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FERPA AND LAW ENFORCEMENT

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INSIDE THIS ISSUE:

OSBI Legal Extern, Jonathan Shirley, examines the Family Educational Rights and Privacy Act (FERPA) and its possible effects on Law Enforcement efforts to obtain educational records for use in criminal investigations.

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I. Scope of FERPA

Congress enacted the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2013), to protect the privacy of student information by limiting disclosure of student educational records and personally identifiable information. Generally, FERPA requires schools to obtain parental consent in the case of minors, and the student if s/he is an adult, before releasing any student record containing personally identifiable information to a third party. *Id* at § 1232g(a)(1)(A). While FERPA does not explicitly prohibit the release of educational records to police, it calls for a denial of federal funding to any school that has a policy or practice of releasing student educational records containing personally identifiable information to anyone other than the parent or student. *Id.* Although FERPA makes educational records confidential, there are several exceptions in the act that allow police to obtain student records in certain circumstances. FERPA only applies to educational agencies or institutions that receive federal funding. *Id* at § 1232g(a)(3). This can include public or private elementary, secondary, and post-secondary schools. 34 C.F.R. § 99.1(a)(2). FERPA only applies to student records. Therefore it does not protect the records concerning teachers, professors, or administrators. FERPA protects educational records that contain personally identifiable information. This includes any information that would allow any "reasonable person to identify the student with reasonable certainty," or information requested by a third party that the school "reasonably believes knows the identity of the student." *Id* at § 99.3. Finally,

FERPA only protects educational records. The statutory definition of an "educational record" is extremely broad. However, Congress provides several categories of information in FERPA that are not educational records, as well as several statutory exceptions where schools may release records to police under certain circumstances.

II. Educational Records

The question of what constitutes an educational record is important because schools cannot be penalized under FERPA for nonconsensual disclosure of non-educational records. Congress defines educational records as "those records, files, documents, and other materials that contain information directly related to the student; and are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(4)(A). In one of the few United States Supreme Court decisions concerning FERPA, the Court ruled that FERPA implies that Congress intended for educational records to be kept by a central custodian, such as a registrar. *Owasso Independent School Dist. No. I-011 v. Falvo,* 534 U.S. 426 (2002). Therefore, it is clear that for something to be an educational record, it must be maintained by the school. For instance, a court found that a middle school student's hit list he had created of other students was not an educational record after it was found by a janitor, and therefore was subject to disclosure. *Risica ex rel. Risica v. Dumas,* 466 F.Supp.2d 434, 441 (D.Conn. 2006). Similarly, an individual's personal statements or other independent sources of information are not considered educational records because they are not maintained by the school. In *Frasca v. Andrews,* the court stated, "Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records." 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979).

Congress carves out several categories of information that do not qualify as educational records and therefore do not fall under the protection of FERPA, some of which might be of interest to law enforcement. Educational records do not include "records maintained by a law enforcement unit of the educational agency or institution that were created by the law enforcement unit for the purpose of law enforcement." 20 U.S.C. § 1232g(a)(4)(B)(ii). The Department of Education defines a law enforcement unit as anyone who is authorized by the school to enforce any local, state, or federal laws and to maintain the security and safety of the agency or institution. 34 C.F.R. § 99.9(a)(1). Therefore, records of campus police departments or school security guards may be shared with other law enforcement officials, so long as the records were created by and maintained by the law enforcement unit. In many cases, schools may share education records created by the school with campus law enforcement units. However, this information does not lose its status as a protected educational record just because it is shared with campus police. Similarly, records created by the unit for non law enforcement purposes, such as information relating to a disciplinary proceeding, would fall under the protection of FERPA and could not be shared

with police absent parental consent, a subpoena, or some other statutory exception. 34 C.F.R. § 99.8(b)(2)(ii). While records of law enforcement units may be disclosed to outside parties such as police, FERPA "neither requires not prohibits disclosure." *Id* at § 99.8(d). However, this provision certainly allows for open communication and information sharing between campus law enforcement and outside law enforcement agencies.

Records of students who are over the age of eighteen or in attendance at a post-secondary school that are created by physical or mental health professionals in regards to treatment of the student are not educational records. *Id* at § 1232g(a)(4)(B)(iv). However, other privileges or bans on disclosure, such as doctor-patient privilege still apply. Finally, records created or received concerning an alumni of the school that do not directly relate to attendance are not educational records. 34 C.F.R. § 99.3.

III. Obtaining Student Educational Records

Generally, absent parental consent or some other exception police may obtain student educational records from a school through a court ordered subpoena or search warrant. 20 U.S.C. § 1232g(b)(1)(J)(ii). The act states that schools may disclose records concerning the entity or persons designated in a subpoena that is issued for a valid law enforcement purpose. *Id.* This applies to Federal Grand Jury subpoenas as well. *Id* at § 1232g(b)(1)(J)(i). Disclosure is also permitted pursuant to a court order issued by the United States Attorney General concerning investigations of domestic or international terrorism. 34 C.F.R. § 99.31. Generally, as long as the subpoena is for a law enforcement purpose, schools are prohibited from disclosing to parents the nature or existence of the subpoena.

In *U.S. v. Miami University,* the court found that disciplinary records qualify as educational records, and therefore FERPA precludes disclosure of student disciplinary records absent consent or some other applicable exception. 294 F.3d 797, 812 (2002). The Court stated that disciplinary records clearly fall within the statutory definition of an educational record because they contain information directly related to a student and are maintained by the school. *Id.* The court went on to determine that the disciplinary records were not records of a law enforcement unit because they were not solely for a law enforcement purpose, and therefore the law enforcement exemption did not apply. *Id.* However, even though disciplinary records are considered educational records, a post-secondary school may release the results of a disciplinary proceeding where the accused is charged with a violent crime or a non-forcible sex offense. 20 U.S.C. § 1232g(b)(6)(B). These can be records of anyone accused of committing or attempting to commit certain acts that if proven would qualify as arson, assault, burglary, negligent or intentional criminal homicide, vandalism, kidnapping, robbery, forcible sex offenses, and certain non-forcible sex offenses include statutory rape and incest. 34 C.F.R. § 99.39. Upon disclosure, the school may only release the

name of the student, the crime charged, and the result of the proceeding. *Id*. So, under FERPA, police can get investigative records from the campus law enforcement unit, but some information may be redacted.

Law enforcement officials do not need a subpoena to obtain directory information from a school. 20 U.S.C. § 1232g (a)(5)(A). FERPA defines directory information as including but not limited to the "student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." *Id.* As long as the school has notified parents of what information they have chosen to list as directory information and have given parents a reasonable opportunity to object to publishing the student's information, schools can release the information to police. Social security numbers are not directory information.

Police can also obtain records in a health or safety emergency without a court order. The health and safety emergency exception allows schools to release student educational records to police in a health or safety emergency. FERPA states that schools may disclose personally identifiable information or educational records to authorities "if knowledge of such information is necessary to protect the health or safety of the student or other persons." 20 U.S.C. § 1232g(b)(1)(I). In determining whether or not an emergency exists, the Department of Education grants deference to the school. The schools look at the totality of the facts and circumstances pertaining to the threat and as long as there is a rational basis for releasing student information to police, disclosure is not prohibited. 34 C.F.R. § 99.36(c). As long as the school can demonstrate a "significant and articulable threat" the Department of Education will not take disciplinary action. *Id.*

It is important to remember that police officers can always obtain student information with parental consent. Also, any information disclosed to law enforcement that was learned independently of an educational record is not protected by FERPA. Police may always obtain educational records through a court issued subpoena with a valid law enforcement purpose. However, a subpoena is not needed if all police seek is directory information. The statutory exemptions that FERPA provides exclude certain records from the definition of educational records, helping to facilitate information sharing between campus security and outside law enforcement. Similarly, statutory exceptions to disclosure make it acceptable for schools to share information with police in instances that warrant it most, such as health and safety emergencies and disciplinary proceedings that concern violent crimes. Finally, it is important to note that schools are not penalized for releasing educational records in a single instance. Only schools that have a policy or practice or releasing records without consent are subject to losing funding. Despite limitations on disclosure, Congress has made it possible for schools to disclose student information that warrants police attention.