been the position taken by FPCO in at least two pre-Falvo letter opinions which addressed this question. In both a May 15, 1995 letter to Mr. John R. Reed, Superintendent of Schools, Newtown Public Schools, Newtown, Connecticut, and an October 29, 1999 letter to Mr. Keith E. Richards, Superintendent, Westlake City Schools, Westlake, Ohio, FPCO stated that FERPA was not intended to interfere with a school's, or classroom teacher's ability to carry out what were generally considered to be normal and legitimate educational activities and functions, such as the generally accepted classroom practice of displaying such artwork. The Westlake, Ohio letter noted that the display of exemplary papers or projects, whether graded or ungraded, was consistent with the part of the "directory information" definition in 34 C.F.R. § 99.3 that covered "awards received." However, the Westlake, Ohio letter also noted that the display would not be prohibited as long as parents had not refused disclosure of directory information. It also noted the teacher could display any paper or object

where parents had given prior written consent for doing so. Thus, even statements that such a practice might be acceptable seemed qualified and injected elements of consent or compliance with the “directory information” definition.

In today’s classrooms, student “artwork” could well include more than a drawing or painting which is displayed in the elementary school hallway. Students might contribute artwork for a school calendar or the cover of a school Christmas card. Students might submit videos, tape recordings, musical performances, or other media which schools might wish to display or publish in some fashion. Whether such distribution would amount to one of those “generally accepted classroom practices” noted in the pre-Falvo letters is certainly more debatable. Furthermore, while a teacher could display a student’s artwork in class without violating potential copyright laws (17 U.S.C. § 110 (1)), display or publication of the works in other fora might not fall into that “classroom” exemption as neatly.

As with many FERPA issues, many questions can be resolved by seeking and obtaining parental consent. Many school districts include information about use of student artwork in their student handbook, and sometimes even in their annual FERPA notifications. Most school districts seem to be seeking a release of some sort from parents before use of such artwork in an abundance of caution. Although not based upon any specific FPCO guidance to my knowledge, it seems that general releases might be sufficient for drawings or other pictorial artwork displayed in an elementary school setting. More specific releases would be more appropriate for use of other artwork and other forms of media that might be more widely displayed than in the local school. Parental release and consent will always answer the question in a safe manner for the school.

7. Is It OK to Release Student Information to “Quasi-School” Organizations – PTAs, School Photographers, Etc? (“Outsourcing”)

We hear frequent questions from schools concerning whether it is permissible to release student information to what I have called “quasi-school” organizations. Most frequently, those questions involve providing information to the PTA for a school directory, providing student information to photographers for student pictures or annuals, booster clubs, and similar organizations that help with school-related activities but are not formally a part of the school. Another frequent question is whether or not parent volunteers are allowed to have access to student information when they are working in the school office or assisting teachers on a project. In recent years, there have also been concerns raised by some organizations concerning the release of student information to private companies or vendors of school districts.

In a technical sense, there is no such thing as a “quasi-school organization” or “quasi-school official” under FERPA. Any disclosure of student information must meet the authorized exception for release without parental consent. However, depending upon the outside group, some organizations such as the PTA are considered by some school families to be related to the school. Even without any legal connection, the PTA is usually filled with volunteers who want to help the school in some fashion, as well as to organize parents to become more involved in the school. Schools may run into this question when the PTA is preparing a parent-student directory. While such directories should logically only contain directory information, and while the PTA could easily seek the information from parent members themselves, there is always a desire by the PTA to provide a comprehensive directory that includes all students. The school is obviously not required to voluntarily provide properly designated directory information on students to the PTA, even for a beneficial purpose such as a school directory. If the PTA

formally requests the information, compliance with state open records statutes may require the production of the information.

Most of the complaints we have heard concerning such releases of information come when a vendor has obtained a school directory, or directory information from the school through an open records request, for purposes of making commercial solicitations of students and/or their parents. Some schools have attempted to define directory information in such a way as to limit disclosure to such commercial vendors, such as declaring items of personal information as student directory information only for purposes of district or campus-sponsored purposes and not to any other third parties. In Texas, such a designation is authorized by state law. TEX. EDUC. CODE § 26.013 (2005).

In 2008, 34 C.F.R. § 99.31(a)(1) was clarified to allow disclosure of student information to a contractor, consultant, volunteer, or other party to whom an agency or institutional services or functions are outsourced. Section 99.31(a)(1)(i)(B) considers such a person to be a “school official,” provided that the outside party performs an institutional service or function for which the agency or institution would otherwise use employees, is under the direct control of the agency or institution with respect to the use and maintenance of education records, and is subject to the requirements of Section 99.33(a) governing the use and re-disclosure of personally-identifiable information from education records. Thus, parent volunteers, outside vendors, or other persons are permitted to obtain personally identifiable information in education records if the school has imposed the appropriate controls required by the regulations. Section 99.31(a)(1)(ii) requires educational agencies or institutions to use reasonable methods to ensure that school officials - including outside parties to whom services or functions are outsourced - obtain access to only those education records in which they have a legitimate educational interest and requires that the agency or institution ensure that its policies for controlling access to the education records is effective and in compliance with FERPA regulations. Therefore, schools cannot just hand over information without imposing adequate controls and supervision of the use of that information. In the case of a parent volunteer, the volunteer needs to be thoroughly familiar with the restrictions on the use of student information only for the school’s authorized purposes and needs to clearly understand that any disclosure to other parties is strictly prohibited.

Some additional questions were raised following the 2011 revisions to the FERPA regulations. Those revisions broadened the definition of who could be an “authorized representative”, and who could be entitled to receive student records without prior consent in connection with audits or evaluations of educational programs. The Electronic Privacy Information Center (“EPIC”) urged Congress to investigate who has access to student data, whether that data is being used for commercial purposes, what security standards are in place, and whether the data could be used in the future for employment, credit, or insurance determinations. EPIC also brought legal action to challenge the regulations. The lawsuit was thrown out by a federal judge. Despite the failure of the legal challenge, schools are naturally urged to carefully follow FERPA so that education records are not released to outside agencies without appropriate controls. Also, with any kind of disclosure to agents, volunteers, or outside agencies, schools are reminded to comply with 34 C.F.R. § 99.7(a)(3)(iii) and provide notice to parents in the annual FERPA disclosures of the school’s criteria for determining who constitutes a “school official” and what constitutes a legitimate “educational interest.”

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE TO Q AND A NO. 7

The Department’s Student Privacy website FAQs ask and answer: “Can schools disclose education records to community-based organizations performing outsourced tutoring programs using the school

official exception?” The Department states that schools can use the school official exception for such purposes so long as the “school chooses to outsource to a community-based organization a tutoring program that it would otherwise use school employees to provide, . . .” Similar to other responses in its FAQs related to a school’s use of the “school official” exception, the website reminds schools of the FERPA regulatory conditions at FERPA (§ 99.31(a)(1)(i)(B)) which:

permits schools to outsource institutional services or functions that involve the disclosure of education records to contractors, consultants, volunteers, or other third parties provided that the outside party:

1. Performs an institutional service or function for which the agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
3. Is subject to the requirements in § 99.33(a) that the personally identifiable information (PII) from education records may be used only for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of students, and governing the redisclosure of PII from education records; and
4. Meets the criteria specified in the school or local educational agency’s (LEA’s) annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.

Can Schools Disclose Education Records to Community-Based Organizations Performing Outsourced Tutoring Programs Using the School Official Exception?, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/can-schools-disclose-education-records-community-based-organizations-performing-outsourced> (last visited August 21, 2017). The Department also notes that “[i]t is a best practice to enter into a written agreement with the community-based organization prior to sharing any PII from education records.” *Id.*

8. What Can The School Release In “Reasonably Likely To Identify” Situations When The Requesting Party Knows Who The Student Is And Redaction Is Useless?

The definition of “personally identifiable information” in 34 C.F.R. § 99.3 includes a number of obvious items, such as name, address, and similar information. However, subsections (f) and (g) of the definition frequently create problems for schools. Subsection (f) states that “personally identifiable information” includes “other information that, alone or in combination, is linked or linkable to a specific student that will 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.” Subsection (g) includes 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.

If parental consent has been obtained, providing such information in a disclosure will not be prohibited. If the disclosure is otherwise allowed under Section 99.31, no problem will arise. Redaction of personally identifiable information can often solve the problem. However, there are many situations where redactions cannot delete the identifiable information – the requestor knows or could easily figure out who the records refer to despite the redactions. In fact, the mere fact that the request has been made

may indicate that the requestor knows who the records will refer to and what their connection is to a well-known or well-publicized issue. However, consent or other authorized disclosures often do not exist when a request for such information is made.

FPCO has issued at least three letters which relate to these circumstances: *Letter to Kennesaw State University, Georgia re: Open Records Request (9/27/02)*; *Letter to Georgia Board of Regents re: Open Records Request (9/25/03)*; and *Letter to Miami University re: Disclosure of Information Making Student's Identity Easily Traceable (10/19/04)* (All available on the FPCO "Online Library.")

All three letter opinions deal with media requests to universities, and all three involve situations where the personal identity of students would be "easily traceable" based upon the nature of the information requested and which would ordinarily be produced. The 2004 letter to Miami University is also connected with incidents which led to litigation between the Department of Education and Miami University which will be discussed further in response to Question 10 below. In that case, Miami University had been requested to provide student disciplinary information regarding students who had been alleged to have committed crimes of violence or non-forcible sex offenses. In that case, the university had released enough information previously that when later requests came in, identifying the suspects would have been fairly simple. In each of these instances, FPCO noted that the school itself is in the best position to determine, at least initially, what information must be removed from education records in order to ensure that a student's identity is not traceable. However, if because of other records that have been released, or if other aspects of the release would make it easy to trace the identity of the student, FERPA prohibits the release of such information.

When requests for information come from the media, a flat refusal to produce on the basis of FERPA may not be troubling to the school. A situation prohibited by subsection (g) of the definition of "personally identifiable information" may be more troublesome. For example, when parents know the identity of a student who somehow victimized the requestor's child, redactions would be futile. In situations where the entire school community, or at least a substantial portion of it, is familiar with the nature of a student's misconduct, production of redacted information either to parents or the media would also be futile.

If the request is for information which would be relevant to and useful in student disciplinary hearings, investigations of student misconduct required by federal or state law (harassment or bullying), or employee investigations by the school or by the state educational agency, the school might have a legitimate purpose for wanting to be able to disclose that information. However, the available guidance and the definitions contained within FERPA and its regulations seem to clearly prohibit such a release. In a sense, such requests may be comparable to a request for videos (as discussed in response to Question 1 above), where the requested records clearly relate to two separate students. Although videos are dealt with differently because videos are more difficult to redact or alter, parents of each student involved in the incident may have a legitimate interest in obtaining the contents of the records.

Consent is obviously one way to resolve this issue. When consent cannot be obtained because of the hostility between the parties or because of pending legal or regulatory investigations, some of the exceptions discussed in response to Question 5 above may help in resolving the request.

9. Who Has FERPA Rights And What Can Be Given To Parents Of “Eligible Students” (18 And Over)?

Some tend to think that parents have FERPA rights regarding their student’s education records until the student turns 18 and at 18 the student acquires all rights and the parents correspondingly lose those rights. However, FERPA is more nuanced than just that.

First, review the definitions in 34 C.F.R. § 99.3. Under that section, the definition of “Eligible Student” is a student who has reached 18 years of age or is attending an institution of post-secondary education at any age.

Next, review Section 99.31(a)(8). Disclosure is allowed without prior consent to parents of a dependent student as defined in Section 152 of the Internal Revenue Code of 1986. Thus, if parents are carrying the student as a dependent, a school may continue to provide student information to the parents, even when the student is 18 or older.

Next, review Section 99.31(a)(15). This section allows disclosure to a parent of a student attending an institution of post-secondary education regarding the student’s violation of any federal, state, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or controlled substance, if the institution determines the student has committed a disciplinary violation with respect to the use or possession and that student is under the age of 21 at the time of the disclosure to the parent.

Last but not least, note that the definition of “eligible student” can include a K-12 student who is attending an institution of post-secondary education. Today, many, if not most, public schools have some type of a “dual enrollment” arrangement where students can attend high school classes and also post-secondary education classes to obtain college credit. Accordingly, even if the student is under 18, the student acquires his or her own FERPA rights when they enroll in the post-secondary institution for this dual-enrollment class. As noted in the final regulations for the 2008 FERPA Amendments (73 Fed. Reg. 74,806, 74,813 (Dec. 9, 2008)):

With regard to the comment about high school students who are concurrently enrolled in postsecondary institutions as early as ninth grade, FERPA not only permits those postsecondary institutions to disclose information to parents of the high school students who are dependents for Federal income tax purposes, it also permits high schools and postsecondary institutions who have dually-enrolled students to share information. Where a student is enrolled in both high school and a postsecondary institution, the two schools may share education records without the consent of either the parents or the student under § 99.34(b). If the student is under 18, the parents still retain the right under FERPA to inspect and review any education records maintained by the high school, including records that the college or university disclosed to the high school, even though the student is also attending the postsecondary institution.

The “FAQs” link on the FPCO website, <http://www2.ed.gov/policy/gen/guid/fpco/faq.html>, provides good guidance regarding the FERPA rights of eligible students under these conditions:

5. If I am a parent of a college student, do I have the right to see my child’s education records, especially if I pay the bill?

As noted above, the rights under FERPA transfer from the parents to the student, once the student turns 18 years old or enters a postsecondary institution at any age. However, although the rights under FERPA have now transferred to the student, a school may disclose information from an “eligible student’s” education records to the parents of the student, without the student’s consent, if the student is a dependent for tax purposes. Neither the age of the student nor the parent’s status as a custodial parent is relevant. If a student is claimed as a dependent by either parent for tax purposes, then either parent may have access under this provision. (34 CFR § 99.31(a)(8).)

6. Can a postsecondary institution disclose financial records of an eligible student with the student’s parents?

If the student is a dependent for income tax purposes, the institution may disclose any education records, including financial records to a student’s parents. If the student is not a dependent, then the student must generally provide consent for the school to disclose the information to the parents.

7. What if my child is a minor and he or she is taking classes at a local college while still in high school - do I have rights?

If a student is attending a postsecondary institution - at any age - the rights under FERPA have transferred to the student. However, in a situation where a student is enrolled in both a high school and a postsecondary institution, the two schools may exchange information on that student. If the student is under 18, the parents still retain the rights under FERPA at the high school and may inspect and review any records sent by the postsecondary institution to the high school.

8. May a postsecondary institution disclose to a parent, without the student’s consent, information regarding a student’s violation of the use or possession of alcohol or a controlled substance?

Yes, if the student is under the age of 21 at the time of the disclosure. FERPA was amended in 1998 to allow such disclosures. See § 99.31(a)(15) of the FERPA regulations. Also, if the student is a “dependent student” as defined in FERPA, the institution may disclose such information, regardless of the age of the student.

10. What Are The Penalties For FERPA Violations? Has Any District Ever Actually Lost Federal Funds?

When one reads through 20 U.S.C. § 1232g, the statute repeatedly states that “no funds shall be made available” to educational agencies that have “a policy of denying, or which effectively prevents” parents from exercising their right to inspect or review the education records of their children, having an opportunity to challenge the content of the records or to correct errors in the records, or for permitting the release of education records (unless specifically allowed by statute or by written consent of the parents), or failing to inform parents of their rights under the statute. The denial of funds is the only express penalty stated in the statute. However, subsection (f) of the statute says that the Secretary of Education is to take appropriate actions to enforce the section and deal with violations of the section, but

that action to terminate assistance (funds) may only be taken if the Secretary finds there has been a failure to comply with the section and is determined that compliance cannot be secured by voluntary means.

Subpart E of 34 C.F.R. Part 99 sets out the regulatory framework for enforcement procedures. Complaints can be filed with the FPCO, investigations can be conducted (if timely filed within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation), and to make findings concerning its investigation. Under Section 99.66(c), if the educational agency or institution fails to comply, the Department of Education may find the educational agency's failure to comply was based on a policy or practice of the agency. Section 99.67(a) allows the Secretary to take any legally available enforcement action in accordance with the act, including but not limited to, enforcement actions available in Part D of the General Education Provisions Act (20 U.S.C. § 1234 *et seq.*). Such actions include withholding of further payments, issuing a complaint to compel compliance through a cease and desist order, or terminating eligibility to receive funding. If it is found that a third party outside the educational agency or institution violated the act, the educational agency or institution may be prohibited from allowing that third party to access personally identifiable information from education records for at least five (5) years.

Court actions and interpretations have further detailed possible enforcement actions which could be taken. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court found that no individual cause of action was created under FERPA or was enforceable under 42 U.S.C. § 1983 for alleged wrongful disclosure of education records. However, it is worth reviewing the comments on the 2008 revisions to 34 C.F.R. Part 99 on that point. On pages 74,842-843 of the 2008 final regulations, FPCO notes that the Gonzaga opinion did not address whether there might be individual causes of action for other FERPA violations, such as the parents' right to inspect and review their children's education records and affording parents an opportunity for a hearing to challenge the content of the student's education records, which do not contain the same "policy or practice" language as the nondisclosure requirements. Thus, is there some potential that an individual cause of action might exist under FERPA for violations of both those rights?

In *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit found that the Department of Education was authorized to bring a cause of action under 20 U.S.C. § 1234c for injunctive relief in order to halt or prevent a violation of FERPA. The court held that the Department was within its rights in seeking injunctive relief because none of the administrative remedies authorized by FERPA would have stopped the violations. The court basically held that the Department could take preemptive actions in enforcing FERPA, rather than only after violations occur. The court noted, "[o]nce personally identifiable information has been made public, the harm cannot be undone." *Id.* at 818. The 2008 revisions to 34 C.F.R. § 99.67(a) sought to make it clear that the Department did not have to determine that a policy or practice existed before taking any enforcement actions. Thus, some types of legal actions are possible at any time, regardless of whether or not a policy or practice of violating the act has been found to exist.

Lastly, we have been unable to find any instance where a school actually was denied federal funding because of a violation of FERPA. However, none of us wants our client schools to be the first to suffer such a fate. Likewise, none of us wants our district to have to spend public funds defending an action by the Department of Education accusing the school of violating parents' rights under FERPA. It is therefore important that all school attorneys continue to advise their clients carefully about the potential legal downsides to violations of FERPA and the importance of following its requirements carefully.

2017 SCHOOL LAW PRACTICE SEMINAR UPDATE: ADDITIONAL Q AND A NO. 11

- 11. *If a school uses online educational services to supplement the delivery of curriculum to its students, can it disclose personally identifiable information (PII) from student records to the service providers? Can a school or school district utilize outside providers or participate in an Integrated Data System (IDS) to assist it in housing or evaluating student data for purposes of furthering the school's instructional design for its students? And finally, are other laws implicated when a school utilizes online providers or IDS to support its programs?***

For all practical purposes, schools throughout the country cannot effectively manage and interpret student assessment data and/or deliver effective instruction to its students without utilizing online educational services and IDS in some way. The student data privacy issues that arise from using online services and/or IDS to support a school district's education programs have raised concern about the means by which schools districts maintain the privacy of student data. The U.S. Department of Education has responded to the developing issues regarding the ever-increasing use of online services and IDS in schools and school districts. The U.S. Department of Education established the Privacy Technical Assistance Center (PTAC) which assists school officials to learn about data privacy, confidentiality, and security practices. As mentioned above, the new Student Privacy website is meant to replace both the Privacy Technical Assistance Center's and the Family Policy Compliance Office's sites and is found at: <https://studentprivacy.ed.gov>.

PTAC has developed guidance to support schools in the use of online educational services to supplement the delivery of curriculum to students. This guidance addresses student privacy issues and is helpful to school attorneys and school officials in understanding FERPA's application to student data privacy issues. Two guidance documents provide a helpful discussion regarding FERPA, student data privacy, and best practices when schools use online technology to provide education services:

- *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, U.S. Department of Education (February 2014), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf
- *Protecting Student Privacy While Using Online Educational Services: Model Terms of Service*, U.S. Department of Education (January 2015), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/TOS_Guidance_Jan%202015_0%20%281%29.pdf

In its 2014 guidance document addressing the use of online education services, PTAC makes clear that in certain instances student information used in online services is protected by FERPA. The guidance states that "it depends" as to whether FERPA applies to student information used in online educational services "[b]ecause of the diversity and variety of online educational services." *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, U.S. Department of Education (February 2014), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf, p. 2. This PTAC guidance suggests that if online educational services use FERPA-protected student information, FERPA would apply:

Some types of online educational services do use FERPA-protected information. For example, a district may decide to use an online system to allow students (and their parents) to log in and access class materials. In order to create student accounts, the district or school will likely need to give the provider the students' names and contact information from the students' education records, which are protected by FERPA. Conversely, other types of online educational services may not implicate FERPA-protected information. For example, a teacher may have students watch video tutorials or complete interactive exercises offered by a provider that does not require individual students to log in. In these cases, no PII from the students' education records would be disclosed to (or maintained by) the provider.

Id. This guidance also discusses “metadata” -- the “contextual or transactional data” that “provides meaning and context to other data being collected.” *Id.* With respect to whether metadata could be used by a provider, the guidance notes:

Metadata that have been stripped of all direct and indirect identifiers are not considered protected information under FERPA because they are not PII. A provider that has been granted access to PII from education records under the school official exception may use any metadata that are not linked to FERPA-protected information for other purposes, unless otherwise prohibited by the terms of their agreement with the school or district.

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices at p. 3.

The PTAC guidance also addresses what FERPA requires when PII is disclosed to providers from students' education records. Noting FERPA's general rule that requires consent, the guidance states that “schools and districts must either obtain consent, or ensure that the arrangement with the provider meets one of FERPA's exceptions to the written consent requirement.” *Id.* The PTAC guidance explains that the frequently used exception would be the “school official” exception but acknowledges that the “directory information” exception might also apply when disclosures of PII are made to set up student/parent user accounts or individual student profiles. *Id.* The guidance stresses the importance of a school's meeting the requirements for application of the “school official” exception under 34 C.F.R. § 99.31(a)(1)(i):

Two of these requirements are of particular importance. First, the provider of the service receiving the PII must have been determined to meet the criteria for being a school official with a “legitimate educational interest” as set forth in the school's or district's annual FERPA notification. Second, the framework under which the school or district uses the service must satisfy the ‘direct control’ requirement by restricting the provider from using the PII for unauthorized purposes. While FERPA regulations do not require a written agreement for use in disclosures under the school official exception, in practice, schools and districts wishing to outsource services will usually be able to establish direct control through a contract signed by both the school or district and the provider. In some cases, the “Terms of Service” (TOS) agreed to by the school or district, prior to using the online educational services, may contain all of the necessary legal provisions governing access, use, and protection of the data, and thus may be sufficient to legally bind the provider to terms that are consistent with these direct control requirements.

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices at p. 4.

The PTAC guidance makes clear that FERPA limits what a provider can do with student information and that FERPA does not protect properly de-identified student information:

Any PII from students' education records that the provider receives under FERPA's school official exception may only be used for the specific purpose for which it was disclosed (i.e., to perform the outsourced institutional service or function, and the school or district must have direct control over the use and maintenance of the PII by the provider receiving the PII). Further, under FERPA's school official exception, the provider may not share (or sell) FERPA-protected information, or re-use it for any other purposes, except as directed by the school or district and as permitted by FERPA.

It is important to remember, however, that student information that has been properly de-identified or that is shared under the "directory information" exception, is not protected by FERPA, and thus is not subject to FERPA's use and re-disclosure limitations.

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices at p. 5.

PTAC also highlights that the Protection of Pupil Rights Amendment (PPRA) provides parents with certain rights regarding some marketing activities at schools and that the PPRA requires a school district to notify parents of students who are scheduled to participate in activities involving the collection, disclosure, or use of their personal information for marketing purposes and to give parents the opportunity to opt out of these activities. See 20 U.S.C. § 1232h(c)(2)(C)(i). The guidance points out that "[s]ubject to . . . exceptions, PPRA also requires districts to develop and adopt policies, in consultation with parents, about these activities" and notes an important exception that "neither parental notice and the opportunity to opt-out nor the development and adoption of policies are required for school districts to use students' personal information that they collect from students for the exclusive purpose of developing, evaluating, or providing educational products or services for students or schools." *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices* at p. 6.

Finally, the guidance suggests "best practices for protecting student privacy" for school officials, which explain "best practices" focusing on the following pointers directing that school officials:

- Maintain an awareness of all relevant laws (besides FERPA and PPRA);
- Be aware of what online services are being used in the district's schools (conduct an audit);
- Develop and implement policies and procedures to evaluate and approve on-line educational services;
- When possible, use a written contract or legal agreement (identifying the components of such an agreement);
- Take extra steps before employing/accepting Click-Wrap licenses for consumer apps;
- Be transparent with parents and students about how the school or district collects, shares, protects, and uses student data; and
- Consider that parent consent may be appropriate.

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices at pp. 7-12.

Following the issuance of its guidance regarding protecting student privacy while using online educational services discussed above, PTAC issued another instructive document designed to help school officials understand and evaluate potential Terms of Service (TOS) agreements with online educational service providers. See *Protecting Student Privacy While Using Online Educational Services: Model Terms of Service*, U.S. Department of Education (January 2015), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/TOS_Guidance_Jan%202015_0%20%281%29.pdf. This document includes a chart addressing TOS provisions and warning school officials regarding some TOS agreement terms and describing TOS language which would constitute “best practice.” PTAC explains its rationale for TOS best practices. The explanatory chart addresses the following TOS agreement provisions: the definition of “data;” data de-identification; marketing and advertising; modification of terms of service; data collection; data use; data mining; data sharing; data transfer and destruction; rights and license in and to data; access; and, security controls. *Id.*

Another PTAC document, *Integrated Data Systems and Student Privacy*, discusses how educational authorities (including school districts) can participate in an IDS while ensuring compliance with FERPA without the prior written consent of parents for disclosure of student PII. PTAC explains two exceptions to FERPA’s consent requirement:

There are two exceptions to FERPA’s general requirement of consent that may allow an educational authority to disclose PII from education records to an IDS Lead without consent. All educational authorities may explore the **audit and evaluation exception** to consent to make the disclosure of PII from students’ education records to the IDS Lead. If the educational authority is a school district, it may also explore the **school official exception** to consent to make the disclosures of PII from students’ educational records to the IDS Lead.

Integrated Data Systems and Student Privacy, U.S. Department of Education (January 2017), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final.pdf, p. 7 (emphasis added).

When school districts participate in an IDS, PTAC explains that:

Prior to integrating any PII from education records into an IDS, educational authorities should ensure that the governance framework and documentation for the IDS meets all of the legal requirements for the relevant FERPA exception . . . , ensures strong physical and IT security controls over the system, establishes sufficient oversight over the operation of the IDS, promotes transparency about the IDS’s data practices, and establishes a framework for reviewing and approving individual uses of the integrated data.

Integrated Data Systems and Student Privacy at p. 11. The PTAC guidance shares “best practices” for data security and transparency related to the multi-agency governance and information security program for the IDS participants. These “best practices” address: decision-making authority; standard policies and procedures; data content management; data records management; data quality; data access; recordation; and, data security and risk management. See *Integrated Data Systems and Student Privacy* at pp. 21-22.

Another issue of importance to school officials and school attorneys at the K-12 level is how FERPA and the Children’s Online Privacy Protection Rule (COPPA) interact. The Federal Trade Commission provides FAQs regarding COPPA which specifically address COPPA and schools. See

Complying with COPPA: Frequently Asked Questions, Federal Trade Commission, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Schools> (last visited August 25, 2017). These FAQs state that a school can consent to a website or app's collection, use or disclosure of personal information from students, explaining that:

Many school districts contract with third-party website operators to offer online programs solely for the benefit of their students and for the school system – for example, homework help lines, individualized education modules, online research and organizational tools, or web-based testing services. In these cases, the schools may act as the parent's agent and can consent to the collection of kids' information on the parent's behalf. However, the school's ability to consent for the parent is limited to the educational context – where an operator collects personal information from students for the use and benefit of the school, and for no other commercial purpose. Whether the website or app can rely on the school to provide consent is addressed in FAQ M.2. FAQ M.5 provides examples of other “commercial purposes.”

In order for the operator to get consent from the school, the operator must provide the school with all the notices required under COPPA. In addition, the operator, upon request from the school, must provide the school a description of the types of personal information collected; an opportunity to review the child's personal information and/or have the information deleted; and the opportunity to prevent further use or online collection of a child's personal information. As long as the operator limits use of the child's information to the educational context authorized by the school, the operator can presume that the school's authorization is based on the school's having obtained the parent's consent. However, as a best practice, schools should consider making such notices available to parents, and consider the feasibility of allowing parents to review the personal information collected. See FAQ M.4. Schools also should ensure operators to delete children's personal information once the information is no longer needed for its educational purpose.

Id. at FAQ M.1. The FTC's FAQs also address a school's or school district's obligations to notify parents of the website and online services whose collection the school or school district has consented to on behalf of the parents, indicating that it is “best practice” that the school or school district provide such notification. *See Id.* at FAQ M.4. Furthermore, the FTC guidance counsels schools on the types of information it should seek from an operator before entering into an arrangement that permits the collection, use, or disclosure of student PII, stating that:

In deciding whether to use online technologies with students, a school should be careful to understand how an operator will collect, use, and disclose personal information from its students. Among the questions that a school should ask potential operators are:

- What types of personal information will the operator collect from students?
- How does the operator use this personal information?
- Does the operator use or share the information for commercial purposes not related to the provision of the online services requested by the school? For instance, does it use the students' personal information in connection with online behavioral advertising, or building user profiles for commercial purposes not related to the provision of the online service? If so, the school cannot consent on behalf of the parent.

- Does the operator enable the school to review and have deleted the personal information collected from their students? If not, the school cannot consent on behalf of the parent.
- What measures does the operator take to protect the security, confidentiality, and integrity of the personal information that it collects?
- What are the operator's data retention and deletion policies for children's personal information?

Id. at FAQ M.5.

Finally, in addition to the PTAC information discussed above, other guidance resources are readily available to assist a school attorney in guiding school districts to comply with applicable laws related to student data privacy on the Student Privacy website:

- *Best Practices for Data Destruction*, U.S. Department of Education (December 2016), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Best%20Practices%20for%20Data%20Destruction%20%282014-05-06%29%20%5BFinal%5D_0.pdf.
- *Developing a Privacy Policy for Your District*, U.S. Department of Education (August 3, 2016), <https://studentprivacy.ed.gov/training/developing-privacy-policy-your-district>.
- *Frequently Asked Questions - Cloud Computing FAQ*, U.S. Department of Education (July 2015), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FAQ_Cloud_Computing.pdf.
- *Data Security: Top Threats to Data Protection*, U.S. Department of Education (June 2015), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Issue%20Brief%20Data%20Security%20Top%20Threats%20to%20Data%20Protection.pdf

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