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Candid Camera: FERPA's privacy requirements give schools reason to pause

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Many school units have installed video surveillance cameras in buses, hallways, parking lots and other public areas. These cameras are often the best available witness to help school officials resolve matters involving student misconduct. In order to take full advantage of these cameras, however, schools must make and keep a recording that can be viewed after-the-fact. When schools do this, they need to be wary of potential implications of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA").¹ Naturally, the issue becomes acute for schools when multiple students are caught on camera and each student's family wants a copy of the video to determine whether the discipline imposed was fair or to prepare for an expulsion hearing. Under FERPA, this situation essentially presents two questions about the video: (1) which education record, if any, does it belong in, and (2) who has access to it? This article discusses how school officials may address these situations in light of FERPA's general requirement of student privacy.

The legal backdrop

In general, FERPA controls access to, and disclosure of, a student's education records. Education records are defined as all records, regardless of medium, which are maintained by a school and that contain information directly related to a student, other than directory information, law enforcement records, and personal notes possessed solely by teachers and administrators.²

With limited exceptions, FERPA prevents disclosure of material in a student's education record, or personally identifiable information from that record, without prior written consent from that student's parent.³ FERPA also gives parents the right to access the materials in the education record of their own child; however, FERPA does not allow the parents of one student access to the education record of any other student.⁴ By law, a parent may inspect, review, and be informed of only those parts of the documents or materials that relate to their own children.⁵

Video surveillance tapes

Given FERPA's privacy parameters, how may schools handle videotapes showing multiple students? The Family Policy Compliance Office ("FPCO")⁶ takes the position that if education records of a student contain information of more than one student, the parent requesting access to the education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child. Thus, in the case of videotapes capturing the misconduct of multiple students, the FPCO's official stance is that a parent may only inspect the videotape showing his or her child engaged in misbehavior if no other students are pictured.⁷ Informal guidance from the FPCO seems to stray from this position and suggest that video recordings are only education records for those students who are "directly related" to the subject of the video (e.g., two students pictured fighting).⁸ This apparent lack of consistency from the FPCO has resulted in

repeated requests from school attorneys across the country for FPCO to issue new guidance on the subject. FPCO has not issued such guidance to date, but has stated that guidance will be forthcoming.

Until the FPCO issues clear guidance on this subject, schools should approach questions in this area by first determining whether a videotape belongs in any student's education record. Video surveillance generally captures everything in the camera's lens at any given moment and does not become an educational record until a school makes a recording of a particular student doing something of interest to school officials. The recording is then considered an education record of each student of interest involved in the incident. If only one student is identifiable, the video constitutes an education record of that student only. However, if a recording shows multiple students, it may be considered an education record of some, or all, of them depending on the reasons for making and keeping the recording.

For example, if a video depicts an altercation among students, that portion of the video will constitute an education record of each student who can be seen fighting. This is because the school is considering discipline for each student seen fighting in the video. Based on informal guidance from the FPCO, the recording would probably not be considered an education record of a student-bystander unless school officials also maintained the recording for some purpose directly related to that bystander. For example, if school officials treat a particular bystander as a witness, the recording would also be included in that student's education record.

Next, schools must determine who has access to a video recording that depicts multiple students. As mentioned above, a parent's right of access under FERPA is limited to the education record of his/her child. When that child's education record includes a recording that is also considered to be an education record of other students, as in the above scenario, FERPA provides three options for parental access to the video recording. First, if the school obtains prior written consent⁹ from the parents of all the other students depicted in the video, then all of the parents may receive a copy of the recording. Of course, any further disclosures by the parents are also subject to the privacy requirements of FERPA. In the absence of parental consent, a school has two other options. A school official may allow a parent to watch the segment of the video depicting his/her child, even if the parent sees other children. This is because information about other students in video recordings cannot be as easily redacted as it can be in written materials. Alternatively, a school official may satisfy a request for access by informing the parent about the contents of the video recording.

Summary

In summary, when a video recording of identifiable students is made and kept by a school, it will likely be protected under FERPA. Depending on the school's reasons for keeping the recording, it may constitute an education record of multiple students. When parents request access to such recordings, school officials may choose from three options to satisfy the request and comply with FERPA. Schools may (1) obtain the necessary consents from all parents and provide copies of the recording, (2) allow the parents to view (but not copy) the recording, or (3) inform the parents regarding the contents of the video recording.

School officials should carefully consider the practical advantages and disadvantages of these options before choosing one of them. Some of the advantages and disadvantages become apparent when considering these options in the context of the Maine legislature's newly adopted due process standards for student expulsion proceedings.¹⁰ Those standards require superintendents to provide prior written notice of a disciplinary hearing and to notify the student and his or her parents of the right to review the student's school records before the hearing. The student must also be informed of the nature of the evidence against him or her. In the event that the administration seeks to offer a videotape during a student discipline hearing, a school could comply with these due process standards and FERPA by obtaining parental consents before distributing copies of the videotape prior to an expulsion hearing. However, this option requires the cooperation of multiple individuals and time to obtain the required consents. Additional practical consequences of distributing copies of the videotape include the staff time and cost associated with making the copies as well as the disruptive impact of the video being uploaded to internet websites such as YouTube. Of

the two remaining options, simply informing the parents of the video's depiction of their child's conduct arguably may not meet the due process right to review the student's records even though such an approach would likely comply with FPCO's guidance. Thus, allowing the potentially expelled student's parents to view the segment of the video directly related to their child before an expulsion hearing will generally be the most practical method of complying with FERPA and Maine's due process requirements in the context of a student expulsion. ■

Endnotes

1. 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.1 et seq. Maine's education statutes incorporate the provisions of FERPA, see 20-A M.R.S.A. § 6001.
2. 20 U.S.C. § 1232g(a)(4).
3. 20 U.S.C. § 1232g(b)(1). Personally identifiable information is defined as information that would make the student's identity easily traceable.
4. 20 U.S.C. § 1232g(a)(1).
5. 20 U.S.C. § 1232g(a)(1)(A).
6. The FPCO is the division of the U.S. Department of Education responsible for administering FERPA and investigating alleged violations of the law.
7. See Letter re: Berkeley School District, 104 LRP Publications 44490 (February 10, 2004).
8. FPCO Letter from Director Rooker dated October 31, 2003 (<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/1031.html>); FPCO Letter from Director Rooker dated March 23, 2006.
9. FERPA has specific requirements for the consent to be effective. The written consent must (1) specify the records to be disclosed, (2) state the purpose of disclosure, and (3) identify the parties who may see the records. See 20 C.F.R. § 99.30.
10. 20-A M.R.S.A. § 1001 (8-A).