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Charles J. Russo

University of Dayton, crusso1@udayton.edu

Allan G. Osborne Jr.

Snug Harbor Community School

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Student Records and Privacy

By Charles J. Russo, J.D., Ed.D., and Allan G. Osborne Jr., Ed.D.

Parents and qualified students have the right to inspect and review records that include personally identifiable information.

The Family Educational Rights and Privacy Act (FERPA), which became federal law in 1974, addresses the rights of students and their parents with regard to educational records. The two goals of FERPA are (1) to grant parents and eligible students, typically those over age 18, access to their educational records and (2) to limit the access of outsiders to those records. FERPA, along with the Individuals with Disabilities Education Act (IDEA) and its regulations, also has a significant effect on the delivery of special education for students with disabilities (20 U.S.C. § 1232[g]; 34 C.F.R. § 99.4).

Types of Records

FERPA covers “education records” that include personally identifiable information about students that are maintained by education agencies or by persons acting on their behalf (20 U.S.C. § 1232g[a][4][A]). Since education records may include information about more than one student, those who review records can examine only those portions of group data specific to their own children or themselves (20 U.S.C. § 1232g[a][1][A]).

Another form of records that school systems preserve is so-called directory information. Those records cover the “name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees and awards received, and the most recent previous education agency or institution attended by the student” (20 U.S.C. § 1232g[a][5][A]).

Before school officials can release directory information about current students, they must notify their parents and qualified students of the categories of records designated as directory and afford them a

reasonable time to request that the material not be released without their consent (20 U.S.C. § 1232g[a][5][B]; 34 C.F.R. § 99.37). Because the disclosure provisions about directory information are inapplicable to former students, officials can release such data without obtaining prior approvals (34 C.F.R. § 99.37[b]).

FERPA requires school officials to notify parents and qualified students of their annual right to inspect and review, to request amendment of, and to consent to disclosure of educational records, as well as to file complaints with the U.S. Department of Education alleging failures to comply with the statute’s terms (34 C.F.R. §§ 99.7, 300.612). Typically, parties receive a single notice that is reasonably likely to inform them of their rights via postings on district Websites, in newsletters, in student handbooks, in notes home, on local access TV, in Emails, or by other methods or combination of methods designed to ensure that they receive the information.

Pursuant to four major exceptions in FERPA, a variety of documents are not classified as educational records (34 C.F.R. § 99.3[b]) subject to mandatory disclosure:

1. Records made by educational personnel, such as teachers who make private notes about their students that are in the sole possession of their makers and are not accessible by or revealed to any other persons, except temporary substitutes, are not subject to release (20 U.S.C. § 1232g[a][4][B][1]).
2. Records kept separately by law enforcement units of education agencies that are used only for their own purposes cannot be accessed by third parties (20 U.S.C. § 1232g[a][4][B][2]).
3. Records made in the ordinary course of events relating to individuals who work

at, but who do not attend, educational institutions that refer exclusively to their capacity as employees and are unavailable for other purposes are exempt from disclosure (20 U.S.C. § 1232g[a][4][B][3]).

4. Records about students who are 18 years old or older, or who attend postsecondary educational institutions, made by physicians, psychiatrists, psychologists, or other professionals or paraprofessionals for use in their treatment, and are not available to others, except at the request of the students, cannot be released (20 U.S.C. § 1232g[a][4][B][4]).

Access Rights

As noted, pursuant to FERPA, parents and qualified students have the right to inspect and review records that include personally identifiable information (20 U.S.C. § 1232g[a][1][A]; 34 C.F.R. § 300.613). Absent court orders or state laws, FERPA grants noncustodial parents—typically divorced or unmarried—the same access rights to educational records as custodial parents (34 C.F.R. § 99.4). If court orders are in effect, educators would be wise to consider keeping hard copy files in two separate locations. In other words, to avoid the risk of mistakenly granting access to noncustodial parents or their representatives, educators should place essentially blank files in the main set of student records directing individuals who need to see them to a second, more secure location; officials should develop similar safeguards for materials in electronic formats. Along with access rights, FERPA requires officials to provide reasonable interpretations and explanations of information contained in records of children (34 C.F.R. § 99.10[c]).

Under FERPA, parental permission or consent is transferred to eligible students when they turn 18 or enter postsecondary institutions (20 U.S.C. § 1232g[d]; 34 C.F.R.

§ 300.625[b]). In a key exception relating to special education, educators can take students' ages and the types or severity of their disabilities into account when considering whether to grant access rights (34 C.F.R. §§ 300.574, 300.625[a]). Other restrictions permit officials in postsecondary institutions to deny students access to financial records of their parents (20 U.S.C. § 1232g[a][1][B]); 34 C.F.R. § 99.12[b][1]) or letters of recommendation if they waived their rights of access (20 U.S.C. § 1232g[a][1][C]; 34 C.F.R. § 99.37[b][2][3]). Further, officials are not required to grant access to records pertaining to individuals who were not or were never students at their institutions (20 U.S.C. § 1232g[a][6]).

Third parties generally can access school records, other than directory information, only if parents or eligible students provide written consent in advance (20 U.S.C. §§ 1232g[b][1], 1232g[b][2][A]). To assist in smooth school operations, especially as educators in different systems interact with each other, FERPA includes 11 major exceptions where permission is not required before officials can review educational records.

1. School employees with legitimate educational interests can access student records (20 U.S.C. § 1232g[b][1][A]). For example, at the end of a school year or over a summer, first grade teachers can review the records of kindergarteners who will be in their classes in the fall in order to prepare for classes. However, first grade teachers would be unlikely to have a legitimate need to see the files of children entering fifth grade because they would not be instructing or interacting with them in official capacities.
2. Officials representing schools to which students applied for admission can access their records as long as students or their parents receive proper notice that the information has been sent to the receiving institutions (20 U.S.C. § 1232g[b][1][B]).
3. Authorized representatives of the U.S. comptroller general, the secretary of education, and state and local education officials who are authorized to do so by state law can view student records for law enforcement purposes (20 U.S.C. § 1232g[b][1][C][E]).
4. Persons who are responsible for evaluating the eligibility of students for financial aid can review appropriate educational records (20 U.S.C. § 1232g[b][1][D]).
5. Members of organizations conducting studies on behalf of education agencies or institutions developing predictive tests or administering aid programs and improving instruction can view records as long as doing so does not lead to the release of personal information about students (20 U.S.C. § 1232g[b][1][F]).
6. Individuals acting in the course of their duties for accrediting agencies can review student records (20 U.S.C. § 1232g[b][1][G]).
7. Parents of dependent children can access student records pertaining to their own children (20 U.S.C. § 1232g[b][1][H]).
8. In emergency situations, persons who protect the health and safety of students or others can view records (20 U.S.C. § 1232g[b][1][I]).
9. Written permission is unnecessary if student records are subpoenaed or otherwise sought via judicial orders; however, school boards must notify parties in advance of compliance (20 U.S.C. §§ 1232g[b][1][J], 1232g[b][2][B]). Even so, before ordering the release of information, courts weigh the need for access against the privacy interests of students. Those

- provisions specify that FERPA does not forbid educators from disclosing information about registered sex offenders who must register per federal law.
10. The secretary of agriculture or authorized representatives of the Food and Nutrition Service or contractors acting on its behalf who are engaged in program monitoring, evaluations, and/or performance measurements of agencies or institutions receiving funding or that provide benefits under one of two named federal lunch and nutrition programs for which results are reported in an aggregate form not identifying individuals can access student files (20 U.S.C.A. § 1232g[b][1][K]). Also, that section dictates that personally identifiable information about students or their parents must be protected from disclosure except to the representatives specified earlier in this paragraph. The section further calls for the destruction of personally identifiable data no longer needed for program purposes.
 11. Caseworkers or other representative of an array of child welfare agencies who have access rights to the case plans of the children in their care can review the educational records or the personally identifiable information contained therein (20 U.S.C.A. § 1232g[b][1][L]). Even so, those accessing files are forbidden from disclosing information except to individuals or entities engaged in addressing the educational needs of the students and are authorized to receive such disclosures as long as the way in which data are released is consistent with applicable law protecting the confidentiality of the underlying records.
- Third parties seeking disclosure of student records must have written consent from parents or students specifying the record(s) to

be released, the reason(s) for the proposed release, to whom the information is being given (34 C.F.R. § 99.30), and proof that they have the right to receive copies of the materials (20 U.S.C. § 1232g[b][2][A]). Moreover, educators must keep records on individuals or groups, except exempted parties, who request or obtain access to student records (20 U.S.C. § 1232g[b][4][A]). Those records must both explain the legitimate interests of those who were granted access and be kept with the records in question (20 U.S.C. § 1232g[b][4][A]; 34 C.F.R. § 300.614).

Education agencies that maintain student records must comply with requests for review without unnecessary delay. In other words, unless parents or students agree otherwise, officials must grant access no later than 45 days after receiving requests (20 U.S.C. § 1232g[a][1][A]; 34 C.F.R. § 99.10[b]). Needless to say, officials can grant access to records more quickly.

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Officials receiving requests for access to records cannot charge fees to search for or to retrieve student files (34 C.F.R. §§ 99.11[b], 300.614[b]). Once materials are located, though, officials can charge for copies as long as doing so does not effectively prevent persons from exercising their rights to inspect and review the records requested (34 C.F.R. §§ 99.11[a], 300.614[a]).

Amending Records

Individuals who disagree with the content of educational records can ask school officials to amend the disputed information (34 C.F.R. §§ 99.20[a], 300.618[a]). If officials refuse to amend records within a reasonable time (34 C.F.R. §§ 99.20[b]

[c], 300.618[b]–[c]), parties are entitled to hearings at which independent third-party hearing officers evaluate whether the challenged material is accurate and appropriately contained in the educational records (34 C.F.R. §§ 99.21, 300.619).

Hearing officers must both conduct hearings and render decisions within a reasonable time (34 C.F.R. § 99.22). If hearing officers agree that contested materials are inaccurate, misleading, or otherwise violate student privacy rights, educators must amend them and inform the parties in writing that it has been done (34 C.F.R. §§ 99.21[b][1], 300.620[a]). Conversely, if hearing officers think that the materials are neither inaccurate nor misleading, or do not otherwise violate students' privacy rights, the records need not be removed or amended (34 C.F.R. §§ 99.21[b][2], 300.620[b]).

Still, parents or students who remain concerned about the content of the educational records can add statements explaining their objections that must be kept with the contested information for as long as the records are retained on file (34 C.F.R. §§ 99.21[c], 300.620[c]).

Destruction of Records

The number of records in the files of students who are in special-education placements, in particular, can multiply rapidly. Accordingly, the IDEA's regulations address the destruction of information that is no longer needed. Although neither the IDEA nor its regulations define the term, the latter indicate that records, such as outdated individualized education programs, can be destroyed when they are no longer needed to provide children with services (34 C.F.R. § 300.624[a]).

The regulation adds that parents must be advised that records are going to be destroyed and that school officials can save, without any time limitation, records that include students' names, addresses, phone numbers, grades, attendance

records, classes attended, and grade levels completed along with the years they were completed (34 C.F.R. § 300.624[b]).

Enforcement

If parents are denied the opportunity to review the records of their children or if information is released impermissibly, such as for students over the age of 18 in postsecondary institutions, the officials who denied appropriate access or granted inappropriate access can be charged with violating FERPA, thereby triggering its enforcement provisions. In *Gonzaga University v. Doe* (2002), a case from higher education, the Supreme Court clarified that aggrieved parties must file written complaints detailing alleged violations with the U.S. Department of Education's Family Policy Compliance Office (FPCO) (34 C.F.R. § 99.63). Accordingly, individuals cannot file suits directly against their boards.

Complaints must be filed within 180 days of when alleged violations occurred or the dates claimants knew or reasonably should have known about them (34 C.F.R. § 99.64). When FPCO staff members receive complaints, they must notify officials at the schools in writing, detailing the substance of the alleged violations and asking them to respond before considering whether to proceed with investigations (34 C.F.R. § 99.65). If, after investigations (34 C.F.R. § 99.66) are completed, the FPCO staff members agree that violations occurred, U.S. Department of Education officials can withhold future payments under its programs, can order boards to comply, or ultimately can terminate institutional eligibility to receive federal funding if administrators refuse to comply within reasonable time frames (34 C.F.R. § 99.67), a draconian solution that has yet to occur.

The only other Supreme Court case involving FERPA, *Owasso Independent School District v. Falvo* (2002), addressed peer grading in a

K–12 school, a practice that allows teachers to have students grade the papers of classmates. The Court held that peer grading does not turn papers into educational records covered by FERPA because those assignments do not become educational records within the meaning of the law until they are entered into a teacher's grade books. The Court concluded that a board in Oklahoma did not violate FERPA by permitting teachers to use peer grading over the objection of a mother whose children attended schools in the district.

Recommendations

In light of FERPA's extensive provisions, school business officials, their boards, and other education leaders would be wise to develop policies addressing the following issues.

First, policies should protect the privacy of records by appointing a record keeper in each school to prevent unauthorized access by student workers, parent volunteers, or others. That person should keep a log, including the name, date, time, and duration that individuals accessed hard-copy materials. Electronic files should be password protected.

Second, consistent with provisions in state law that may provide more detail than FERPA, policies must protect the rights of noncustodial parents with respect to student records, detailing how they may be able to access the files of their children.

Third, policies should include provisions to remind parents when their access rights are being transferred to their children who reach 18. Even so, officials can take the age and types or severity of student disabilities into account when considering whether to grant them rights of access instead of their parents.

Fourth, hearings should be provided for individuals who object to the contents of student records. Subsequently, officials should amend records shown to be inaccurate or misleading or should allow parents or students to include

statements in files that are not amended.

Fifth, as to students with disabilities, officials should develop procedures to review files periodically and to remove documents that are no longer needed. In that respect, though, it is important to recognize that many documents may be needed in the future should litigation occur. As such, it is important to consult legal counsel when selecting materials that are about to be purged from files.

Sixth, districts should offer annual professional development sessions to keep staff abreast of changes in the law.

Seventh, officials should conduct annual reviews to ensure that policies are up-to-date with developments in federal and state law.

Conclusion

As with many legal matters, knowledge of the law can help avoid potential controversies or litigation. Thus, the better that school business officials, their boards, and other education leaders understand FERPA, then the greater their ability to spend district resources educating children rather than fighting legal battles that can easily be avoided.

References

- Code of Federal Regulations, as cited (2013).
- Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012).
- Gonzaga University v. Doe*, 536 U.S. 273 (2002).
- Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (2012).
- Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002).

Charles J. Russo, J.D., Ed.D., vice chair of ASBO's Legal Aspects Committee, is Joseph Panzer Chair of Education in the School of Education and Health Sciences (SEHS), director of SEHS's Ph.D. program, and adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crusso1@udayton.edu

Allan G. Osborne Jr., Ed.D., is retired principal of Snug Harbor Community School, Quincy, Massachusetts. Email: allan_osborne@verizon.net