

Confidentiality and the Guidance Counselor

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A Word of Caution

No two cases are exactly alike. This material is designed to provide guidance counselors with an overview of the confidentiality rules. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide guidance counselors with a working knowledge of the Family Education Rights and Privacy Act (“FERPA”) and to review the conflict created by the competing ethical and legal obligations with regard to confidentiality which are imposed on guidance counselors. Guidance counselors frequently face the challenging question of whether or not to disclose information that has been entrusted to them by a student. The intent of this material is not only to teach the minimal legal requirements but also to encourage guidance counselors as to the best practices in the area of FERPA compliance, and to assist the guidance counselor in resolving the issues associated with the tension between the competing duties owed to the District, parents and the student.

II. The Expanding Role of the Guidance Counselor

The expanding role of the guidance counselor is the direct and proximate cause of the emerging tension with regard to confidentiality. School boards are authorized to provide “child benefit services,” including “school guidance and psychologist services.” NH RSA 189:49, IV. ED 306.13¹ and Ed 306.39 currently set forth the minimum standards imposed on schools with regard to guidance. Ed 306.13 states:²

“The local school board shall ensure that every school provides a comprehensive guidance and counseling program. A comprehensive guidance and counseling program shall comply with all applicable provisions of Ed 306.39.”

The current regulations go on to state that:

- (a) The local school board shall require that each school in its district provides for the implementation of a comprehensive developmental school guidance and counseling program based on Ed 306.39 and “The ASCA National Model: A Foundation for School Counseling Program,” published by the American School Counselor Association (ASCA) in 2003 as an integral part of the total educational program.
- (b) The department shall develop and distribute a comprehensive school guidance and counseling program model implementation manual that may be used by schools and districts as a resource in professional development and planning activities.

¹ Ed 306 is currently under revision by the Department of Education. The revisions were conditionally approved by the State Board on February 13, 2014. Throughout this material, both the current version of the Ed 306 regulation has been included, as well as the conditionally approved regulation, if that regulation differs from the existing regulation.

² This provision has been removed from the conditionally approved revisions to Ed 306.

(c) The local school board shall require that each district develop, and have on file a comprehensive K-12 developmental school guidance and counseling policy and implementation plan.

(d) This policy and plan shall:

1. Address the applicable state frameworks consistent with RSA 193-C:3, III;
2. Be based on Ed 306.39 and “The ASCA National Model: A Foundation for School Counseling Program,” published by the American School Counselor Association (ASCA) in 2003;
3. Support the local school district’s improvement plans and goals; and
4. Identify measures of success for student competencies in each of the 3 areas of academic, individual/social, and career learning, based on planned and periodic assessment of the comprehensive developmental school guidance and counseling program.

(e) The comprehensive school guidance and counseling plan shall include:

1. A guidance curriculum that provides all K-12 students the knowledge and skills appropriate to their developmental level through a collaborative model of delivery involving the school counselor, classroom teachers, and other appropriate education professionals, and including prevention and pre-referral activities;
2. Individual planning with all students to assist in establishing individual goals and developing future plans through coordinated, ongoing systemic activities, including personalized, individual goal setting and parental involvement;
3. A responsive services component of supportive, short-term counseling with the goal of facilitating the educational functioning or academic achievement of all students K-12, or both, including:
 - a. Individual and group counseling;
 - b. Crisis assessment and referral;
 - c. Consultation with school personnel, parents, local agencies, or appropriate others;
 - d. Conflict resolution;
 - e. Drop out prevention;
 - f. Substance and abuse issues;
 - g. College and career counseling; and
 - h. Individual, school, family, or peer issues impacting the

educational environment; and

4. A systems support component that establishes, maintains, and enhances the total school guidance and counseling program, including:
 - a. The maintenance of organized, clear, and useful records in a confidential manner, utilizing technology relevant to provision of services in a confidential manner;
 - b. The maintenance of records in a manner compliant with current state and federal laws, rules, policies, and standards, and with Ethical Standards for School Counselors as adopted by the American School Counselor Association (ASCA) Delegate Assembly March 19, 1984, revised March 27, 1992, June 25, 1998, and June 26, 2004 for school counseling, as they apply to the implementation of comprehensive school guidance and counseling services within a school setting;
 - c. Systematic, goal oriented professional development directly applicable to the goals and outcomes of implementing a comprehensive school guidance and counseling program and school and district improvement goals;
 - d. Counselor evaluation based on the professional competencies of the school counseling profession; and
 - e. Program evaluation based on student outcomes, stakeholder surveys, and self-assessment against national model recommendations.
- (f) The staff requirements for provision of the comprehensive developmental guidance and counseling program shall be as follows:
 1. The counseling load in each elementary school shall not exceed the equivalent of one full time guidance counselor per 500 students enrolled;
 2. The counseling load in each middle school and each high school shall not exceed the equivalent of one full time guidance counselor per 300 students enrolled;
 3. High schools with more than 4 guidance counselors shall provide a high school level director of school guidance and counseling, unless (4) below applies; and

4. District level directors of school guidance and counseling shall be provided in districts where the number of guidance counselors across all schools exceeds 10.

Ed 306.39.

The conditionally approved regulations provide that:

- (a) The local school board shall require that each school in its district provides for the implementation of a comprehensive school counseling program based on this section and “The ASCA National Model: A Foundation for School Counseling Program,” published by the American School Counselor Association (ASCA) in 2012 . . . as an integral part of the total educational program. The local school board shall require that each district develop and have on file a comprehensive K-12 School counseling program policy and implementation plan consistent with the components in this section and kept current biennially.
- (b) The K-12 school counseling program shall include a comprehensive sequence of learning opportunities designed to promote each student’s development of work-study practices in academic development, career development, and personal/social development by means of the following components:
 1. A school counseling core curriculum based on the ASCA student competencies and local goals, designed to help students attain the desired work-study practices and to provide all students with the knowledge, attitudes and skills appropriate to their developmental level, including prevention and intervention activities. The school counseling core curriculum shall be delivered throughout the school’s overall curriculum and be systematically presented by school counselors in collaboration with other professional educators in K-12 classroom and group activities;
 2. Individual student planning that is coordinated and systematic including activities designed to assist students in establishing personal goals, developing future plans, and attaining college and career-ready work-study practices;
 3. Responsive services to meet students’ immediate needs and concerns and counselor teaming in crisis response;
 4. School counseling program management including data-driven decision-making reflective of the school’s needs; and

5. Consultation and collaboration with parents, teachers, other educators, and community organizations, and referral of students for additional assistance.
- (c) For the school counseling programs in grades K-12, the performance of the school counselor(s) shall be evaluated on knowledge, abilities, skills and attitudes necessary to plan, organize, implement and evaluate the implementation of a comprehensive school counseling program based on the ASCA national model.
- (d) For the school counseling programs in grades K-12, schools shall demonstrate the effectiveness of the local comprehensive school counseling program through a summary report of student performance in achievement, attendance, and behavior to the local school board at least once a year.
- (e) The staff requirements for provision of the comprehensive developmental guidance and counseling program shall be as set forth in Ed 306.15(b).

See Ed 306.39 (Conditionally approved Feb. 13, 2014) (hereinafter, CA Ed 306.____).

The conditionally approved regulations go on to state:

“The local school board shall require that in carrying out the school counseling program established by Ed 306.39:

- (1) The counseling load in each elementary school shall not exceed the equivalent of one full-time certified counselor per 500 students enrolled;
- (2) The counseling load in each middle school and each high school shall not exceed the equivalent of one full time certified school counselor per 300 students enrolled;
- (3) High schools with more than 4 school counselors shall provide a high school level certified director of school counseling to coordinate the implementation of the school counseling program plan and policy, unless (4) below applies; and
- (4) District level certified directors of school counseling to coordinate K-12 implementation of the school counseling program plan and policy shall be provided in districts where the number of school counselors across all schools exceeds 10.”

See CA Ed 306.15(b).

Guidance counselors routinely perform the work of a mental health counselor and offer guidance that goes well beyond career and college counseling. Guidance counselors also play a vital role in initiating and operating student assistance programs in the schools. The expanded role of the guidance counselor has been recognized by the Department of Education in its standards for certification.

III. The Department of Education’s Standards for Certification as a Guidance Counselor and School Psychologist

A. Certification as a Guidance Counselor

ED 507.07 sets forth the “entry level” requirements for certification as a guidance counselor.³ The applicant must have:

- (a) completed a state board of education approved school counseling collegiate program at the master’s degree level or higher; OR
- (b) acquired the competencies, skills and knowledge of a guidance counselor through:
 - 1. Completion of courses related to school counseling at the master’s degree level or higher and completion of a counseling internship in a school setting; OR
 - 2. Experience in comparable positions in school guidance and counseling or other professions closely related to school guidance and counseling.

In addition, “a candidate for certification as a school guidance counselor” must have the following skills, competencies, and knowledge in the following areas:

- 1. In the area of counseling and guidance issues affecting the development and functioning of students:
 - a. Interviewing and counseling skills, including establishing appropriate counseling goals and maintaining appropriate boundaries;
 - b. Skills to develop a counseling relationship, design intervention strategies, evaluate counselee outcomes, and successfully terminate the counseling relationship;

³ Ed 507.06 contains the entry level education and employment experiences required for certification as a guidance and counseling director.

- c. Individual and group counseling skills, and classroom guidance approaches designed to promote school success and academic, career, individual and social development for grades K-12;
- d. Theories and models of counseling that are consistent with current professional research and practice in the field;
- e. Approaches used for various types of group work, including:
 - i. Task groups;
 - ii. Psychoeducational groups;
 - iii. Support groups; and,
 - iv. Counseling groups;
- f. Understanding of the particular confidentiality issues affecting group and classroom guidance work in the school setting;
- g. Various age-level characteristics that impact and are impacted by the counseling process, including techniques for pre-kindergarten, elementary, middle and junior high school, and high school age students;
- h. Self-awareness of the counselor in regard to counselor characteristics and behaviors, such as age, gender, ethnic differences, and verbal and nonverbal behaviors and skills, that influence the counseling process;
- i. Approaches to peer facilitation, including peer helper, peer tutor, and peer meditation programs;
- j. Developmental approaches to assist all students and parents at points of educational transition, including, but not limited to:
 - i. Home to elementary school;
 - ii. Elementary to middle school or junior high school;
 - iii. Middle school or junior high school to high school; and
 - iv. High school to postsecondary education or a career option;
- k. Constructive partnerships with parents, guardians, families and communities in order to promote each student's academic, career, personal, and social success;
- l. Systems theories and related interventions;

- m. Understanding of relationships among and between community systems, family systems, and school systems, and how they interact to influence children and families; and
 - n. Approaches for recognizing and assisting children and adolescents who might use alcohol or other drugs or who might be affected by someone who does;
2. In the area of human growth and development:
- a. Knowledge of individual and family development and transitions across an individual's life span;
 - b. Knowledge of learning and personality development;
 - c. Understanding of human behavior, including developmental crises, disability, exceptional behavior, addictive behavior, psychopathology and its diagnosis and treatment, and situational and environmental factors that affect both normal and abnormal behavior; and
 - d. Strategies for facilitating the optimum academic, career, and individual/social development of individuals at all developmental levels;
3. In the area of career and educational development:
- a. K-12 career development program planning, organization, implementation, and administration, including career awareness strategies designed to meet the developmental needs of K-12 students;
 - b. Career development theories and decision-making models, including state career development standards and evaluation methods for the effectiveness of program components and delivery;
 - c. Individual and group career and educational planning;
 - d. Career and college counseling processes, techniques, and resources, including those applicable to specific populations;
 - e. Assessment instruments and techniques that are relevant to career and college planning and decision-making, including technology-based applications, strategies, and resources; and

- f. Interrelationships among and between work, family, and other life roles and factors, including the role of diversity and equity in career development;
4. In the area of consultation and collaboration:
- a. A general framework for understanding and practicing consultation, as it is appropriate to the school counselor in an educational setting, including the development of each individual's personal model of consultation;
 - b. Strategies to promote, develop, and enhance effective teamwork within the school and larger community;
 - c. Knowledge of crisis prevention and intervention strategies;
 - d. Knowledge of theories, models, and processes of consultation and change involving teachers, administrators, other school personnel, parents, community groups, agencies, and students;
 - e. Strategies and methods of working with parents, guardians, families, and communities to empower them to act on behalf of their children; and
 - f. Knowledge and skill in conducting programs that are designed to enhance students' academic, social, emotional, career, and other developmental needs;
5. In the area of social and cultural diversity:
- a. Knowledge of characteristics and concerns when working with or within diverse groups, including K-12 strategies, strategies for working with family, group, and individual components, and strategies for working with diverse populations and ethnic groups;
 - b. Knowledge of school counselors' role in the realms of social justice, advocacy, and conflict resolution;
 - c. Cultural self-awareness and understanding of the nature of biases, prejudices, processes of interaction and unintentional oppression, discrimination, and other culturally supported behaviors that are detrimental to the growth of the human spirit, mind, or body; and
 - d. Theories of multicultural counseling, theories of identity development, and multicultural competencies;

6. In the area of professional school counseling:
 - a. History and foundations of the school counseling profession, including professional roles and functions, relationships with other human service providers, and advocacy processes designed to facilitate access, equity, and success for students and families;
 - b. Knowledge of current state and federal laws, rules, policies, and standards relating to school guidance counseling and current national ethical guidelines for school guidance counseling, as they apply to the implementation of comprehensive school guidance and counseling services and programs within a school setting, including:
 - i. Professional credentialing and standards;
 - ii. State and local policy processes; and
 - iii. Professional organizations;
 - c. Technological competence and computer literacy, including integration of technological strategies and applications within counseling and consultation processes; and
 - d. Confidentiality, including record-keeping.
7. In the area of school counseling program administration:
 - a. Use, management, analysis, and presentation of data from school-based information, including standardized testing, grades, enrollment, attendance, retention, and placement, surveys, interviews, focus groups, and needs assessments to improve student outcomes;
 - b. Design, implementation, monitoring, and evaluation of comprehensive developmental school counseling programs according to state and national models;
 - c. Integration of the school counseling program into the total school curriculum through collaborative information and skills training to assist K-12 students to maximize their academic, career, individual, and social development;
 - d. Identification of student academic, career, individual, and social competencies and implementation of processes and activities to assist students in achieving these competencies;

- e. Preparation of an action plan and school counseling calendar that reflects appropriate time commitments and priorities in a comprehensive developmental school counseling program; and
 - f. Knowledge of all state curriculum standards consistent with RSA 193-C:3, III and special skill in implementing these standards and proficiencies through a collaborative school-wide process; and
8. In the area of research and assessment:
- a. Basic concepts and methods of standardized and nonstandardized testing and assessment including:
 - i. Norm-referenced and criterion-referenced assessment;
 - ii. Environmental assessment;
 - iii. Performance and competency-based assessment;
 - iv. Individual and group test and inventory methods;
 - v. Behavioral observations; and
 - vi. Computer-managed and computer-assisted methods;
 - b. Knowledge of statistical concepts, including:
 - i. Reliability and validity;
 - ii. Scales of measurements;
 - iii. Measures of central tendency;
 - iv. Indices of variability;
 - v. Shapes and types of distributions; and
 - vi. Correlations;
 - c. Strategies for selecting, administering, and interpreting assessment and evaluation instruments and techniques in counseling, including the impact of age, gender, sexual orientation, ethnicity, language, disability, culture, spirituality, and other factors related to the assessment and evaluation of individuals, groups, and specific populations;
 - d. General principals and methods of case conceptualization, assessment, and diagnoses of mental and emotional status; and
 - e. Principals, models, and applications of needs assessment, program evaluation, and use of findings to effect program modifications and to improve counseling effectiveness.

B. Certification as a School Psychologist

The State Board has adopted the following minimum requirements pertaining to entry level requirements for an individual to be certified as a school psychologist. Ed 507.08.

1. Completion of any state board of education approved doctoral program in school psychology; or
2. Meeting both of the following requirements:
 - a. Completion of at least 60 semester hours or the equivalent of graduate study, of which at least 54 hours are exclusive of credit for the supervised internship experience as described in b. below with an earned master's degree that includes coursework in the following areas:
 - i. Human growth and development;
 - ii. Learning theory;
 - iii. Theories of personality;
 - iv. Abnormal psychology;
 - v. Statistics and research models;
 - vi. Purposes and organization of public schools;
 - vii. Teaching strategies and programs for exceptional children;
 - viii. Individual intellectual assessment;
 - ix. Individual personality assessment;
 - x. Educational evaluation techniques; and
 - xi. Counseling/psychotherapeutic techniques, including group therapy; and
 - b. Experience as follows:
 - i. A one-year supervised internship in a general school setting and 1,200 hours, full-time over one year or half time over 2 consecutive years, of experience in the role of an associate school psychologist, in a general school setting, provided that if additional experiences are provided in mental health clinics, psychiatric hospitals, and other institutions for children, such experiences shall not replace the supervised internship in a general school setting for more than 600 of the 1,200 hours; or
 - ii. A 2-year supervised experience as an associate school psychologist or its equivalent title.

There are also specific requirements pertaining the skills, competencies, and knowledge required for certification as a school psychologist. They include, but are not limited to the “ability to record and organize clear and useful records in a confidential manner, in keeping with state and federal law.” Ed 507.08(b)(5)(b).

IV. The Ethical Standards Imposed by Professional Organizations on Guidance Counselors

The ethical standards for school counselors are adopted at an organizational level. These ethical standards do not have the force of law, but instead, should be interpreted in a manner that permits a guidance counselor to follow the law. For an example of the detailed nature of these ethical standards, see “Ethical Standards for School Counselors,” American School Counselor Association, (revised 2010), available at: <http://www.schoolcounselor.org/asca/media/asca/Resource%20Center/Legal%20and%20Ethical%20Issues/Sample%20Documents/EthicalStandards2010.pdf> (accessed Feb. 21, 2014).

With regard to confidentiality, the ASCA standards observe in part, “[e]ach person has the right to privacy and thereby the right to expect the school-counselor/student relationship to comply with all laws, policies and ethical standards pertaining to confidentiality in the school setting.” *Id.* at Preamble. The ASCA standards articulate the following with regard to confidentiality:

The professional school counselor:

- a. Informs individual students of the purposes, goals, techniques and rules of procedure under which they may receive counseling. Disclosure includes the limits of confidentiality in a developmentally appropriate manner. Informed consent requires competence on the part of students to understand the limits of confidentiality and therefore, can be difficult to obtain from students of a certain developmental level. Professionals are aware that even though every attempt to obtain informed consent it is not always possible and when needed will make counseling decisions on students’ behalf.
- b. Explains the limits of confidentiality in appropriate ways such as classroom guidance lessons, the student handbook, school counseling brochures, school Web site, verbal notice or other methods of student, school and community communication in addition to oral notification to individual students.
- c. Recognizes the complicated nature of confidentiality in schools and considers each case in context. Keeps information confidential unless legal requirements demand that confidential information be revealed or a breach is required to prevent serious and foreseeable harm to the

student. Serious and foreseeable harm is different for each minor in schools and is defined by students' developmental and chronological age, the setting, parental rights and the nature of the harm. School counselors consult with appropriate professionals when in doubt as to the validity of an exception.

- d. Recognizes their primary obligation for confidentiality is to the students but balances that obligation with an understanding of parents'/guardians' legal and inherent rights to be the guiding voice in their children's lives, especially in value-laden issues. Understand the need to balance students' ethical rights to make choices, their capacity to give consent or assent and parental or familial legal rights and responsibilities to protect these students and make decisions on their behalf.
- e. Promotes the autonomy and independence of students to the extent possible and uses the most appropriate and least intrusive method of breach. The developmental age and the circumstances requiring the breach are considered and as appropriate students are engaged in a discussion about the method and timing of the breach.
- f. In the absence of state legislation expressly forbidding disclosure, considers the ethical responsibility to provide information to an identified third party who, by his/her relationship with the student is at a high risk of contracting a disease that is commonly known to be communicable and fatal. Disclosure requires satisfaction of all of the following conditions:
 - a. Student identifies partner or the partner is highly identifiable
 - b. School counselor recommends the student notify partner and refrain from further high-risk behavior
 - c. Student refuses
 - d. School counselor informs the student of the intent to notify the partner
 - e. School counselor seeks legal consultation from the school district's legal representative in writing as to the legalities of informing the partner.
- g. Requests from the court that disclosure not be required when the release of confidential information may potentially harm a student or the counseling relationship.
- h. Protects the confidentiality of students' records and releases personal data only according to prescribed federal and state laws and school policies including the laws within the Family Education Rights and Privacy Act (FERPA). Student information stored and transmitted electronically is treated with the same care as traditional student records.

Recognizes the vulnerability of confidentiality in electronic communications and only transmits sensitive information electronically in a way that is untraceable to the students' identity. Critical information such as a student who has a history of suicidal ideation must be conveyed to the receiving school in a personal context such as a phone call."

Id. at A.2. Confidentiality

These ethical guidelines reiterate the core role that the law plays in defining a counselor's ethical duties.

V. The Law Pertaining to Confidentiality

There are various aspects of state and federal law which come to bear on defining the duty and scope of confidentiality to be maintained by a guidance counselor.

A. The Law Pertaining to Privileged Communications: the Absence of a "Testimonial Privilege" for Counselees of Guidance Counselors

The most sacred province of confidentiality is the area of law known as "privileged communications." Also known as the "testimonial privilege," the testimonial privilege is a much narrower limitation on disclosure than a general duty to maintain confidentiality. Privileged communications are communications which give rise to a legal right on the part of the communicator to invoke the privilege and a duty on the part of the recipient of the communication to protect the confidentiality of the communication. Even a privileged communication can be disclosed if the communicator knowingly waives the privilege. The key to remember is that each of these privileges is held by the communicator, and protected by the recipient of the communication.

The New Hampshire Rules of Evidence acknowledge the following privileged communications:

- The news gatherer's privilege;
- The informant's privilege;
- The lawyer-client privilege;
- The husband-wife privilege;
- The religious privilege;
- The psychologist-client privilege;
- The physician-patient privilege;
- The Trade Secret privilege;

Even these privileges are not absolute, but instead are limited by such statutes as the child abuse reporting requirements (NH RSA 169-C:32) and the duty to report gunshot wounds (NH RSA 631:6).

In New Hampshire, there is no evidentiary privilege extended to students who confide in a guidance counselor. Therefore, a student does not have the right to preclude a guidance counselor from testifying in Court on the basis of a statutory privilege.

B. Privileges and Duties Arising from Certifications in Other Fields

1. Psychologists, Mental Health Counselors, Pastoral Counselors and Clinical Social Workers.

Certain guidance counselors may hold licenses as psychologists, mental health counselors, pastoral counselors, or clinical social workers under NH RSA 330-A:1 et seq. NH RSA 330-A:32 provides that:

“The confidential relations and communications between any person licensed under provisions of this chapter [NH RSA 330-A] and such licensee’s client are placed on the same basis as those provided by law between attorney and client and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order.” See NH RSA 330-A:32.

While there is an open issue whether or not an individual employed as a guidance counselor is practicing in a regulated field, there is a fair argument that guidance counselors holding one of these licenses, may be under a different restraint than the counselor who is certified solely by the State DOE.

2. Alcohol and Drug Abuse Professionals

The state of New Hampshire now offers licensure for alcohol and drug counselors through the Board of Licensing for alcohol and other drug abuse professionals. Guidance counselors may NOT hold themselves out as a “licensed alcohol and drug counselor,” without complying with the licensure requirements of NH RSA 330-C:1 et seq.

NH RSA 330-C:26 provides that, “A person licensed or certified under this chapter [NH RSA 330-C] or an employee of such person, shall not disclose any confidential information that the licensee, certificate holder, or employee may have acquired while performing substance use counseling services for a patient unless in accordance with the federal regulation regarding the Confidentiality of Alcohol and Drug Abuse Patient Records pursuant to 42 C.F.R. section 2.1 et seq.”

Licensees have a duty to warn of, or to take reasonable precautions to provide protection from, a client’s violent behavior when the client has communicated to such person a serious threat of physical violence against a clearly identified or reasonably identifiable victim or victims, or a serious threat of substantial damage to real property.

RSA 330-C:25, I. Confidential information may be disclosed if necessary to discharge this duty. Id.

The law is not as clear in the context of the guidance counselor who is both certified by the DOE and licensed as an alcohol and drug counselor. Therefore, the guidance counselor who holds such a license should be prepared to preserve confidentiality and invoke this statutory obligation. See RSA 330-C:33.

C. Privacy Obligations under the Federal Educational Right to Privacy Act [FERPA] and State Regulations

Guidance counselors and school psychologists, like all school personnel, are obligated to maintain the confidentiality of student information. The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. 1232g, speaks to maintaining the rights of both parents and students to maintain the privacy of student information. State regulations, such as ED 1119.01 et seq also require that school personnel, including guidance counselors maintain the confidentiality of information.

This duty runs to the benefit of both the parent and the student. Thus, there is a clear statutory obligation to furnish records and information to parents. Only in the rarest of circumstances will an educator be justified in withholding information from a parent. Those circumstances will usually be determined by ethical standards rather than legal standards.

The obligations and duties under FERPA are discussed in more detail, below.

D. Conclusions Regarding Privileges and Privacy

There is no “privileged communication” status afforded to communications between students and guidance counselors. As indicated above, there may be a “privileged communication” status when the guidance counselor is acting with licensure in a related profession.

All guidance counselors and school psychologists have a duty to maintain privacy under FERPA in the same manner as other school professionals.

VI. Understanding the Scope of Confidentiality

There is a tendency to misunderstand the scope of an educator’s ethical privacy obligations. For example, a guidance counselor providing SAP counseling may be reticent to share information regarding the nature of counseling and the incidents giving rise to the counseling with members of an IEP Team. Such a reticence illustrates a misunderstanding of the scope and definition of confidentiality.

Guidance in this area can be gleaned from considering the function of statutory confidentiality obligations in analogous professions. A hospital consists of a team of medical professionals charged with a clear physician-patient duty to preserve confidentiality. This duty in no way impedes the interchange of information among concerned professionals. Similarly, a large law firm is obligated, as an entity to preserve the attorney-client privilege. This privilege in no way impedes the ability of the law firm's staff from sharing information necessary to service the client.

In the same fashion, the guidance counselor is one member of an organization with clear federal privacy obligations. Even those guidance counselors who by virtue of collateral licenses have a statutory confidentiality obligation, are not constrained from disclosing relevant information to the IEP Team. This is particularly true where the IEP Team is under a regulatory duty to accurately assess and respond to a broad spectrum of student needs.

VII. The Family Educational Rights and Privacy Act ("FERPA")

A. Overview

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students⁴ in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records.

FERPA is known as a "spending clause" statute enacted under the Constitutional authority of Congress to spend funds to provide for the general welfare. See U.S. Const. Art. I, Sec. 8. Simply put, recipients of federal funds are required to meet certain statutory requirements in order to receive the funds available under the applicable federal program. FERPA is an example of such legislation, imposing requirements on recipients of federal funds administered by the US Department of Education as a precondition to their receipt of such funds.

FERPA applies to any:

- State or local educational agency ["LEA"];
- Institution of higher education;
- Community college;
- School;
- Agency offering a preschool program; or

⁴ When a student turns 18 years of age, the permission/consent requirements of FERPA, as well as the right to access records, and all other FERPA rights, transfer to the student; throughout these materials, this group of students is referred to as "adult students." 20 USC 1232g(d). Unless otherwise noted, references to "parents" include references to "adult students."

- Other educational institution.

School districts are considered “local educational agencies” and thus are subject to FERPA. FERPA does not apply to private and parochial schools that do not receive funding from the US Department of Education.

B. Defining an “Education Record” under FERPA

The intent of FERPA is to extend privacy and access rights to “education records.” Therefore, it is vital that the educator understand what constitutes an education record under FERPA.

The statute defines educational records as: “those records, files, documents, and other materials which:

- i. Contain information directly related to a student; and
- ii. Are maintained by an educational agency or institution or by a person acting for such agency or institution.”

20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. 99.3.

The term “record” means “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” 34 C.F.R. 99.3.

However, educational records do not include:

- i. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker and which are not accessible or revealed to any other person except a substitute;
- ii. Records maintained by a law enforcement unit of the school district that were created by that law enforcement unit for the purpose of law enforcement;
- iii. In the case of persons who are employed by a school district but who are not attending a school district, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose;

- iv. Records on a student who is 18 years of age or older, or is attending a college or other postsecondary institution, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;
- v. Records created or received by a school district after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; or,
- vi. Grades on peer-graded papers before they are collected and recorded by a teacher.

20 U.S.C. 1232g(a)(4)(B) (emphasis added); 34 CFR 99.3.

1. Records of a Law Enforcement Unit

For purposes of FERPA, a "law enforcement unit" is "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 to:

- i. 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
- ii. Maintain the physical security and safety of the agency or institution.

A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student."

34 C.F.R. 99.8(a).

Records of a law enforcement unit “means those records, files, documents, and other materials that are - -

- i. Created by a law enforcement unit;
- ii. Created for a law enforcement purpose; and,
- iii. Maintained by the law enforcement unit.”

Such records do not include “records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or [r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.” 34 C.F.R. 99.8(b).

C. Rights of Parents and Adult Students

FERPA enumerates a number of rights that Parents and adult students have with regard to student records. This section discusses those rights and how they are actualized.

1. The right to inspect, review and access education records

Simply put, parents have the right to inspect and review the education records of their children. When the data pertains to more than one child the parent has 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.” 20 U.S.C. 1232g(a)(1)(A). The privacy rights of other students are implicated in these circumstances, and the District is required to redact the names and other personally identifiable information about other students that may be included in the child’s education records. As a matter of best practice, student records should be generated in a manner which, to the extent possible, keeps the records student specific.

The regulations require that when a parent makes a request to inspect and review his or her child’s education records the District must provide the parent with access within 45 days of the request. 20 U.S.C. 1232g(a)(1)(A); 34 C.F.R. 99.10(b). The best practice however, is not to delay disclosure. When a parent has made a request, the District should promptly allow access.

The right of access includes the right to request copies of education records. The District has a duty to provide copies to parents, but may charge a reasonable duplication fee for those copies. However, the District may not charge a fee to search for or to retrieve the education records. 34 C.F.R. 99.11.

FPCO opined that the district should have provided the parent with access to the records. FPCO noted that schools are required to provide custodial and noncustodial

parents alike with full rights under FERPA unless the school has been provided with evidence that there is a court order, state statute, or other legally binding document that specifically revokes these rights. The district was not provided with any of these documents, therefore, the district violated FERPA when it refused to provide the parent with access to the records.

2. The right to challenge the content of education records

A parent/adult student has the right to challenge the content of their education records. 34 C.F.R. 99.20.

Upon receipt of a challenge, the District has a choice:

- To agree to amend the record within a reasonable time after receiving the request; or
- To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If, after hearing, the information in the record is not found to be inaccurate, misleading, or otherwise in violation of the privacy rights of the student, the District is required to offer the parent the right to place a statement in their child's record, which will be kept and disclosed with the record in question. 34 C.F.R. 99.21. A District that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

3. The right to consent to the disclosure of education records

The parent/adult student retains the right to consent to the release/disclosure of education records and to consent to the disclosure of personally identifiable information contained in educational records (other than directory information, as discussed below). 20 U.S.C. 1232g(b).

Personally identifiable information includes, but is not limited to:

- The student's name;
- The name of the student's parent or other family members;
- The address of the student or the student's family;
- A personal identifier, such as the student's social security number, student number, or biometric record;

- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- Other information that, alone or in combination, is linked or linkable to a specific student that would 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; or
- 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.

34 C.F.R. 99.3.

FERPA creates a general presumption that a school district **may not release** the **education records, or personally identifiable information** contained in educational records, of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of **directory information** and the concept of certain **exceptions to the prior written consent rule**.

Directory information is defined as information that a district may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- electronic mail address;
- photograph;
- date and place of birth;
- major field of study;
- grade level;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;

- dates of attendance;
- degrees, honors, and awards received; and,
- the most recent educational institution attended.

20 U.S.C. 1232g(a)(1)(5)(A); 34 C.F.R. 99.3; see also RSA 189:1-e (authorizing local educational agencies to provide information designated as directory information consistent with FERPA, and defining directory information as “information not generally considered harmful or an invasion of privacy if disclosed,” which “may include: name and address of a student; field of study; weight and height of athletes; most recent previous school attended; date and place of birth; participation in officially recognized activities and sports; and, date of attendance, degrees, and awards”).

Directory information does not include a student’s social security number. 34 C.F.R. 99.3.

In order for a District to be free to release directory information without prior written consent, the District must provide public notice of the areas of information that it has designated as “directory information,” and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent. 20 U.S.C. 1232g(a)(1)(5)(B); 34 C.F.R. 99.37.

The NCLB addresses the disclosure of directory information, such as student’s names, addresses, and telephone numbers to military recruiters, requiring, with some exceptions, such as parental refusal, that districts disclose this information to military recruiters. 20 USC 7908; 10 USC 503(c).

There are twelve (12) relevant ***exceptions to the “prior written consent” rule.*** They are as follows:

- a. **Other school officials, including teachers within the local educational agency, who have been determined to have a legitimate educational interest in the information.**

Prior written consent is not required for disclosure of education records to teachers and other school officials who have a “legitimate educational interest” in reviewing the records. 34 C.F.R. 99.31(a)(1).

It is the school which makes the determination as to which educators have a “legitimate educational interest” in obtaining the records. The District must include “a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest” in its annual FERPA notification. 34 C.F.R. 99.7(a)(3)(iii).

The Family Policy Compliance Office, the office responsible for implementing FERPA, suggests defining a school official as “a person employed by the school as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel) or a person serving on the school board. A school official also may include a volunteer or contractor outside of the school who performs an institutional service of function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of PII from education records, such as an attorney, auditor, medical consultant, or therapist; a parent or student volunteering to serve on an official committee, such as a disciplinary or grievance committee; or a parent, student, or other volunteer assisting another school official in performing his or her tasks.” See Model Notification of Rights under FERPA for Elementary and Secondary Schools, available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html> (accessed March 16, 2014).

“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.” Id.

b. Officials of other schools or schools systems in which the student intends to enroll.

A district may release education records to other schools or school systems in which the student is enrolled or intends to enroll upon the following conditions:

- The district makes a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:
 - The parent or adult student requested that the records be disclosed or,
 - The District’s annual FERPA notification includes a statement that it forwards education records to other agencies or institutions that have requested the records, so long as the disclosure is for purposes of the student’s enrollment.
- The parent or adult student receive a copy of the records, if desired; and
- The parent or adult student have an opportunity for a hearing to challenge the content of the record.

34 C.F.R. 99.31(a)(2); 34 C.F.R. 99.34.

The No Child Left Behind Act (“NCLB”) requires that the district have a procedure in place to ensure that disciplinary records pertaining to a student’s suspension or expulsion are transferred to any elementary or secondary school where the student is enrolled or intends to enroll.

c. Authorized representatives of the State Department of Education, the Attorney General of the United States, or State and local educational authorities.

State and local education officials have access to student or other records which may be necessary in connection with the audit of their programs. For example, state auditors may request student records in order to audit a state supported program. 34 C.F.R. 99.31(a)(3); see also 34 C.F.R. 99.35.

d. Financial Aid Officials.

This exception permits appropriate officials in connection with a student’s application for, or receipt of, financial aid to obtain education records, including a student’s social security number, so long as the disclosure is necessary to determine the eligibility for the aid, the amount of the aid, the conditions for the aid, or enforce the terms and conditions of the aid. 34 C.F.R. 99.31(4).

e. Persons subject to a Subpoena or Court Order.

FERPA allows education records to be released pursuant to a subpoena upon condition that parents and adult students are notified in advance of compliance with the subpoena. This notification requirement does not apply if the subpoena is a Federal grand jury subpoena or if the subpoena has been issued for law enforcement purposes, and the court or issuing agency has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed. 34 C.F.R. 99.31(a)(9).

f. Disclosure to State and local officials in connection with the state’s juvenile justice system under specified conditions.

FERPA allows educators to share information verbally with organizations such as Child Protective Services agencies. For example, FERPA does not prohibit an educator from making a verbal report to the Division for Children, Youth and Family, so long as the official certifies in writing to the district that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student. 34 C.F.R. 99.31(a)(5); 34 C.F.R. 99.38.

In addition, schools may receive and use information from law enforcement courts and other justice system components in order to provide services to students and to maintain a safe and effective learning environment. However, once the information is received and maintained by the school, it becomes subject to FERPA and the FERPA exceptions.

Educators are also permitted to make disclosure to state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication the student whose records are being released. For example, when a district has been joined by the court in a juvenile system it may share information with the court as part of the joinder and evaluation process.

It is also important to remember that information garnered by a school resource officer is not considered an "education record," under FERPA. If, for example, a school resource officer creates a file and places a report in it pertaining to a school based investigation, a school resource officer is entitled to share that information with a law enforcement unit or for that matter any other law enforcement unit.

g. Organizations conducting studies for educational agencies.

Organizations conducting studies for, or on behalf of educational agencies for purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and that such information will be destroyed once no longer needed. 34 C.F.R. 99.31(a)(6).

The district must enter into a written agreement with the organization, and the written agreement must: specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require that the organization use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require that the organization conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests; and, require that the organization destroy or return (within a specified time period) all personally identifiable information when it is no longer needed for the purpose for which the study was conducted.

h. Accrediting organizations.

Organizations which carry out accrediting functions are exempt from the prior written disclosure requirement. 34 C.F.R. 99.31(a)(7).

i. Parents.

Parents of dependent students as defined in the IRS Code are exempt from the prior written consent requirement by virtue of their status as the child's parent. 34 C.F.R. 99.31(a)(8).

j. Health or safety emergencies.

Appropriate persons in connection with an emergency are entitled to obtain education records if the knowledge of the information is necessary to protect the health or safety of the student or other persons. 34 C.F.R. 99.31(a)(10); 34 C.F.R. 99.36(a).

When making this determination, the district may "take into account the totality of the circumstances pertaining to the threat to the health or safety of a student or other individuals." If the district determines that there is "an articulable and significant threat to the health or safety of a student or other individuals, 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." 34 C.F.R. 99.36.

In addition, FERPA does not prohibit schools "from including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student." 20 U.S.C. 1232g(h); 34 C.F.R. 99.36(b)(1)-(2).

k. The Patriot Act of 2001.

The USA Patriot Act of 2001 added a new subsection that allows the US Attorney General to apply for an ex parte order requiring an educational agency to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism, whether domestic or international. 20 U.S.C. 1232g(j).

l. Any agency caseworker or other representative of a State or local child welfare agency, or tribal organization, who has the right to access a student's case plan, as defined by the State, when such agency or organization is legally responsible, in accord with State law, for the care and protection of the student.

The agency or organization is prohibited from disclosing the educational records, or the personally identifiable information contained in such records, except to an individual or entity engaged in addressing the student's education needs and authorized

by such agency or organization to receive such disclosure and such disclosure is consistent with State laws applicable to protecting the confidentiality of a student's education records.

20 U.S.C. 1232g(b)(1)(L).

D. Record Keeping Requirements under FERPA

There is a mandated record keeping requirement with regard to FERPA. The school district is required to keep a log with the education records of each student which indicates:

- All individuals, agencies or organizations that have requested or obtained access to a student's education records;
- The legitimate interest that each of the above has in obtaining the information.

In addition, if the information was disclosed due to a health or safety emergency, the record must also include:

- The articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure; and
- The parties to whom the school district disclosed the information.

34 C.F.R. 99.32(a).

The record of access is available only to parents and school officials responsible for custody of the records.

E. Penalties for Redisclosure by Third Parties

Personally identifiable information from covered records can only be transferred to a third party on condition that they will not permit any other person access to the records without the parent's written consent. 34 C.F.R. 99.33(a)(1). If the third party permits access to education records without parent consent, (except in response to a subpoena) then the district must ban the third party from access to education records for not less than five (5) years. 34 C.F.R. 99.33(e).

F. FERPA and HIPAA

The Health Insurance Affordability and Accountability Act of 1996 protects protected health information (PHI) from disclosure. When HIPAA was first adopted

questions arose as to whether or not HIPAA applied to school districts. Student health records are “education records” subject to FERPA, and not HIPAA. See 45 C.F.R. 160.103.

G. Electronic Consent

As indicated above, a school must have a signed and dated written consent prior to disclosing personally identifiable information from educational records. The written consent must:

- Specify the records that may be disclosed;
- State the purpose of the disclosure; and,
- Identify the party or class of parties to whom the disclosure may be made.

34 C.F.R. 99.30(b).

This written consent may “include a record and signature in electronic form that - (1) [i]dentifies and authenticates a particular person as the source of the electronic consent; and (2) [i]ndicates such person’s approval of the information contained in the electronic consent.” 34 C.F.R. 99.30(d).

Upon request, the district must provide the parent with a copy of the records disclosed. 34 C.F.R. 99.30(c).

H. Pertinent Decisions and Rulings Pertaining to FERPA

The Family Policy Compliance Office is the office primarily responsible for issuing opinions with regard to FERPA. These opinions provide guidance to the educator as to the interpretation of FERPA.

1. A Parent’s Due Process Rights Do Not Entitle Them to Access Records Regarding Other Children

In Letter to Attorney for School District, 40 IDELR 99 (FPCO October 31, 2003), an attorney asked for an official opinion as to whether FERPA permits a school district to release information in education records related to one student to the parents of another student. An impartial due process hearing officer had ordered that the parents be provided with a “complete and accurate copy” of their son’s disciplinary records which would include the names and other personally identifiable information of other students. The FPCO ruled that the IDEA did not trump FERPA and that the IDEA regulations did not give the parents a greater right of access to the education records

belonging to other students simply because they were involved in a due process hearing.

2. FERPA Compliance in Proposed Survey of Children with Disabilities

In Letter to Lloyd-Jones, 41 IDELR 67 (FPCO 2004), the Compliance Office found that there was no FERPA exception that would allow the State Department of Education to disclose students' personally identifiable information to the State's Health Services Department. The Office further noted that nothing in FERPA prohibited the State Department or districts and schools from disclosing information in the aggregate or in another non-personally identifiable form. However, before making the disclosure, the agency would need to remove the students' names, ID numbers and any personal characteristics that would make the child's identity "easily traceable."

3. The IDEA Also Protects Student Privacy

In Douglas County School District, 41 IDELR 258 (SEA CO 2004) the hearing officer ruled that a Colorado school district violated the IDEA when a principal made comments about a student's cognitive and social/emotional level to parents of another student. The investigating officer refused to consider whether the disclosure denied the child FAPE since such an allegation should be resolved at due process.

It is important to note that the IDEA also contains non-disclosure provisions which are based on the similar provisions of FERPA. 34 CFR 300.571(a)(1) (the IDEA regulation) generally requires parental consent before personally identifiable information contained in their child's educational records may be disclosed to anyone other than school officials.

In Greater Hoyt (SD) School Board, 20 IDELR 105 (FPCO 1993), the Compliance Office found that a district violated FERPA after it disclosed information contained in a student's "IEP Addendum" to the newspaper and at a board meeting. The IEP Addendum contained information such as: details stating that Student's parent would be reimbursed for 8 trips to visit student at an out of state school and information pertaining to reimbursement to the parents for the costs associated with the Student's placement. In making the disclosure, the district did not specifically name the student; however, the district disclosed enough "personally identifiable information" to enable a third party to identify the student. Thus, it was irrelevant that the student's name was not released.

4. Untimely Disclosure of Records Could Expose a District to a Claim of Denial of FAPE

In Council Rock School District, 41 IDELR 204 (SEA PA 2004), the hearing officer rejected a claim by the parents that the district's failure to provide a timely and

complete set of educational records pertaining to their student amounted to a denial of FAPE. The Appeals Panel hearing the case concluded that, “the case law is overwhelming that procedural violations that are not prejudicial failed to establish denial of FAPE.” The Panel acknowledged however that it was conceivable that a breach of FAPE could occur based solely on a records violation. The educator is best advised to diligently and timely disclose records to parents who request access.

5. OCR Does Not Have Jurisdiction Over Personal Privacy Claims

In Jonesboro Consolidated Community School District No. 43, 41 IDELR 99 (OCR, Chicago (IL) 2003), OCR issued a ruling explaining that it had no authority to address an allegation that a special education teacher discussed a child’s disability and testing information with the child’s neighbor. OCR noted that the privacy claim is best addressed by FERPA and directed the parent to contact the Family Policy Compliance Office.

6. Access to Records

In Letter to Segura, 113 LRP 7194 (FPCO Oct. 2, 2012), FPCO opined that:

- A school district is not required to provide a parent’s attorney with access or copies of educational records in response to his or her request, and it is not required to respond to such a request within the 45 day time limit set by FERPA. This is because the attorney does not hold FERPA rights with regard to gaining access to the student’s educational records and because FERPA does not require the district to provide copies of education records.
- Similarly, a district is not required to respond to a request for copies of, or access to, educational records received by any third party (other than the parent or eligible student), even if the request is accompanied by written parental consent.
- A district must comply with a request for access to records from a parent or eligible student within 45 calendar days of receipt of the request. This time period begins to run as of the date the district receives the request for access to records.

Similarly, in Letter to Tagg, 113 LRP 5521 (FPCO, Nov. 7, 2012), the FPCO opined that a school district is not required to provide the parents of a 22 year old student with access to the student’s educational records. The student provided written permission to the school, authorizing disclosure of the records to student’s parents, but the district refused. Parents claimed that the district was violating their rights under FERPA. FPCO investigated and found that the complaint was unsubstantiated. FPCO noted that once the student turns 18 years old or enters post-secondary education at

any age, the school is only required to give the student access to the records. The school may give the parents access with written permission from the student, but they are not required to do such.

7. Non-Custodial Parents Have the Right to Access Records, Absent a Court Order Stating Otherwise

Recently, in Letter to Lianides, 113 LRP 7159 (FPCO Oct. 9, 2012), the FPCO found in favor of a non-custodial parent who was denied access to her minor daughter's educational records. In that case, the student was in the custody of her paternal grandmother, who requested that the school prohibit both parents from accessing student's records. When the non-custodial parent requested access to the records, the district denied the request and the parent complained.

FPCO opined that the district should have provided the parent with access to the records. FPCO noted that schools are required to provide custodial and noncustodial parents alike with full rights under FERPA unless the school has been provided with evidence that there is a court order, state statute, or other legally binding document that specifically revokes these rights. The district was not provided with any of these documents, therefore, the district violated FERPA when it refused to provide the parent with access to the records.

8. Inadvertent Disclosure of Records

Letter to Fagan, 113 LRP 7161 (FPCO Oct. 9, 2012) addresses the inadvertent disclosure of records that were contained on a flash drive. A school attorney wrote to the FPCO requesting guidance as to whether a disclosure of records may have occurred when the flash drive could not be located.

FPCO opined that the district's response to the loss of an electronic data storage device from a classroom will determine whether it violated FERPA. The FERPA safeguarding recommendations recognize that no system is perfect and sometimes information will get out. FERPA does not dictate requirements for safeguarding education records, but the FPCO encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information.

Schools may use any reasonable method to protect the information. The FERPA Safeguarding Recommendations specify that an educational agency or institution that has experienced a theft of files should consider one or more of the following steps:

1. Report the incident to law enforcement authorities.
2. Determine exactly what information was compromised.
3. Take steps immediately to retrieve data and prevent any further disclosures.

4. Identify all affected records and students.
5. Determine how the incident occurred.
6. Determine whether institutional policies and procedures were breached.
7. Determine whether the incident occurred because of a lack of monitoring and oversight.
8. Determine steps that will prevent the incident from happening in the future.
9. Notify students of steps they should take if they believe their information was stolen.

Failure to take reasonable and appropriate steps to protect education records could result in the release or disclosure of personally identifiable information from education records and may constitute a policy or practice of permitting the release or disclosure of education records in violation of FERPA requirements.

VIII. Practical Considerations relating to Confidentiality

There are a number of practical considerations that the educator should follow in order to avoid misunderstandings with regard to confidentiality.

1. Minor students should be informed of the counselor's general obligation to disclose information to inquiring parents prior to forming of the counseling relationship.
2. Guidance should be limited to the areas supported by District policy.
3. When working with minors, counselors should encourage family involvement when possible. Remember parents of minors have the right to information in most circumstances.
4. Legal counsel should be sought when a guidance counselor encounters a "grey area."
5. The safety of the student and the safety of third parties should be paramount in your consideration.
6. Abuse and neglect will always be reported.
7. Threats of injury to third parties will always be reported.

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