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**STUDENT RECORDS 2004: ISSUES AND POLICY CONSIDERATIONS****Overview**

More often than not a discussion of student records raises legal and policy questions. Ironically, however, a review of the literature in education law (1975-2000) did not yield an over abundance of books, scholarly articles, and other sources specifically treating student records-related issues facing public school officials, teachers, and counselors. The reason for this is very clear. The passage and implementation of the federal *Family Educational Rights and Privacy Act of 1974 (FERPA)*, and subsequent changes in the laws of the states to comply with *FERPA*, actually prevented many potential issues from reaching fruition by giving guidance to public school policy-makers and practitioners. In other words, over a twenty-five year period (1975-2000), where school system policies and procedures complied with federal and state laws, and practitioners carried out their duties in good faith, legal issues seemed few in number. (Bosher, Kaminski, and Vacca, 2004)

*FERPA (1974) Requirements.* A comprehensive federal statute, the *Family Educational Rights and Privacy Act* (which applies to all school system and individual schools receiving some form of federal financial assistance and/or funding) contains very specific mandates regarding student educational records (in some states referred to as *scholastic records*, in other states referred to as a *permanent record*). Some examples of *FERPA* requirements are: parents must be given annual notice of their rights under *FERPA* and they cannot be prevented from seeing, reviewing, and challenging information in their child's record; no complete record or any portion of it can be released to any "unauthorized person" or to any outside agency or person without parental consent; no personally identifiable information (*i.e.*, information related directly to a specific student) can be released without parental consent; persons (including school staff) wanting to gain access to student information must establish a "legitimate interest" in the information; and, students who have reached the age of eighteen years old and who are currently in attendance at the school may gain access to their educational record. It must be stressed that an underlying principle of *FERPA* is to protect the confidentiality of all information contained in a student's educational record. (McCarthy, Cambron-McCabe, and Thomas, 2004)

On balance, implementation of *FERPA* had a positive effect on student record keeping in public school systems. As one source summarized, "Although the act has imposed additional administrative responsibilities on schools, it has generally led to an improvement in the quality and accuracy of student records." (Fischer, Schimmel, and Kelly, 1999)

Since *FERPA* contains minimum requirements, each of the states is permitted to expand and build on its mandates. In the Commonwealth of Virginia, for example, the Code of Virginia contains specific subsections governing the release of information to public and private schools, colleges and universities, and the military (Sec. 22.1-288); sharing information with law enforcement agencies (Sec. 22.1-288.1); and transfer, management, and disclosure of information in court notices (Sec. 22.1-289).

## **The Changing Scene**

Until recently, keeping student records secure and protected from unauthorized and unwarranted access and disclosure has been a fairly simple task. Suffice it to say, however, things are changing rapidly. Some experts have described the current scene as “increasingly volatile.” (Cambron-McCabe, et al, 2004)

*Why the Change?* Five reasons have caused changes in student record keeping policy and procedures. First, the need for school personnel to discover, collect, store, and use student information (both school related and family/personal data), in an effort to meet student curricular needs and to provide related services, has expanded the scope of student records. Second, the availability of computers and other forms of technology enables school officials, counselors, and others to locate, collect, store, and use information from all aspects of a student’s life (academic and social). Third, requests for student information now come from a growing number of sources inside school systems (e.g., counselors, principals, school social workers, special education personnel, classroom teachers) and outside school systems (e.g., military recruiters, university researchers, law enforcement officers, the courts, college admissions personnel, guardians ad litem, the media, social services agencies). Fourth, the broad based data collection and confidentiality requirements of such federal statutes as the *Individuals with Educational Disabilities Act (IDEA)* and *No Child Left Behind (NCLB)*. Fifth, an increased need to identify, collect, use, and share information between school systems and police agencies in a coordinated effort to prevent the reoccurrence of such horrific events as the student shooting spree at Columbine High School.

*Privacy v The Right to Know.* More often than not at the heart of student records-related issues is an existing tension between the *privacy expectations* of students and their families (i.e., to be “let alone,” free from unauthorized and unwarranted intrusion and publicity), and the prerogatives of public school officials and professional personnel to be informed (i.e., the right to know). As one author has summarized, privacy is a personal right, neither easily defined nor explained. It encompasses the intimate details of a person’s personal life. Thus, the right to privacy “often clashes with other rights and responsibilities that we as a society deem important.” (Alderman and Kennedy, 1995)

## **Emerging Issues**

In recent years, events such as the shootings at Columbine High School, the terrorist attacks at the World Trade Towers and the Pentagon, and passage of the U.S.A. Patriot Act of 2001 (which, for example, creates the possibility obtaining a subpoena to gain access to student confidential information without a student and/or parent knowing it), have raised numerous issues regarding the privacy of this nation’s citizens, including public school students. Eight examples of emerging student records issue producers are:

- Identifying and gathering information (especially involving the methods and mechanisms for gathering data).
- Determining (a) what is or is not the educational record (For example, in Virginia the official (scholastic) record contains all information maintained by a school that is directly related to a student.

However, a student's "record does not include records of instructional, supervisory, administrative, and ancillary educational personnel kept in the sole possession of the maker of the record and are not accessible to any other person except a temporary substitute for the maker of the record" [Code of Virginia, Sec. 22.1-289]), and (b) the official location of that record.

- Separating *personally identifiable information* from *directory information* (e.g., student's name, sex, address, telephone listing, date and place of birth, dates of attendance, participation in school activities) contained in the record.
- Examining the contents and accuracy of all information included in the educational record (involving methods of challenging, correcting, purging, and expunging information).
- Storing information (where, how, electronic v paper), including identifying the official custodian of the information.
- Access to information (by whom, when, how, where).
- Uses of information (by whom, when, for what purpose).
- Determining a reasonable time limitation (specified in years) on maintaining the record. (Bosher, Kaminski, and Vacca, 2004)
- Each of the above issues can be further subdivided into specific sub-issues each of which has a profound impact on educational policy. For example:
  - Who is or is not a "party in interest," or a "school official," or someone "having a legitimate educational interest in the student," or other "authorized person," having access to a student's educational record? How and to whom is this established?
  - Is parental *consent* always necessary as a precondition of releasing any information (both directory and personally identifiable) from a child's educational record? What form must this consent take (oral, written)?
  - What about the rights of students who have reached the age of eighteen? What about students who may not have reached the age of eighteen but are legally emancipated from their parents? What about the rights of non-custodial parents, or guardians ad litem, or court appointed special advocates? How is their identity established? What official correspondence and documentation is needed?
  - When is it appropriate to transfer, or otherwise share and discuss *personally identifiable information* about a student with other professional staff in a school setting, or with professional staff of other schools, or with outside agencies such as child protective services, juvenile justice personnel, family welfare, the courts, the police? Are there federal (other than *FERPA*) and state statutory provisions and requirements (see, for example, the *Code of Virginia* 22.1-287, et seq.) involved?
  - Should all information on a student (e.g., scholastic, disciplinary, health-related) be kept in the same record or should information be kept separately? Who is the official custodian of these records?

## Case Law

Existing case law regarding student records is sparse and the case law that does exist leaves many questions unanswered. However, what follow are some examples of court decisions that offer advice to policy makers.

While a New York court in Blair v Union Free School District (1971) stressed that the confidential relationship between students and school personnel must be protected against intentional or negligent divulgence of information to "unauthorized third parties," and a Pennsylvania court in Merriken v Cressman (1973) made it clear that a balance must be struck between a person's right to privacy and the right of government to "invade that privacy for the sake of the public's interest," a California court in Tarasoff v Regents (1976) established that the duty of confidentiality gives way to the duty to warn. In Tarasoff the issue revolved around a

psychiatrist's duty to disclose information shared in a confidential therapy session with a student. The information shared by the student involved a threat of suicide and impending danger to another student.

In Belanger v Nashua (1994), a federal district court in New Hampshire held that a student's school record includes all information found in a student file maintained by school officials, including information generated by a juvenile court but housed in the student's school file. Similarly, the United States Court of Appeals for the Sixth Circuit held that student disciplinary records (including names and other personally identifiable information) contained as a part of a student's educational record are not subject to public release. U.S. v Miami University (2002)

The United States Supreme Court decided two *FERPA* cases during the 2002 term. Owasso I.S.D. v Falvo (2002) involved a teacher's practice of allowing students to exchange and grade each other's homework papers, quizzes, and examinations in class. Student names were not hidden from the student grader. The high court did not consider this practice as violating *FERPA*. In the second case, Gonzaga University v Doe (2002), the Supreme Court emphatically stated that private citizens do not have a right to sue under *FERPA*. The authority to enforce the requirements of *FERPA* vests with the United States Secretary of Education.

Florida Department of Education v Cooper (2004) involved a suit filed by the legal guardian of a student s who had failed the Florida Comprehensive Achievement Test (FCAT). The guardian sought access to the test itself. The appellate court held that a state department of education interpretation of the law (i.e., that to protect test security the law only allowed for access to test scores and not to the test instrument itself) was a reasonable one.

### **Policy Implications**

As the 2004 school year comes to a close it is a good time to revisit student records-related issues and to consider possible revisions in school system policy and procedures to prevent future problems. As a part of the review process (i.e., policy audit) school officials should review policies and procedures that proved successful in handling potential issues before they got out of hand. What follow are some suggested questions to ask as the policy audit process moves forward:

- Is your student records policy in conformance with *FERPA* and the laws of your state (e.g., the definitions of educational record, directory information, parental rights, rights of students who have reached the age of eighteen)?
- Does the policy reflect a respect for student and family privacy and ensure confidentiality?
- Is the policy written in clear, non-legal, non-educational jargon language?
- Does the policy clearly differentiate between *directory information* and *personally identifiable information*?
- Does the policy require a separation between information kept in a student's official educational record and information that is more appropriately kept in another secure place (e.g., medical information)? Here a note of caution is in order. Be careful not to create a student data storage system that is so fragmented that it actually violates *FERPA* access requirements.
- What does the policy say about student disciplinary information?
- Does the policy clearly state that access to student information is only granted to parents, guardians, students who have reached the age of eighteen, persons acting for the school system, and others who can demonstrate a "legitimate educational interest" in the student?
- What does the policy say about the rights of non-custodial parents?

- Does the policy state anything about time, place, and manner (including the presence of a qualified school person to help interpret the information contained in the record) of access to student records?
- Does the policy say anything about correcting information contained in the record, including expungement of the record?
- What does the policy say about copying information from the record (including the cost and who is financially responsible for copying costs)?
- Does the policy cover the transfer of records?

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Note: The views expressed in this commentary are those of the author.