

Safe Schools, Information Sharing & FERPA

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Collaboration between schools and other agencies is quickly becoming the norm rather than the exception. Interagency teams are increasingly motivated to maintain an effective network for making better assessments about the needs of children and the safety of school campuses. As this trend continues, the rules regarding information sharing will remain a hot topic, deserving constant and careful scrutiny.

In particular, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.S. §1232g, is being studied by many agencies to determine the scope and the limits on efforts by educators to share information. Persistent misperceptions exist about the role of FERPA in the safe schools movement. This need not be. Each member of an interagency team needs to understand FERPA and its impact on interagency collaboration.

Test your “FERPA IQ” on the following scenarios:

- 1) Local police are investigating an assault that occurred on a public school campus during the school day. School officials have received a request from the police to provide a class list containing the name and address of all students in the classroom for the particular period when the assault occurred and all attendance lists for the class. Is FERPA a barrier to this disclosure?
- 2) Mary, age 15, is arrested for shoplifting. This is her first offense, and the police department contacts the school for information about Mary’s school attendance, discipline and academic performance. Can school officials share the information without violating FERPA?
- 3) A state child protection agency, after receiving complaints from parents about alleged incidents of child abuse at a public school, ask school officials for permission to visit the school during school hours, speak to students and have access to student records. Does FERPA permit access to the records?
- 4) The federal government wants to make an assessment regarding the compliance by a local school district with federal antidiscrimination law. The federal agency asks school officials to provide for each student in the school district the following: name, student identification number, address, grade, school, homeroom number, birth date, race, sex, telephone number, any special education designations, and whether the student transferred to the school. Does FERPA prevent this disclosure?
- 5) A student’s father wrote his son’s teacher a letter, in which he stated his opinion about certain politically sensitive issues discussed in class and frank criticism about the teacher’s educational goals. One year later, when the same parent ran for the City Council, school officials released the letter for publication to a local newspaper. The parent filed a lawsuit for money damages for invasion of privacy based on FERPA. Will the lawsuit be successful?
- 6) Two students get into a fight on campus. A school resource officer, who is assigned to the campus, breaks up the fight and files an incident report with the assistant principal. The SRO gives the original report to the assistant principal and keeps a copy for herself. Later, when the

same students are taken into custody for fighting in a local shopping mall, the city police ask the school for a copy of the incident report. Does FERPA permit this?

These questions are not as difficult to discuss as they once were because FERPA is no longer as inscrutable. First, it is still true that FERPA remains focused on what Congress in 1974 saw as growing evidence of abuse of access to student records. Attracting specific concern were incidents of access to student records without parental notice or consent, lack of a consistent system for governing access to records by other agencies and failure to disclose disciplinary information to parents. Second, it is equally clear that FERPA provides a strict framework to deter abusive practices by conditioning the availability of federal funds to schools that comply with its regulations:

“No funds shall be made available...to any educational agency or institution which has a policy or practice of permitting the release of education records... of students without the written consent of their parents to any individual, agency, or organization.” 20 U.S.C.A. §§ 1232g(a) and (b)(1).

However, both Congress and the courts have clarified what constitutes a violation of FERPA’s privacy provisions. With this clarity comes a degree of confidence in describing the role of educators as information providers. The essential starting point for FERPA disclosure is always notice to, and consent from, the parent or guardian prior to the sharing of the contents of the education record. After this, Congress has refined a list of the circumstances when disclosure is permitted without prior written consent. It includes disclosures that are made:

- To comply with a judicial order or lawfully issued subpoena. 34 CFR 99.31(a)(9)
- In connection with a health or safety emergency. 34 CFR 99.31(a)(10);
- To provide “directory information” (student name, address, date of birth, dates of attendance, etc.). 34 CFR 99.37;
- To State and local officials in compliance with a State statute that requires or authorizes information sharing. 34 CFR 99.31(a)(5) and 34 CFR 99.38;
- To provide information from the school’s law enforcement unit records file that is usually maintained by the SRO. 34 CFR 99.3 and 99.8.
- To other school officials, including teachers, within the school or school district. 34 CFR 99.31(a)(1);
- To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll. 34 CFR 99.34;
- To teachers and school officials in other schools when the information concerns disciplinary action taken against the student for conduct. 34 CFR 99.36.

For its part, the courts have clarified how FERPA is to be enforced. FERPA does not create a private right of action that allows a person to bring a lawsuit for damages in court. See *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The U.S. Supreme Court based the ruling on its view that spending legislation is generally not intended to create a right to file a lawsuit as a means of enforcement, “[u]nless Congress speaks with a clear voice and manifests an unambiguous intent to confer [such a right]...” *Gonzaga*, 536 U.S. at 273-74. As a result, enforcement for violations of FERPA rests solely with the U.S. Department of Education through its Family Policy

Compliance Office. Taken together a different picture of FERPA is emerging that is compatible with the safe schools collaborative movement.

In the I.Q. test, the answer is “Yes” to all fact patterns except number five. In Question One, the information sought is “directory information” concerning the names and addresses of students who were present in class when the assault occurred. Disclosure of such information is not privileged under FERPA. Therefore, providing the police with the names and addresses does not require parental consent and is not a violation of federal law. See *Patterson v. School Dist.*, 2000 U.S. Dist. LEXIS 10245 (E.D. Pa. July 19, 2000). See also *Staub v. East Greenbush School Dist.*, 128 Misc. 2d 935, 491 N.Y.S.2d 87 (N.Y. Sup. Ct. 1985).

In Question Two, the school can release school attendance, academic performance, or other information from Mary’s education record with the consent of one of her parents. If State law authorizes the disclosure to juvenile justice system agencies, the school can share information from Mary’s education record without parental consent. Absent such a State law, the school should ask the police department to obtain a subpoena for the records. See *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs. A Guide to FERPA. Series: NIJ (www.ncjrs.org/txfiles/163705.txt)*.

In Question three, the information sought is part of the essential work of an agency created under state and federal law for child protection. Therefore, the interest to maintain privacy of student records is outweighed by the broad mandate to investigate and remedy suspected abuse or neglect. See *Disability Rights Wis., Inc. v. State Dep’t of Pub. Instruction*, 463 F.3d 719 (7th Cir. Wis. 2006).

In Question Four, the government’s discovery request falls within the law enforcement exception of FERPA because law enforcement is not limited to the enforcement of criminal laws. The government’s request to obtain the records in order to determine whether the school district is in compliance with the law constitutes law enforcement purposes under 20 U.S.C.S. § 1232g(b)(1)(C)(ii) of FERPA. See *United States v. Bertie County Bd. of Educ.*, 319 F. Supp. 2d 669 (E.D.N.C. 2004). Also *Patterson v. School Dist.*, 2000 U.S. Dist. LEXIS 10245, 2000 WL 1020332, (E.D. Pa. July 19, 2000).

In Question Five, although the parent has a valid argument that the disclosure violates FERPA, he is not permitted to enforce FERPA through a private civil lawsuit. See *Gonzaga University v. Doe* (above).

Finally, in Question Six, while it is true that the record of the school incident is an education record that is ordinarily subject to FERPA constraints, the incident reports created and maintained by the SRO may be disclosed under the law enforcement unit record exception. See 34 C.F.R. 99.3 definition and 99.8.

Article reprinted from the Fall 2007 edition of the NASRO Journal of School Safety.