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ABSTRACT

This memorandum discusses the major legal issues related to the confidentiality of students' school records, stressing in particular the requirements of the Family Educational Rights and Privacy Act. Major provisions of the act are summarized, and guidelines are offered to aid school officials in complying with the act's requirements. Separate sections of the memorandum focus in turn on the background of the act, access to student records by parents and pupils, release of student records to persons other than pupils and their parents, publication of a student records policy, and principals' liabilities for improper administration of student records. A sample consent form authorizing the release of student records is also included. (JG)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Drive
Reston, Va. 22091

ED127709

September 1976

Concerning

THE CONFIDENTIALITY OF PUPIL SCHOOL RECORDS

1976 Update

Pupil school records have been a subject of importance to school administrators for a considerable time, but only in the last few years has the principal faced the possibility of legal action if these records are not handled properly.

At the same time, it has become more difficult for principals to be sure just what is "proper" behavior in this important area because of the variety of positions being taken by courts and the active involvement of state legislatures--each often taking a very different position.

In 1974, the federal government became involved through the enactment of The Family Educational Rights and Privacy Act[1] (FERPA). This Act has also been referred to as the Buckley Amendment because it was introduced by Senator James Buckley of New York, not as a separate bill, but as an amendment to other legislation. Partly because of the way in which it was introduced--it did not go through the usual Committee process--and because of its rapid enactment, most educators and the groups that represent them in Washington were taken by surprise by the Act's requirements.[2]

This Memorandum will deal with all legal aspects of the pupil school records issue but will stress the requirements of FERPA not only because it is applicable nationally but also because so many state and local laws and regulations now being adopted are based on or closely related to the federal law. Before examining the specific requirements of the law, it is important to note just where it applies, and in what ways it is enforceable.

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1. Public Law 93-380; August 21, 1974, now in 20 U.S.C., Sec. 1230,1232 (g)-(i)
2. For a good description of how FERPA came about see The College Board Review No. 96, Summer 1975.

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I The Law and Its Background

FERPA amended the General Education Provisions Act by the addition of a section (Sec. 438) that authorizes the Secretary of Health, Education, and Welfare to withhold all federal funds available under that Act if an otherwise eligible educational agency or institution fails to meet its requirements. The amended general Act is the principal federal legislation governing federal aid to education, so the effect is to apply FERPA's requirements to all public schools, colleges, and universities, unless they should choose to forego federal aid.

Private schools or educational institutions are not directly covered, but some will be if their students receive financial aid from the U.S. Office of Education, as in the case of student loans or grants at the college level. Finally, it should be noted that the law provides no remedy to persons claiming violation of the law, except for complaint to HEW. It is possible, however, that a court might allow such a claim, if HEW failed to act in response to complaints.

It is interesting to note that the statute itself contains no statement of purpose or rationale for its requirements, but it clearly grew out of the increasing concern of many people in our society for the protection of individual privacy, and especially those aspects of privacy relating to the written records kept by institutions.[3]

At the same time, legislatures and the public at large are aware of, and concerned with, the need to collect and transmit to appropriate persons school records containing personal information about pupils, if the public purposes of education are to be accomplished. It was the awareness of such concerns that led to the amendment of FERPA[4] even before it took effect, and the issuance of administrative regulations.[5]

II Access by Parents and Pupils

Even in the absence of a federal or state statute, the law is fairly clear that a parent of a child attending school under the compulsion of the state should have the right to review the child's records.

In *Van Allen v. Cleary*[6], for example, the court cited as a common law rule that: "When not detrimental to the public interest, the right to inspect records of a public nature exists to persons who have sufficient interest in the subject matter. . . ."

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3. Another piece of legislation passed the same year as FERPA is the Privacy Act of 1974, which enables all citizens to gain access to their personal records held by agencies of the federal government (5 U.S.C. 552 and 552[a] effective September 27, 1975). This Act further provided for the establishment of a Privacy Protection Study Commission charged with making recommendations to Congress and the President on controlling information in the private sector. In addition, a number of states have enacted or are considering privacy protection laws of their own.
4. Senate Joint Resolution 40 (approved by the President December 31, 1974).
5. A limited final regulation was adopted but has now been superseded by the full regulation dated June 8, 1976, and effective June 17, 1976. It was published in full in the Federal Register on the latter date, p. 24662.
6. 211 N.Y.S. 2d (Sup. Ct. 1961).

One area in which the federal law goes farther is its provision that the student or the parent may also challenge records or portions of records which they believe to be incorrect. This does not mean that any record with which a parent disagrees must be changed. The opportunity, however, must be given to them to present arguments about why the record should be changed or removed.

Regulations provide that the parent or eligible student whose request that a record be changed is refused shall have the right to a hearing in order to challenge that record. While no specific procedures are prescribed for such a hearing, certain basic elements must be present. It must:

(a) Be afforded within a reasonable time of the request, and after adequate notice of date, time, and place;
(b) Be conducted by an official who does not have a direct interest in the outcome;
(c) Afford a full and fair opportunity to present relevant evidence, including assistance or representation by an attorney of his choice (but at his own expense);
(d) Result in a written decision to be rendered in a reasonable time, and based solely upon the evidence presented at the hearing.

If, after the hearing, the school decides not to make any change in the school record protested, the parent or student must be advised of his right to place a statement in the education records of the student rebutting or otherwise commenting upon the record to which exception is taken.

What constitutes "a record"?

Any written or documentary material about a pupil maintained by a school is a record according to the law. It doesn't matter where such materials are kept, or in what form. If a pupil's test score is on a sheet with those of other pupils, other scores can be masked, but the individual requesting the information must be shown his own score.

All kinds of reports are covered by the law except records of the school security police if they are kept separately from other school files. A teacher's or counselor's personal notes are not regarded as records, however, as long as they are kept solely for that person's own use (or for their substitutes).

Must all of a student's records be accessible to him?

Yes, if the student is over 18, with two major exceptions: psychiatric or treatment records (though he may authorize his doctor to see them); financial records of parents. Note: Former students have the same rights as current students under the law. There is no requirement, however, that any records be retained for any given length of time. The law only forbids the destruction of a record after access to it has been requested by an appropriate person.

Can an eligible person demand copies of records?

If he cannot reasonably obtain access personally, as in the case of a person living far away from the school, and if the record pertains solely to that person, he has a right to have copies made at his own expense. An eligible person may also request a copy when a record is to be transferred to another school or released to some other party outside the school system.

Can a student or parent challenge a teacher's grade under FERPA?

Not on the basis that the grade was unfair or the result of an improper judgment. They can challenge the grade as being improperly recorded, or otherwise misrepresenting the teacher's judgment.

III Release of Records to Others

The other half of FERPA (and most similar statutes) is the protection of school records from access by persons other than the pupil and his parents. This again is not an issue newly discovered by the Congress. First, there has been little argument about the right of appropriate school staff to have access to pupil records. And FERPA makes no change in this.

The only question is who is appropriate. As Dr. Arthur Rezny says in his essay in Martha Ware's classic, Law of Guidance and Counselling,[7] "Only those members of the staff who have an interest in the general welfare of the pupil should have access to the records." Determining which staff members have the required interest may be a bit more difficult. Few cases have arisen on this point and principals who have applied a "need to know" criterion to teachers and other professional staff seem to have stayed out of trouble.

School records may also be made available to school officials in another district to which a pupil has announced an intention to transfer or apply. When doing so other than at the pupil's request, notice must be given, and an opportunity to receive a copy of any records being forwarded. In cases where the pupil has moved to another jurisdiction without notice, the notice requirement can be satisfied by mailing it to his last known address at the same time as honoring the new school's request for the pupil's records. The requirement can also be met simply by announcing the school's intent to forward such records in its published policies and procedures concerning student records.

State and national education agencies may also have access to pupil records in the course of their work. They are, however, required to maintain the confidentiality of personal information in any reports made public. Other authorities to whom the school is required to report information by state statutes (in effect prior to November 19, 1974) may also be sent material from pupil records without consent or notice being given.

The same is true, of course, with regard to material subject to a court order or subpoena. In these cases, pupils or their parents should first be notified of the order. It does not pertain to requests from police, juvenile court staffs, probation officers, and the like. Information can only be provided to such persons after receiving the consent of the pupil concerned or the parent.

In emergencies, information can be provided to persons requiring it for the protection of the health and safety of the pupil or other persons. Factors that must be taken into account in determining whether personal information may be

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7. Martha L. Ware, Law of Guidance and Counselling (Cincinnati, Ohio: W.H. Anderson Co., 1964), Chapter 5.

disclosed without consent in this kind of situation include the seriousness of the threat to health and safety; the need for the information; the degree to which the parties to whom the information is to be disclosed can deal with the emergency; and the extent to which time is of the essence in dealing with it.

The regulation also states that this section will be strictly construed. Thus, care should be exercised in relying upon it. The commonest acceptable situation would probably be one in which a hospital requests medical information about a pupil who has been admitted in an unconscious state for emergency treatment.

Release of information to anyone other than those persons already described must only be made with the consent of the pupil or the parent. This process can be simplified by the use of a form, and many school systems have already prepared and adopted one. (An example is offered on page 6 of this Memorandum.)

Basically, however, a consent form and request for it should indicate the person or organization to whom the information is released, the purpose for its release, and the particular record or information to be released. The consent should also be dated and signed by the person granting it.

May a school prepare and use a blanket consent, that is, one which would generally authorize release of data to anyone at any time?

The specific intent of a consent indicates that a blanket consent would not be permissible. It also would seem to run against the general intent of the law. It does appear to be acceptable for students to sign consent forms authorizing release of a particular kind of information to certain kinds of persons for a specific purpose. An example would be a form authorizing release of academic records without notice to all employers to which the pupil applies for employment.

Can any kind of personal information about students be released without consent?

After the initial enactment of the law, many educators pointed out that its wording would prevent publication or release of information customarily made public, including the height and weight of football players on game programs, pupils making the honor roll, and the information generally found in yearbooks. The amendments made by Congress at the end of 1974 provided for release of "directory information," defined to include a student's name, address, telephone number, date and place of birth, major field of study, participation in school activities, dates of attendance, honors and awards, and other similar information.

A school desiring to release such information without securing prior consent must give public notice of its intention in a public newspaper, school paper, newsletter, or announcement sent home to parents of the kinds of information it is designating as being in the directory category. Such notice must be given a reasonable time before actual release of such information to give anyone affected the opportunity to notify school authorities of his objection, in which case the information relating to that person will not be made public. Of course, a school need not adopt any of these categories to be made public if it does not wish to. Many, for example, have chosen not to include student addresses and telephone numbers.

RECORD RELEASE FORM*

In order to forward a transcript or other school records to other schools, colleges or universities, and prospective employers, we are required to obtain your written permission prior to complying with such requests.

Please sign the attached form if you desire your child's records to be released.

I hereby consent to the release of a copy of _____ records by the school system to the following:

_____

_____

_____

_____

_____

_____ _____

(Date) (Parent's Signature)

*Taken from form used by Metropolitan School District of Wayne Township, Indianapolis, Ind.

Must a record be kept and made available to parents and students of the names of all persons, agencies or organizations requesting access to an individual's records?

The law requires that such a record must be kept for all persons making requests from outside the school system. The record must also indicate the legitimate interest of the person making the request, and whether or not it was granted. This requirement does not apply, however, to requests for access by teachers or other school personnel who have a legitimate educational interest in a student's record, or, of course, to parents.

IV Publication of Student Records Policy

One of the requirements of FERPA is that all parents and adult students be informed of the requirements of the law, and of their rights under it. In most cases, this responsibility will be assumed by the school district; but if not, it will probably be each principal's responsibility. Parents should be informed annually of the specific records that are kept for each student by the school district, the name or title of the person in charge of the records, and those who have access to the records with the reasons stated. Parents should also be informed of the policies for expunging records, the procedure for challenging the record, the cost of reproducing copies and the categories of directory information. Most important, all parents and students over 18 must be informed of these rights:

1. To know the records that are kept;
2. To inspect and review the record or material that pertains to themselves or their offspring;
3. To receive a copy of the record at a reasonable cost, if copying is the only feasible way access can be assured;
4. To receive a response to a reasonable request for explanation and interpretation;
5. To challenge a record claimed to be false or misleading, and to a fair hearing if, after review, no change is made;
6. To place a statement of rebuttal in the challenged record if no change is made;
7. To file a complaint with HEW if they believe any of these rights are violated.

In addition, it is clearly the principal's responsibility to see that the duties of the school under FERPA and any state law or district regulation are carried out fully and appropriately. What are the risks and penalties of not doing so? And are there risks if you do?

V The Principal's Liabilities

As mentioned previously, there is no remedy for violation of FERPA except through complaint to HEW, which has the power to cut off federal financial aid to the school system administered by the Office of Education. This is highly unlikely, of course, unless the district refused to comply even after notification of violation by HEW. More likely, the principal or other employee responsible for the violation would merely be ordered to take the appropriate action to bring about compliance. If the violation had been the result of misunderstanding or ignorance of the law's requirements, it is unlikely that any further liability by the principal would result.

Even before enactment of FERPA or any state laws, of course, improper release of private information was a possible source of common law liability if it injured another's reputation. And it is the publication or communication of a defamatory statement, not its authorship, that constitutes libel. So a principal can be liable for transmitting information even if he was not its original source. It should be remembered, however, that the transmission of information to persons having the right to receive it, without being motivated by malice, is privileged, or protected by law.[8]

Similarly, when students protested the transmission of their records relating to non-academic matters to institutions of higher learning to which the students had applied, courts have upheld the right of high school officials to do so. In denying the student's petition in the case of *Einhorn v. Maus et al*[9] the court said:

> School officials have the right, and we think a duty to record and to communicate true factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission.

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8. *McLaughlin v. Tilendis*, 253 NE 2d 85 (Ill. 1969). For more detailed discussion see NASSP Legal Memorandum, "School Communications," April 1974.
9. 300 F. Supp. 1169 (1969) Pa.

On the other hand, it must be recognized that with FERPA and similar state laws on the books, students and their parents are going to have far greater access to, and therefore knowledge of, the contents of their records.

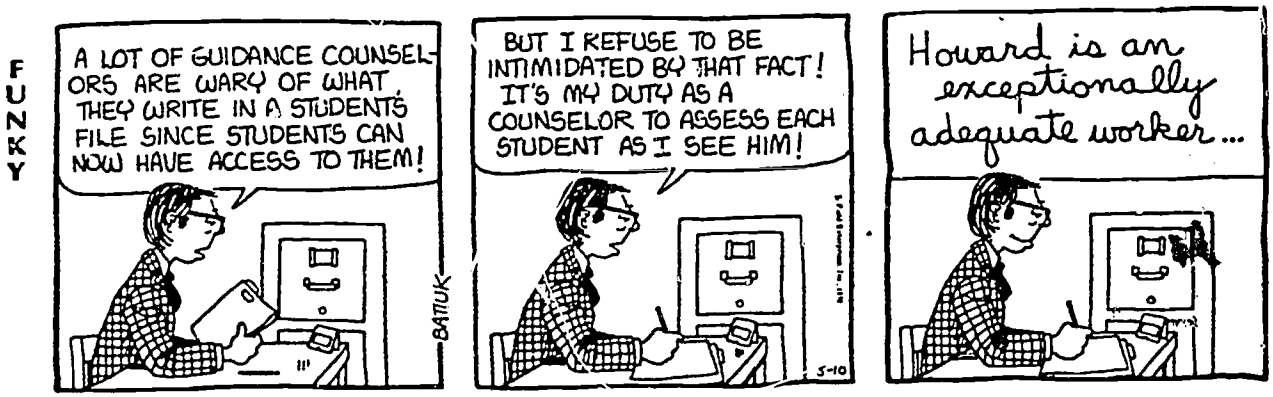
In the interest both of fairness and of prudence, administrators and principals will have to exercise greater care both as to what is placed in the student's record, and to whom the material is communicated.

- Critical comments about students should be narrowly confined to specific incidents. Opprobrious terms, especially of a general nature, should never be used.

- When a comment or observation which might be defamatory is believed necessary as a part of the report of an incident or other record, additional consideration should be given as to whether that report should be placed in a student's permanent file.

- In general, file retention policies should be reviewed to see whether disciplinary records and other non-academic records should be retained for long periods of time.

Appreciation is expressed to Dr. Thomas D. McLennan, director of Student Services, Dearborn Public Schools, Dearborn, Michigan, for his contribution to this Legal Memorandum.



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