

FERPA and Confidentiality Issues

Galveston Independent School District
August 12, 2023



Celena Vinson



Elizabeth Humphrey

Thompson & Horton LLP
3200 Southwest Freeway
Suite 2000
Houston, Texas 77027

Family Educational Rights and Privacy Act 20 U.S.C. § 1232g

- Gives parents and students access to their own educational records
- Prohibits release to third parties without the consent of the parent or eligible student
- "**Eligible student**" - student who is 18 or who is attending an institution of postsecondary education

What is an “Educational Record”?

- Records directly related to a student that are maintained by an educational institution or a party acting for the institution
- **Contains personally identifiable information**- name of the student, parent or other family member; the student's address; social security number or driver's license number; or other information making the identity of the student traceable
- ***In any form***, including handwritten, typewritten, tapes, film, video, and computer records

Is the Student's Identity “Easily Traceable”?

- FERPA applies even when the record does not actually reveal the name of the student.
- If it is possible for third parties to figure out who the student is, then the record is protected by FERPA.

What If...

- The assistant principal investigates a violation of the Student Code of Conduct and takes statements from 3 students, one of whom is a girl. These are the only 3 students who witnessed the event. Even with names redacted, it is clear the girl's statement was written by her. Can her statement be used without parent consent?

- **No.** FERPA does not apply to disclosure of information derived from a source other than an educational record, such as personal knowledge or observation, even if the same information is in an educational record.
- **However**, if the information is derived from education records, FERPA prevents disclosure even if the information is available from another source.
- When in doubt whether information is protected by FERPA, err on the side of refraining from disclosing information about students.

What Does the Family Policy Compliance Office Say?

- Parent alleges that school office worker improperly disclosed information from educational records
- Office worker claimed information stemmed from her personal observation
- Office worker is also a parent of a child in the student's classroom
- Parent relied on an email from another parent that contained information discussed at the IEP meeting and on a discipline report

- Office worker claims that information in the email came from her observations and information she heard from other parents and her own child
- FPCO found that based on the evidence it could not substantiate an improper disclosure of the student's educational records
- *Letter to Anonymous*, 15 FAB 33 (FPCO 2012).

Verbal Information – Does it Constitute an “Education Record”?

- During a volleyball game, a counselor talks to a special education teacher regarding a student’s discipline record and the student’s grades. A person at the volleyball game overhears this conversation. Has the counselor improperly disclosed an education record?

Possibly. If a school official verbally imparts information about a student that is a result of the official's personal knowledge, observation, or hearsay, then that information would not be protected under FERPA. On the other hand, if the school official's knowledge of the information is derived from the student's education records or based on actions that the official took, then that information is protected by FERPA from improper disclosure.

What is ***Not*** an “Educational Record”?

Certain uncirculated notes and records

- In the sole possession of the maker; and
- Are not accessible or revealed to any other person except a substitute for the maker.
- Intended to protect “personal notes” used to jog a teacher’s memory about a particular matter or event, such as a note reminding the teacher to call a parent or that the student was disruptive
- Not intended to exclude detailed or comprehensive notes that record specific clinical, educational, or other services provided to a student or that records direct observations or evaluations of student behavior

What If...

- A counselor takes notes during a session with a student. The counselor keeps the notes in a filing cabinet at the school. The notes have not been reviewed by anyone else. Are these notes an “education record?”

- ***Most likely, yes.*** While the notes have not been reviewed by anyone else, they are being kept in a filing cabinet at the school and are “accessible” to others.
- Even if the notes were kept at the counselor’s home or office, it is possible the notes would still be considered an “education record.”
- In *Abuse in Schools v. Williamsport Area Sch. Dist.*, 140 Pa. Commw. Ct. 1990, the court found the notes of a psychologist were not protected because they were intended to be shared with others under the terms of the agreement with the parents.

What is ***Not*** an “Educational Record”?

- **Certain Law Enforcement Records**
- Records maintained by a law enforcement unit of the educational institution that were created by that law enforcement unit for law enforcement purposes
- If a copy is placed in a student's file, the information becomes an education record.
- Release of the law enforcement record will be governed by the PIA.
- Documents created in connection with *school-initiated discipline* are not law enforcement records and must be considered a student educational record.

What is ***Not*** an “Educational Record”?

Employment Records

- The person is employed by an educational institution but is not a student and the records are made and maintained in the normal course of business and relate exclusively to that person's capacity as an employee
- If the person is a student and is employed in his or her capacity as a student, records regarding employment are subject to FERPA.

What is ***Not*** an “Educational Record”?

Directory Information

- Special category of information under FERPA
- May be disclosed without consent, provided no previous request for confidentiality
- Includes name, address, telephone number, date and place of birth, major field of study, participation in activities and sports, weight and height of athletes, dates of attendance, degrees and awards, previous school, student e-mail addresses, enrollment status, and photographs, etc.

Directory Information

- FERPA gives schools the opportunity to prepare a list of the items that they consider to be directory information to provide to parents.
- Parents must be given a reasonable period of time to elect to keep that information confidential.
- Once tagged confidential, the information cannot be released without consent.
- A parent may consent to the limited release of directory information for purposes such as a student directory or yearbook if such purpose is specifically designated by the school district. The information would remain confidential if requested by the parent for all other purposes.

Directory Information

- School district receiving assistance under the Elementary and Secondary Education Act of 1965 (ESEA) shall provide, on a request made by military recruiters or an institution of higher education, access to secondary school students' names, addresses, and telephone listings.
- The parent may request that the student's information not be released without prior written parental consent.
- A district shall notify parents of the option to make a request and shall comply with any request.

Directory Information in GISD

- For all District **publications and announcements**, directory information shall include:
 - student name
 - image in photograph or video/audio
 - major field of study
 - degrees, honors, and awards received
 - grade level
 - creative works
 - most recent school previously attended
 - enrollment status
 - participation in officially recognized activities and sports
 - weight and height of members of athletic teams

Directory Information in GISD

- For **all other purposes**, directory information shall include:
 - student name
 - address
 - telephone listing
 - electronic mail address
 - photograph
 - date and place of birth
 - major field of study
 - degrees, honors, and awards received

Directory Information in GISD

- dates of attendance
- grade level
- most recent school previously attended
- enrollment status
- participation in officially recognized activities and sports
- weight and height of members of athletic teams

Who Has FERPA Rights?

- A parent or legal guardian until the child turns eighteen
- Whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, **all rights transfer to the student**
- **Important exception:** FERPA permits, but does not require, that a school provide access to parents if they are the "parents of a dependent student" as defined by the Internal Revenue Code. 28 U.S.C. § 1232g(b)(H)

Disclosure

- **General rule** - education records are available to the parent but may not be disclosed to others without parent consent
- **"Disclosure"** - permits access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written or electronic means

Disclosure of Testing Protocols

- Unless test protocols contain personally identifiable information about a student, they are not considered education records.
- Protocols that are secured documents generally are protected by copyright law.

What If...

A student's reading skills were assessed on an ongoing basis using an observational reading assessment software protected by copyright law. With this software, teachers conducted one-to-one reading assessments using a mobile device to record students' interactions with texts from a variety of book sets. Once the student's responses were recorded into the mobile device, the device generated summary reports to track the student's progress. Student responses were not recorded on the test booklet. The school provided the parents with the computer-generated reports of the student's assessment results, along with explanations of the reports. The parents, however, requested access to the test booklet. Must the school disclose it?

No. The test booklet did not contain the student's personally identifiable information, and the mobile device in which the student's answers were recorded did not contain an electronic version of the test. Therefore, the test protocol was not a part of the student's education record.

Montgomery County Public Schs., 15 FAB 17 (SEA Md. 2011).

Disclosure Via Email

- FERPA allows disclosure of “education records” (or personally identifiable information contained therein) by electronic means. *See* 34 C.F.R. 99.3
- There are no federal requirements for encryption of education records sent via email.
- The Family Policy Compliance Office (FPCO) indicated that a school district’s duty under FERPA is to take all appropriate steps to ensure that student records cannot be viewed by a third party and that they are in fact sending them to the proper email address.

Disclosure Via Email

- To ensure compliance with FERPA when sending education records via email, the district should (1) require prior written permission from parents agreeing to receipt of the information by email and (2) have the parent provide the email address.
- While encryption of emails is not a requirement under the regulations, FPCO does say that encryption is a "good business practice."

Can a teacher send herself/himself confidential student records?

- No. A teacher sent confidential student records to her personal Gmail account. She "admitted she had no legitimate educational interest in accessing and transferring the confidential student information. Indeed, she stated she copied the records to her personal Google account so she might use them in her discrimination suit against the District."
- A Missouri Supreme Court upheld the school board's termination of the teacher based on the improper disclosure.

What About Videos of Students?

- Parent of a student with autism requested that the district provide her with video clips of her son
- District was unable to provide the video clips because they had been deleted from the media drive on which they were stored, which was the school library's normal procedure
- Parent filed a due process complaint under the IDEA claiming the district violated IDEA and FERPA in failing to provide access to educational record

- The administrative law judge found that the district did not "maintain" the video clips because they were routinely deleted; therefore, the video clips did not constitute education records under FERPA.
- *Henry County Public Schs.*, 15 FAB 10 (SEA Ga 2011)
- **Note**: Be careful to comply with the district's retention schedule.

More on Videos

- Videos are educational records of students involved.
- Videos are not educational records of by-standers.
- Parents can view the videos if they are educational records of their children, but they don't get copies.

What About Student Statements?

- Statements written by students are probably the educational records of the student.
- Statements written by students that describe the actions of employees are not the educational records of the student author – they don't contain information “directly related to the student”
- Statements written by a student about another student's actions? Err on the side of non-disclosure.

Parental Access

- Student records are available to the student's parent if the student is a minor or is an adult dependent of the parent.
- If a school record mentions more than one student, the parents have the right to review or be informed only about the information relating to their student.
- Parents are entitled to access within 45 days after their request is made.
- Different statutes define “parent” differently

Records Can Be Released Without Consent

To:

- Other **school officials** who have a **legitimate educational interest** in the student
- **Officials of other school or school systems** where student seeks to enroll
- In connection with a student's application for **financial aid**
- Information allowed to be reported by state statute regarding the **state juvenile justice system**
- Organizations **conducting studies** for or on behalf of educational agencies for the purpose of developing predictive tests

Records Can Be Released Without Consent

- **Accrediting organizations**
- **Parents of a dependent student**
- In connection with an **emergency**, if the information is necessary **to protect the health and safety of the student or other persons**
- To the entity or persons designated in a **court order, a federal grand jury subpoena or a state subpoena**. School district must notify the parent that the records are going to be released *before* the release

What If...

A student begins senior year and is already 18. The student moves out of his parents' home in October. In December, can the parent come to the campus and review the student's transcript and grades for each 6 weeks of the semester?

- *It depends.*
- If the student is a dependent on the parents' tax return, yes.
- If not, probably not.
- If the student gives consent, parent can review.

What If...

A student begins senior year and is already 18. The student moves out of his parents' home in October and we know that the student is not considered the parents' dependent. In December, the student meets with the LSSP as part of a re-evaluation and discloses that he has suicidal tendencies. Can the student's parent have access to a written report that contains that information?

- Maybe, if the circumstances constitute a health and safety emergency and if the parent is the party who is in the best position to deal with the emergency.
- The disclosure must be necessary to protect the health or safety of the student or another person.

Keeping a Record of People Who Access Educational Records

- A school district must keep a record or a log of each person or entity that gains access to a student's educational records, including the name of the person or agency that made the request and the date of access.
- No record is required of access by a parent, a school official, someone with parental consent, or a request for directory information.
- The only people who have access to the record or log are the parent, school officials responsible for custody of the records, and those state, local, and federal officials authorized to audit the operation of the system.
- The documentation should be maintained by the district until the student's death, graduation, or withdrawal from the district.

Interesting Case

- Parents of student with autism requested a complete copy of their child's educational file
- Parts of the file were missing
- Receptionist kept key to filing units in unlocked desk drawer
- Parents were permitted to go to the file room unsupervised and look at files
- District did not have a proper system in place for safeguarding student files

- District was directed to devise a process to ensure the records were maintained in a confidential manner and that people who had access were properly trained.
- District was required to take remedial measures because it could not prove that the documents were not missing or were not missing due to no fault of the district.
- *Harrison Sch. Dist. #2*, 15 FAB 31 (SEA CO 2012)

Amending Records

- A parent or eligible student has the right to amend or contest the information contained in the student's educational record if he or she believes that the educational records are inaccurate, misleading, or violate the privacy of the student.
- The district must *notify* the parents *in writing* of the district's *decision*. If the request is granted, the district must amend the educational record. If the request is denied, the parents must be notified of their right to a hearing.

Amending Records

- A hearing must be held within a reasonable time after the request is received. The parents must be notified in advance of the date, time, and place of the hearing. The hearing may be conducted by a school person who does not have any connection to the dispute – a disinterested, objective third party. The parent must have a full and fair opportunity to present relevant information and may be represented by another person including an attorney.
- The parents must be notified of the district's decision in writing within a reasonable time after the hearing. The decision must be based on the evidence presented at the hearing and include a summary of the evidence and the reasons for the decision.

Amending Records

- If the district denies the request, the parents must be notified that they have the *right to place in the record a statement commenting on the contested information* and/or stating any reason for disagreeing with the district's decision. The statement must be maintained as long as the record is maintained and must be disclosed when the record is disclosed.
- The FERPA amendment procedure may be used to challenge facts that are inaccurately recorded. However, it may not be used to challenge a grade, an opinion, a placement determination, or a substantive decision made by a school about a student.

Interesting Case

- Parents sought to amend the student's education record, claiming the district made misleading and offensive statements in the student's psycho-educational report
- FPCO found that a school official drafted the education record at issue and the comment to which the parent objected constituted that official's opinion. Thus, there was not basis for FPCO to pursue an investigation.
- *Letter to Anonymous*, 15 FAB 20 (FPCO 2011).

Student's Death – Do the Rights Survive?

- **No**. FERPA does not prevent a governmental body from making the education records of a deceased student available to members of the public.
- An individual's privacy rights lapse on the individual's death.
- Op. Tex. Att'y Gen. No. OR2012-10756 (2012); Op. Tex. Att'y Gen. No. OR2006-03605 (2006); Op. Tex. Att'y Gen. No. OR2005-01935 (2005).

Notifying Parents of FERPA Rights

- FERPA requires school districts to **annually notify parents that they have the right to:**
 - inspect and review the student's educational records;
 - seek amendment of the student's educational records;
 - consent to disclosure of personally identifiable information (unless non-consensual disclosure is specifically allowed);
 - file with the Department of Education a complaint regarding a school district's failure to comply with FERPA.

Notifying Parents of FERPA Rights

- The notice **must also provide all** of the following:
 - the procedure for exercising the right to inspect and review;
 - the procedure for requesting amendment; and
 - if the school district has a policy of disclosing information to other school officials who have been determined to have a legitimate educational interest in the information, (1) specific criteria for determining who constitutes a school official and (2) what constitutes a legitimate educational interest.

Notifying Parents of FERPA Rights

- If a school **intends to disclose directory information**, the school must notify parents and eligible students of:
 - the types of information designated as directory;
 - the right of the parent or eligible student to refuse to allow information to be designated as directory; and
 - the period of time to notify the school that there should be no disclosure of any or all directory information.

What If...

During an interview with a psychologist, the psychologist takes notes of the student's discussion and comments. Some of the comments by the student are negative about the student's father. After the interview, the parents request to see the psychologist's notes. The psychologist does not want the parents to see her notes. Are the notes an "education record," and if so, must they be disclosed?

- Yes.
- School health and medical records for children under 18 constitute “education records” under FERPA
- Records of psychiatrists, psychologists, LSSP’s, and the like become education records when a student under age 18 is receiving services under the Individuals with Disabilities Education Act or Section 504 on the basis of an emotional or behavioral disability
- It is likely that FERPA would require the disclosure of a psychologist’s interview notes as well

Do Any of The Exceptions Apply?

- **Probably not.**
- **“Treatment Records”** Exception:
 - only applies to
 - records on a student who is eighteen years of age or older or is attending an institution of postsecondary education;
 - which are made or maintained by a physical, psychiatrist, psychologist, or other recognized professional or paraprofessional;
 - acting in his professional capacity;

Do Any of The Exceptions Apply?

- and which are made, maintained, or used solely in connection with the provision of treatment to the student;
- and are not available to anyone other than the persons providing such treatment;
- except such records can be personally reviewed by a physician or other appropriate professional of the student's choice.
- 20 U.S.C. § 1232g(a)(4)(B)(iv)

Do Any of The Exceptions Apply?

- “Health & Safety” Exception:
 - permits the disclosure of information from student education records “to appropriate parties . . . in connection with an emergency if knowledge of the information is necessary to protect the health and safety of the student or other individuals.” 34 C.F.R. § 99.36(a)
 - The exception provides schools a way to disclose information in the case of an emergency without first obtaining the necessary consent.
 - It does not appear to apply to a situation in which the school is trying to withhold education records from parents.

Psychologist / Patient Privilege – Can the Privilege be Used to Protect the Information?

- **Probably not.**
- *Catrone v. Miles*, 215 Ariz. 446, 451-52, 160 P.3d 1204, 1209-10 (Ariz. Ct. App. 2007).
- the privilege applied only to those records related to the “physical or mental health or condition” of a patient and that were “***maintained for purposes of patient diagnosis or treatment***”
- Court found that the special education records relate to the “physical or mental health or condition” of a student but are created for the purpose of developing an educational program.

Psychologist / Patient Privilege – Can the Privilege be Used to Protect the Information?

- *J.N. By and Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wash. App. 49, 871 P.2d 1106, 1115 (1994).
- The court found that the holder of the privilege has the power to waive it. The court concluded that the privilege never arose because the privilege did not apply where it is manifest that the communication was not intended to be confidential.
- The court found there was no evidence of an expectation of confidentiality.
- The student did not meet with the psychologist for the purpose of treatment or counseling. The purpose of the interview was to provide a recommendation to the team to assess his need for special education services.

Texas Law on Psychologist / Patient Privilege

- The Texas Health & Safety Code § 611.002 is entitled “Confidentiality of Information and Prohibition Against Disclosure” and states the following:
- Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.
- This section applies regardless of when the patient received services from a professional.

Texas Law on Psychologist / Patient Privilege

- A “Professional” is defined as: (A) a person authorized to practice medicine in any state or nation; (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection. Tex. Health & Safety Code Ann. § 611.001.
- A “professional” may disclose confidential information: “to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs.” Tex. Health & Safety Code Ann. § 611.004(a)(4). Also, the content of a confidential record shall be made available to a person who is acting on the patient’s behalf. *Id.* § 611.0045(f) (emphasis added). However, “The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.” Tex. Health & Safety Code Ann. § 611.0045(b).

Texas Law on Psychologist / Patient Privilege

- *Abrams v. Jones*, 35 S.W.3d 620 (Tex. 2000).
- The Court found that parents do have a right of access under Chapter 611 to confidential information pursuant to § 611.045(f).
- If the parent is acting on behalf of his child, a professional may nevertheless deny access if the release “would be harmful to the patient’s physical, mental, or emotional health.”
- If a professional denies a parent access to part of a child's records, the parent has recourse under § 611.0045(e) of the Texas Health & Safety Code.

Texas Law on Psychologist / Patient Privilege

- Under § 611.0045(e), the professional denying access must allow examination and copying of the record by another professional selected by the parent acting on behalf of the patient to treat the patient for the same or a related condition.
- A parent denied access to a child's records has judicial recourse. See § 611.005(a)

Bottom Line

- Two arguments that could be made in support of the parents receiving the interview notes:
 - The privilege never in fact arose because neither the child nor the parent expected or intended the communications would remain confidential.
 - The parents could assert that they are “acting on behalf” of the child and, therefore, must be allowed access pursuant to § 611.045(f) and *Abrams*.

- To deny access, the psychologist would then have to prove that releasing the information would be “harmful to the [child’s] physical, mental, or emotional health.” The parents would have judicial recourse if denied access to the information based on this exception.

What If...

- A grandmother of student enrolled in the District requests documents about her grandchild. Assume that there is no power of attorney giving the grandmother access to the documents and the grandmother is not the legal guardian of the child. Should you give the documents to the grandmother?

- **It depends.** Under FERPA, grandmother does not have rights of access.
- Grandmother filed a complaint with FPCO alleging school release her address to a third party.
- FPCO would not investigate.
- FERPA provides no right of access or protection to third parties such as grandparents.
- But, under IDEA, grandparent might be considered a “parent” under certain circumstances.
- *Letter to Anonymous*, 17 FAB 17 (FPCO 2013).

What If...

- A parent requests that the District provide the types and locations of all education records of the District. Would the District violate FERPA if it doesn't provide the requested information?

- **No**. When parent made broad request for documents, district responded by producing all documents in the child's cumulative file and asked the parent to narrow the request. In response, parent asked for the types and location of all education records maintained by the District.
- FPCO found the district did not have to provide the requested information.
- *Letter to Anonymous*, 17 FAB 35 (FPCO 2014)

What If...

- A speech pathologist threw away her notes after preparing the final report. Parent requests the notes prior to an IEP meeting. District does not produce the documents and does not tell the parent the notes no longer exist. Is that a problem?

- **Maybe not under FERPA, but it is under the IDEA.**
- Hearing Officer found that by not telling parents they had been destroyed, the district violated IDEA's requirement to provide an explanation and interpretation of the student's records to the parents.
- *Parma City Sch. Dist.*, 17 FAB 34 (SEA OH 2013)

**If you have any questions, please
contact us.**

Celena Vinson

cvinson@thompsonhorton.com

713-554-6742

Elizabeth Humphrey

elh@thompsonhorton.com

713-554-6768