Open Records, Open Access
FERPA, IDEA, and Related Rights

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Parents of children with disabilities seeking to protect their educational rights often have need for access to records, or to ensure that those records remain confidential. The Family Educational Rights and Privacy Act, the Individuals with Disabilities Education Act, state records laws, the Health Insurance Portability and Accountability Act, and privacy laws provide parents with a number of important rights. Parents also face issues as school districts increasingly seek to restrict the rights of parents and their professional representatives to observe and visit the classroom, and more courts are beginning to recognize the need to observe.

Family Educational Rights and Privacy Act (FERPA)
Individuals with Disabilities Education Act (IDEA)
and State Student Record Laws

The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, establishes confidentiality and access rights for students' educational records. Parents hold these rights until a child turns 18 or enters a post-secondary educational institution. 34 C.F.R. § 99.5. FERPA applies to any educational institution or agency to which funds have been made available under any program administered by the Department of Education. 34 C.F.R. § 99.1. The IDEA also gives parents the right to examine records relating to a child with a disability, 20 U.S.C. §1415(b)(1); 34 C.F.R. §§ 300.501, 300.613. The Department of Education's Family Policy Compliance Office (FPCO) administers FERPA; the Office of Special Education Programs (OSEP) is largely responsible for IDEA. Most of the FPCO letters cited herein are available at www.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html and many OSEP letters are also available through the internet.

Education Records. FERPA applies to "education records," meaning "those records, files, documents, and other material" that are "directly related" to a student, and that are "maintained" by the educational agency or institution or another person or organization acting for it (such as a contractor). 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. A record is "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. This definition is intentionally broad. *See Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40 (D. N.H. 1994); *Joint Statement in Explanation of the Buckley/Pell Amendment*, 120 Cong. Rec. 39862 (1974) ("*Joint Statement*")‡; *Letters to Husk* (FPCO 2006)‡ and *Baker* (FPCO 2005)‡. At times, some may

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have argued to limit educational records to records maintained by a central school custodian, such as registration forms, transcripts, discipline forms, etc., relying on dicta in *Owasso Ind. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002). This, however, is contrary to the broad definition of education records in the Act itself, and FPCO has consistently refused to limit the act's application in this manner. *See Letters to Husk and Baker, supra.* ‡ Furthermore, school officials may not unilaterally remove records from FERPA's protections by changing where they are maintained or how they are categorized. *Baker, supra.* ‡

Right of Access. Parents may "inspect and review" education records. The school/agency must respond to "reasonable requests for explanations and interpretations of records." Parents may have a representative review the records. 34 C.F.R. §§ 99.10, 300.613. If "circumstances effectively prevent" parent review, the parent may obtain copies. *Id.* One lower court has held that a parent who lacked the ability to understand her child's voluminous records could not have copies for her independent expert before a hearing request was filed because she was technically capable of inspecting records. *Bevis v. Jefferson Co. Bd. of Educ.*, 48 IDELR 100 (N.D. Ala. 2007). The court inappropriately created an "extenuating circumstances" standard not present in the law. But the decision appeared partially premised on the parents' right under state law to copies once she filed for due process, and the hearing officer ultimately concluded that she had such a right. 48 IDELR 117 (Ala. 2007). Perhaps reflecting the fact that copying is readily available and much cheaper than when FERPA was enacted over 30 years ago, many states allow parents copies. *E.g., Ark. Reg.*, §10.01.8, *Florida Admin. Code* § 6A-1.0955, *Conn. State Agencies* § 10-76d-18 (one free written copy annually); *Calif. Educ. Code* § 56504; *Ill. State Student Records Act* §4. FERPA and IDEA do not permit search or retrieval fees, and only allow copying fees. 34 C.F.R. § 99.11, 300.617.

Divorced parents have full FERPA rights unless a parent's FERPA rights are specifically revoked. 34 C.F.R. § 99.4. Parents must receive a list of the types and location of education records the agency maintains. 34 C.F.R. §300.616. If a record includes information about more than one student, the parents may only review the information about their child. 34 C.F.R. §§ 99.12, 300.615. FPCO has opined that a school district would violate FERPA if it complied with a hearing officer's order to produce information relating to one student to the parents of another. The school district could produce records from which all personally-identifiable information had been redacted, but not the unredacted records. *Letter to Attorney for School District* (FPCO 2003). However, other courts have taken a different position, *see* Videotape section below.

FERPA Exclusions. Sole possession records are excluded from FERPA. Such records must be kept in the maker's sole possession, "used only as a personal memory aid," and not accessible or revealed to any other person except a temporary substitute for the maker of the record. 34 C.F.R. § 99.3; *see also Joint Statement* at 39862. ‡ Once the contents or information recorded in a sole possession record are disclosed to any party other than a temporary substitute, the record becomes an "education record" under FERPA. Letter to Otter (FPCO 2002) (http://www.ed.gov/policy/speced/guid/idea/letters/2002-3/otter0729023q2002.doc). Moreover, detailed notes recording specific clinical, educational, or other services provided to a student, or direct observations or evaluations of student behavior, are not sole possession records because they are not personal memory aids–even if they are never shared with another person. *See Letter*

to Husk (2006) and *Baker* (2005).[‡] Hence, therapy notes and logs must be produced. *Id.* Because the FERPA itself does not reference "memory aids," some states have omitted the requirement. *E.g. Calif. Educ. Code* § 49061; *Kentucky Rev. Stat.* § 160.700; *Minn. Data Practices Act* §13.32 (but also stating that records are not sole possession records if retained after end of school year). If a state regulation omits the "personal memory aid" requirement, school districts must follow the federal regulations and apply it. *Letter to Baker* (Dec. 28, 2005).

FERPA applies to school disciplinary records, but not to records created by a law enforcement unit for a law enforcement purpose and maintained by the unit. 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3(b)(2); 34 C.F.R. § 99.8; *U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002). FERPA does not apply to certain personnel records. 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3(b)(3), and certain college health records. 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3(b)(4). Teacher grade books are not education records. Moreover, students grading fellow students' assignments are not engaged in creating education records because they are not acting for the school district. *Falvo*, 534 U.S. 426 (2002). Conversations about facts are not education records, *Jennings v. Univ. of N.C.*, 40 F.Supp.2d 679 (M.D.N.C. 2004). One court has held that reports to harassment victims describing the investigation, facts learned, and discipline taken against offending student were not educational records. *Jensen v. Reeves*, No. 99-4412 (10th Cir. 2001) (ca10.washburnlaw.edu/cases/2001/02/99-4142.htm).

Timelines. School districts must comply with IDEA and FERPA records requests within 45 days after receiving the request, or before the next IEP meeting, due process hearing, or resolution session. 34 C.F.R. § 99.10, 300.613. States may impose shorter timelines. *E.g., Florida Admin. Code* § 6A-1.0955 (30 days); *Calif. Educ. Code* § 56504 (5 days); *Conn. State Agencies* § 10-76d-18 (10 days or 3 for IEP meeting or hearing).

Destruction. Under IDEA, the school district must inform parents when personally-identifiable information is "no longer needed to provide educational services" to the child, and parents may request its destruction. 34 C.F.R. §300.624. Destruction may include physical destruction or rendering the information "no longer personally identifiable." 34 C.F.R. §300.611. Under FERPA, once parents have requested records, they may not be destroyed. 34 C.F.R. § 99.10. FERPA does not require school districts to maintain records or to inform parents of an intention to destroy them. *Letter to Carroll Indep. Sch. Dist.* (FPCO 2005). Nonetheless, under the IDEA regulations, school districts must inform parents when personally-identifiable information is no longer needed to provide educational services to the child. 34 C.F.R. § 300.624. Presumably, records still needed to provide such services would not be destroyed, meaning that under IDEA, parents should be informed prior to the destruction of education records. Moreover, states and districts receiving federal funds must keep records for 3 years to demonstrate compliance with federal program and audit requirements under the General Education Provision Act regulations. 34 C.F.R. §§ 76.730, 76.731. This includes IEPs, evaluations, and similar documents. State record destruction laws and policies vary and may impose stronger requirements. *E.g.*, 5 *Calif. Code Reg.* § 437 (differing schedule depending on record category; some special education records may be destroyed when no longer useful; others must be retained); *Florida Admin. Code* § 6A-1.0955 (school boards to adopt policies regarding destruction other than information required

for permanent record); *Ill. State Student Rec. Act* § 2 (generally 5 years) § 4 (permitting parents to object to destruction); *Nebraska Admin. Code* Ch. 51, §009.01 (5 years); *N.J. Sch. Dist. Records Retention Schedule*, Student Records, M700106-999 (proscribing varying periods).

Confidentiality Rights. School districts may not disclose education records containing personally identifiable information without consent. 20 U.S.C. § 1232g (b)(1); 20 U.S.C. 1232g(b)(2)(A); 34 C.F.R. § 99.30. Personally identifiable information includes the name of the student, parent, or other family member; the student's address, social security or student number; personal characteristics and any other information that would allow someone to easily trace the student's identity. 20 U.S.C. § 1232g; 34 C.F.R. § 99.3. An identity may be easily traceable due to publicity around an event, a child's personal characteristics, or from information culled from a series of records taken together. *Letter to Texas Sch. Dist.* (FPCO Apr. 6, 2006). Thus, the use of nicknames or indirect/code names for a child would not take the record outside the scope of FERPA. One court has held that when all identifying information is redacted, the documents are no longer directly related to the student and may be released. *Unincorporated Oper. Div. v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003).

Consent is not required to disclose records to other school officials if they have "legitimate educational interest" in the record. Nor is consent required for disclosure to other schools in which a student seeks to enroll or from which the child receives services; representatives of the Department of Education, and state and local educational authorities; disclosure of certain juvenile justice records as permitted by state law; and in other situations enumerated in the FERPA regulations. 34 C.F.R. §99.31. Directory information, such as the student's name, address, email, photograph, and school may be disclosed once a school complies with certain procedures. 34 C. F. R. § 99.3. But, schools may not disclose directory information linked to non-directory information, such as a list of special-education students. 65 *Fed. Reg.* 41,852, 41,855 (July 6, 2000); *Letter to Austin Indep. Sch. Dist.* (FPCO 2005). Other FERPA provisions require a log of requests for information and place limits on re-disclosing information. See 34 C.F.R. §§ 99.32-33.

Legal Proceedings. Records may be disclosed pursuant to subpoena or court order without the parent's consent. When a subpoena is sought, the school district must make reasonable efforts to notify the parents so they can seek protection from a court. 34 C.F.R. § 99.31(a). *See Victory Outreach Center v. City of Philadelphia*, 233 F.R.D. 419 (E.D. Pa. 2005). Some state laws may be stronger, E.g., *Minn. Data Practices Act* (allowing parents to object to disclosure of information to juvenile justice system). At least one court has balanced the student's privacy interests against the need for disclosure to obtain some relevant evidence. *Zaal v. State*, 602 A.2d 1247, 1256 (Md.1992), and another has implied a slightly higher burden to obtain discovery when FERPA is involved, *Ellis v. Cleveland Municip. Sch. Dist.*, 309 F.Supp.2d 1019 (N.D. Ohio 2004). But courts can safeguard privacy through appropriate protective orders and do not need to apply heightened standards. *See Fairchild v. Liberty Indep. Sch. Dist.*, 466 F.Supp.2d 817 (E.D. Va. 2006); *DeFeo v. McAboy*, 260 F.Supp.2d 790 (E.D. Mo. 2003). School districts may also disclose education records in legal actions if relevant to the case or defense. 34 C.F.R. § 99.31(a). Finally, common law waiver concepts do not apply to FERPA. Thus,

hearing transcripts and the information developed from them remain education records and may not be released even if the hearing was open. *Letter to Schad* (FPCO Dec. 23, 2004). *See also Warner v. St. Bernard Parish School Board*, 99 F.Supp.2d 748 (E.D. La. 2000) (parent did not waive FERPA protections by discussing issues in another context).

Enforcement. FERPA may not be enforced via private action under § 1983. *Gonzaga v. Doe*, 536 U.S. 273 (2002). Parents may file a FERPA complaint with DoE's FPCO or an IDEA complaint with their state education agency. Some states permit private rights of action under state statutes, E.g., *Ill. State Student Rec. Act* § 9; *Minn. Data Practices Act* §13.04; *Virginia FOIA* § 2.2-3713. Parents may file for due process under IDEA. They may also use §1983 in circuits applying to §1983 to IDEA. *See, e.g., Sean R. v. Bd. of Educ. of the Town of Woodbridge*, 794 F.Supp. 467, 469-70 (D. Conn.1992); *P.N. v. Greco*, 282 F.Supp.2d 221 (D.N.J. 2003) (recognizing §1983 action for violation of IDEA records provisions; Third Circuit later denied right to §1983 actions under IDEA in Circuit). A district's withholding of records can be a denial of FAPE. *Lampkin v. Compton Unif. Sch. Dist.*, No. BC363711 (Superior Ct. Sept. 19, 2007).[‡] The court held that the failure to produce was enough; parents should not have to speculate how withheld records might help their case or show a loss of educational opportunity or right to participate to prove a FAPE denial. *Id.* (The court further concluded that parents' right to participate in the process was significantly infringed, because they could not cross-examine witnesses on the absent documents.) *Id.* A school district may disclose education records to outside counsel, psychologists, and other experts. *Letter to Parent* (FPCO Sept. 2004).

Challenging/Amending Records. If parents believe a record is inaccurate or misleading, or violates their child's right to privacy, they may seek an amendment. If the school district refuses, they may request a hearing. 34 C.F.R. §§ 99.20; 300.618-19. FERPA hearings are quite minimal, 34 C.F.R. § 99.22, although state records statutes may give greater protection. E.g., *Ill. State Student Rec. Act* §7 (right to challenge "accuracy, relevance, or propriety of any entry" in records). If the parent prevails, the school district must amend the record. Parents who do not prevail may add a corrective statement into the record. 20 U.S.C. § 1232g(a)(2); 34 C.F.R. §§ 99.21, 300.620. If a record contains inaccurate information relating to the provision of special education to a child, the legislative history supports the right to seek correction. *Joint Statement* at 39862.

Special Issue: Test Protocols and Copyright

Parents may inspect test instruments, question booklets, answer sheets, and other documents containing personally-identifiable information, even if they include test questions. If the questions are not in such a document, the agency must respond to reasonable requests for explanations, which can include reviewing the questions with the parent. *Memo from Rooker* (FPCO Oct. 2, 1997) (available on many website locations, including www.wrightslaw.com). California's statutory requirement that parents receive copies of test protocols is a "fair use" under copyright law, 17 U.S.C. § 107. The copies are for a nonprofit use; parents only receive personally-identifiable test portions; the use is transformative (meaning that provides added benefit to the public) and there is no substantial adverse market effect by giving protocols to parents. Moreover, school districts can implement safeguards, including written copy requests,

confidentiality agreements, and other reasonable measures. *Newport-Mesa Unif. Sch. Dist. v. State of Calif.*, 71 F.Supp.2d 1170 (C.D. Cal. 2005).‡ See also *School Dist. U-46*, 45 IDELR 74 (IL 2005) (Where district claims test protocols confidential under copyright and state confidentiality requirements, FERPA still requires production, and it is a "fair use" under copyright laws). The "fair use" factors are laid out in §107 of the Copyright Act, 17 U.S.C. §107.

Generally, parents have rights to inspect test protocols and related information, regardless of copyright status. *See In re Educ. Assignment of D. O.*, No. 1457 (Pa. 2004)‡ (available at http://odr.pattan.net/dueprocess/AppealsDecisions.aspx) (FERPA record rights override publishers' copyright and confidentiality interests; school district must retain personally-identifiable protocols and parents may take notes. Hearing officers cannot enforce copyright laws); *Montgomery Co. Pub. Sch.*, No. 03-31338 (Md. 2003) (www.marylandpublicschools.org/NR/rdonlyres/84762443-64D4-4DDD-873C-C8F285BFE48D/3088/03HMONT31338.pdf) (right to materials; parents or expert can sign confidentiality agreement); *Birmingham Bd. of Ed.*, 28 IDELR 407 (Ala. 1998) (right to protocol copy for parents or their experts); *Allegheny Intermediate Unit*, 20 IDELR 563 (OCR 1993) (must disclose test protocols, raw test data, and related notes); *John K. v. Board of Educ.*, 504 N.E.2d 797 (Ill. App. 1987) (under Illinois law, parents have right to raw psychological test data to obtain private opinion); *Letter to Kelley*, 211 EHLR 240 (FPCO 1980) (raw data not sole possession record since two people created it and the test is used to evaluate child, not as memory aid); *Tri-County Spec. Educ. Coop.*, 257 EHLR 529, 531-32 (OCR 1984) (school districts must provide copies of educational data to ensure adequate representation at due process hearings). *Cf. Encintas Union Sch. Dist.*, 1 IDELR 198 (CA OAH 1999) (school district may subpoena parents' experts' protocols); *Lindberg v. County of Kitsap*, 948 P.2d 805 (Wash. 1997) (www.tvw.org/modules/opinions/644608_o.htm) (disclosure of copyrighted materials under state open records law to prepare for comments in public hearings and residential zoning appeals was reasonable fair use). *But see Ripon Unif. Sch. Dist.*, No. 2007060591 (CA OAH 2007) (test protocols part of education record, but parent has no right to raw test data or test questions due to copyright and test security issues); *Genoa City School District*, IDEA Complaint Decision 07-032 (Wisc. DoE 2007) (dpi.state.wi.us/sped/com07032.html) (delay in providing test protocols to parent and expert to obtain signatures to confidentiality agreement as required by copyright holder not inappropriate, even though tests received after IEP meeting).

There are decisions forbidding the destruction of test protocols, *Los Angeles Unif. Sch. Dist.*, No. N 200704039 (CA OAH 2007)‡ (protocol destruction means hearing officer will give school district assessment no weight)*; Clovis Unif. Sch. Dist.*, 102 LRP 10454 (CA OAH 2002) (lack of protocols renders test validity suspect and impedes parents' ability to analyze educational benefits issue in hearing); *St Charles Commun. Sch. Dist.*, 17 EHLR 18 (OCR 1990) (504 violation to destroy protocols). Moreover, such destruction would appear to run afoul of state records retention laws and the GEPA regulations requiring retention of certain materials, 34 C.F.R. §§ 76.730, 76.731.

Special Issue: Videotaping

Special issues arise with regard to videotapes of students. A school district violated IDEA by making a videotape of a therapy session without consent and withholding it until late in a due process hearing, despite a pending records request. *Cobb County Sch. Dist.*, 26 IDELR 229 (Ga. 1997). Some states apply special rules to videotaping, *e.g.*, *Florida Educ. Code* § 26.009(a)(2) (parents' written consent needed to tape child).

FERPA's broad definition of education records appears to include videotapes. Hence, a videotape of a classroom was subject to FERPA, *Medley v. Board of Educ.*, 168 S.W.3d 398 (Ky. Ct. App. 2005), and the Kentucky Attorney General considered a videotape of student activities inside a school bus to be a FERPA record, Att'y Gen. of Ky, 07-ORD-258 (2007). But the Supreme Court of Washington opined that a tape of a school bus fight did not contain "personal information in any files maintained for students" and thus must be disclosed under the state's open records law. This was true even if tape was later used to discipline students. *Lindeman v. Kelso Sch. Dist.*, No. 77253-3 (Wash. 2007) (www.courts.wa.gov/opinions/pdf/772533.ip1.pdf). See also *Rome City Sch. Dist. v. Grifasi*, 2005 NY Slip Op 25525 (N.Y. Sup. Ct. 2005).

Special Issue: Email and Electronic Records

The world is turning increasingly to electronic files, and this is true of school districts. The Topeka Kansas school district recently estimated that its 900 employees send 12,000-14,000 emails each day.

FERPA's broad definition of education records clearly covers email and other electronic materials. *See* 34 C.F.R. § 99.3 ("any information recorded in any way, including . . computer media"), *In re Educ. Assign. of T.M.*, No. 1844A (Pa. 2007) ((available at http://odr.pattan.net/dueprocess/AppealsDecisions.aspx); *School District U-46*, 45 IDELR 74 (IL 2005); Letters to Husk and Baker, *supra*.[‡] The regulation does not bar access to metadata. It is important to discuss with the school district the search efforts they will undertake, to ensure that parents receive all education records. The use of the Explorer and Outlook "search" functions may not produce all documents directly related to the student, particularly those with typos or that use initials or staff-made nicknames or abbreviations. They will not produce PDF and graphic documents (.jpg, .bmp, etc.) They also will not produce documents that do not include a student's name or identification number but would otherwise be easily traceable to him/her and thus producible under FERPA.[2] In the era of email, where many people write in abbreviations and often do not correct typos, this can be significant.

In civil litigation, courts employ cost-shifting factors to determine who will pay the cost of electronic production, based in part on the extent of the burden. *Rowe Entert., Inc. v. Wm. Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Zublake v. UBS Warburg*, 217 F.R.D. 309

[2] For a discussion of best practices in electronic search and retrieval in civil litigation, see *The Sedona Conference Best Practices Commentary on Search & Retrieval Methods* (Aug. 2007) (www.thesedonaconference.org/publications_html) More information about electronic discovery may also be found on the Federal Judicial Center's webpage, www.fjc.gov/public/home.nsf, Craig Ball's website,www.craigball.com/articles.html, and www.discoveryresources.org/ (contains state law updates).

(S.D.N.Y. 2003). New federal Rule 26(b)(2)(B) also imposes limitations. Yet, FERPA and IDEA do not permit search fees. 34 C.F.R. § 99.11, 300.617. A school district may not classify teacher email as not an education record and seek to charge search fees under the state's open record law. *Letter to Husk*, supra.

Duty to Preserve Records When Litigation Reasonably Foreseeable. New Federal Rule of Civil Procedure 37(f) has the effect of allowing sanctions to be imposed if records are destroyed when litigation is reasonably foreseeable, and particularly if the destruction is intentional. The new rule states that, except under extenuating circumstances, a court may not impose sanctions for failing to provide electronically-stored information "lost as a result of the routine, good-faith operation of an electronic information system." This refers to a loss because data is overwritten automatically or other automatic and routine operations of a computer system. *Advisory Committee Note to Rule 37*. Correspondingly, parties (including school districts) have an obligation to end such routine functions when information should be preserved, such as a pending or reasonably anticipated lawsuit. *Id.* Generally, parties are under a duty to preserve records when they know of, or reasonably anticipate, litigation involving identifiable parties and facts. Preservation letters put a party on notice, but a party has an obligation to preserve even without a letter.

The destruction of records when a party knows that litigation is reasonably foreseeable may subject that party to sanctions. *See* K. Withers, *Electronically Stored Information: December 2006 Amend. to the Fed. R. of Civ. Pro.*, 4 NW. J. OF TECH. & INTELL. PROP. 171 (2006); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004) (adverse inference jury instruction and costs); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2003) (adverse inference for intentional destruction); *Mosaid Techs. Inc. v. Samsung* Electronics Co., 348 F.Supp. 2d 332 (D.N.J. 2004) (adverse inference). Consequently, school districts that reasonably anticipate due process should act to preserve records, including notifying employees of the litigation hold and monitoring compliance with it. Many school districts are now aware of this obligation, see *Federal Law Mandates E-Mail Archiving*, District Administration (Oct. 2007) (http://www.districtadministration.com/viewarticle.aspx?articleid=1299). Even though due process is not governed for the Federal Rules of Civil Procedure, a school district that reasonably anticipates going to due process should anticipate the possibility of district court litigation thereafter.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §201, and the HIPAA Privacy Rule, 45 C.F.R. §160.101 *et seq.*, contains certain privacy rights. A great deal of information about HIPAA is available on the website of the Department of Health and Human Services: http://www.hhs.gov/ocr/hipaa/. HIPAA establishes privacy standards for Protected Health Information (PHI). PHI includes information that identifies an individual or for which there is a reasonable basis to believe it could be used to identify him/her. 45 C.F.R. §160.103. Except as provided, PHI may not be disclosed by covered entities--health plans; clearinghouses; and health care providers who transmit health information electronically in

covered transactions (generally health care claims, benefit coordination, and related transactions). *Id.* For this purpose, health care is broadly defined as health-related care, services, and supplies, thus appearing to include speech, occupational, and physical therapists, and social services agencies, as well as hospitals, clinics, and physicians. 45 C.F.R. § 160.103. Covered transactions include Medicaid and health insurance reimbursement. Covered entities may not disclose PHI except as stated in the Rule. 45 C.F.R. § 164.502. Hence, HIPAA applies to private physicians, therapists, hospitals, public service agencies (e.g. city/county mental health agency), and other professional health care providers. In addition, most school districts meet the definition of covered entity, although as discussed below, records subject to FERPA are exempt from HIPAA.

HIPAA Rights. HIPAA gives individuals certain rights. Individuals must receive notice about, and have the right to limit, the uses and disclosures of their PHI. They may access their PHI and receive a list of those who have accessed it. They may seek to amend it. 45 C.F.R. §§164.520-28. Under HIPAA, individuals cannot access psychotherapy notes, "information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding," and certain other materials. 45 C.F.R. §164.524. At least one court has held that HIPAA simply creates records procedures and does not create a federal physician-patient or hospital-patient privilege. *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004).

HIPAA permits disclosure of PHI without consent in certain situations. These include disclosures required by law, for public health purposes, for judicial and administrative proceedings, law enforcement purposes, and in other situations. 45 C.F.R. § 164.512. A covered entity may disclose PHI in any judicial or administrative proceeding in response to a court or administrative tribunal order. It may also be disclosed in response to a subpoena or discovery request that is not accompanied by an order. If the latter, the covered entity must receive assurance that reasonable efforts were made to notify the individual or to obtain a protective order. *Id*. Nonetheless, if disclosure is not permitted by a HIPAA exemption, health care providers cannot disclose HIPAA-covered information unless they receive consent. Hence, if a school district seeks information from a private physician, the physician cannot disclose it unless the parent has given consent or the physician's HIPAA notice states that he may do so. The same should be true of a county or other mental health agency. Moreover, if information is redisclosed to someone who is not a covered entity, it may no longer be subject to HIPAA's protections.

HIPAA and Schools. The HIPAA Privacy Rule expressly excludes from the definition of PHI "education records" covered by FERPA and IDEA. 65 *Fed. Reg.* 82483 (Dec. 28. 2000). It also excludes certain professional treatment records for students 18 and older that are not considered education records under FERPA. *Id.* HIPAA may apply to documents that are not education records but are maintained by covered health care providers and that contain PHI. This would seem to encompass sole possession records, thus giving parents certain rights over those records (although sole possession records become FERPA records as soon as they are disclosed). HIPAA also applies to records of private schools that are not subject to FERPA because they do not receive funds under programs administered by the Department of Education. When a child is placed in a nonpublic school by a school district to receive IDEA services, that

particular student's records are subject to FERPA. *Letter to Schaffer*, 34 IDELR 151 (2000). But when a child is unilaterally placed in a private school pending a reimbursement action, that school's records may be subject to HIPAA rather than FERPA (or not covered by either statute if the school is not a HIPAA-covered entity).

Because FERPA defines education records so broadly, as any records "directly related" to a student maintained by an educational agency/institution or party acting for it, FERPA would seem to apply to almost all records maintained by a public school. Indeed, "any records relating to a minor student's health" such as medical, psychological, and Medicaid records, are education records. *Letter to Benson* (FPCO 1997). A report from a private therapist or a public services agency may be covered by HIPAA, but a copy that is given to such a school would be covered by FERPA.

Other HIPAA Issues. HIPAA does not create a private right of action. *Acara v. Banks*, 470 F.3d 569 (5th Cir. 2006) (and cases cited therein). HHS' Office for Civil Rights enforces the Privacy Rule. There is a 180 day timeline on filing complaints. www.hhs.gov/ocr/privacy/enforcement/hipaarule.html The law creates civil and criminal penalties for HIPAA violations. More information about the HIPAA privacy rule is available here: www.hhs.gov/ocr/hipaa/

Constitutional Right to Privacy

There is a limited constitutional right to prevent disclosure of personal matters. In determining whether information is constitutionally protected, the court must consider if the party asserting the right has a legitimate expectation of privacy in the information; whether a school district official disclosed it, and if so, if disclosure serves a compelling state interest; and if disclosure can be made in the least intrusive manner. *Owasso Ind. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002). Standards may vary by circuit. The Third Circuit considers "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3rd Cir. 2005).

Applying a balancing test, a district court held that the student had a right to privacy in the details of his sexual abuse, but this right was not absolute. It had to be balanced against the need for a social worker with whom he had shared the information to disclose it to other personnel in the context of determining eligibility for special education services. Consequently, the child's right of privacy was not violated when the information was shared with the IEP team. *Mr. & Mrs. N.C. v. Bedford Central School Dist.*, 348 F.Supp.2d 32 (S.D.N.Y. 2004). Of importance, courts have held that FERPA and IDEA themselves do not create reasonable expectation of privacy sufficient to support Fourteenth Amendment claims for invasion of privacy. *Owasso Ind. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002); *Risca v.Dumas*, 466 F.Supp.2d 434 (D. Conn.2006). *But see Warner v. St. Bernard Parish School Board*, 99 F.Supp.2d 748

(E.D. La. 2000) (FERPA established expectation of privacy in records by forbidding disclosure without consent).

A person has a reasonable expectation of privacy in information that "is highly personal or intimate." *Falvo*, 534 U.S. 426. *See also C.N.*, 430 F.3d 159; Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990). Protected privacy interests have included a private employee's medical information, a minor student's pregnancy status, and an inmate's HIV-positive status, *C.N.*, 430 F.2d 159. The Seventh Circuit has recognized a protected privacy interest in medical records and information, *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000). When a university employee improperly disclosed a resident's sickle cell anemia to prospective employers and he lost a job offer, his Fourteenth Amendment right to privacy was violated. *Fleming v. State Univ. of N.Y.*, 502 F.Supp.2d 324 (E.D.N.Y. 2007).

On the other hand, when information about medical issues and a disability had been disclosed to others so that a student could obtain accommodations, there was no reasonable expectation of privacy in that information when it was shared among school personnel, and the student's constitutional right of privacy was not violated. *Doe v. Board of Trustees of the Univ. of Illinois*, 429 F.Supp.2d 930 (N.D. Ill. 2006). A student had no expectation of privacy in a hit list written on a book cover. While the student had a privacy interest in a letter of discipline regarding his suspension, there was no proof that this letter was disclosed by staff to students. Still, the principal could disclose it to staff because school safety and discipline are important government objectives. *Risca v. Dumas*, 466 F.Supp.2d 434 (D. Conn.2006). One court has held that the constitutional right to privacy was not violated when school employees discussed a child's disability with his pediatrician in the context of ascertaining his educational and medical needs. The court reasoned that there was no "public disclosure" of confidential information to anyone who did not already know it. Nor was the child's right to privacy violated when his pre-kindergarten teacher placed a portable commode behind her desk to accommodate him for bathroom breaks. *A.A. v. Houston County School District*, No. 05-107 (M.D. Georgia May 4, 2006) (http://www.websupp.org/data/MDGA/5%3A05-cv-00107-45-MDGA.pdf)[3]

Even if a violation of the constitutional right to privacy has been established, plaintiffs must overcome claims of qualified immunity to seek damages against individuals responsible.

A parent or child may have other privacy rights under state law and these should be analyzed in considering any privacy claim.

Access to the Classroom:
The Right to Observe the Child and Placement

Increasingly, school districts are attempting to prevent or restrict parents and their experts/consultants from observing in the classroom. The district may be relying on a 2004 OSEP letter stating that IDEA doesn't generally entitle parents to observe, include a "general

[3] The A.A. case did not determine whether the child had other privacy-like rights that had been violated, or whether there was a basis for a valid FERPA or other information-related complaint. This part of the decision dealt only with the constitutional right to privacy.

entitlement" to observe, but leaves the question to state and local policy. OSEP encouraged school districts and parents to work together so parents could observe current and proposed placements. OSEP concluded that if parents invoked their right to an IEE, and the evaluation requires observation in the educational setting, the evaluator may "need" access. *Letter to Mamas* (OSEP 2004).

Expert Observation. Two cases in California have held that experts must be allowed to observe. In *L.M. v. Capistrano Unified Sch. Dist.*, No. 06-03049, 48 IDELR 189 (C. D. Cal. 2007) ‡, the parents' expert sought a 90 minute observation but was given only 20 minutes in accord with district policy. The court held that parents were "denied the right to meaningfully participate in the IEP process" as a result, and hence, the child was denied FAPE. The court noted that parents lost the opportunity to gather evidence and face the school district on a "level playing field" in a hearing. In *Benjamin G. v. Special Ed. Hearing Office*, 32 Cal. Rptr.3d 366 (Cal. App. 1 Dist. 2005) ‡ (www.bonniezyates.com/resources/bg.pdf), the Court held that parents' expert must have the opportunity to observe the proposed placement prior to testifying at the hearing, and does not require that the observation be part of a formal IEE. Moreover, the trial court must rule on parents' request because otherwise, they were without a remedy. School districts may not premise the right to observe on a reciprocal right to observe the private placement. *Santa Barbara Sch. Dist.*, No. N 2007050407 (Calif. OAH 2007). ‡ *See also Toledo Public Schools*, 508 EHLR 197 (OH 1986) (private evaluator should classroom access for evaluation). On the other hand, a school district could end biweekly observations by parents' consultant in which she shared opinions with teacher, and one of which included seven observers, because it was too disruptive. *In re Student with a Disability*, 43 IDELR 214 (Nev. 2005). Yet concerns are so significant about school district attempts to bar experts, that Massachusetts is considering a bill to explicitly permit them to observe. (H.B. 391).

In *Schaffer v. Weast*, the Supreme Court emphasized that parents should have equal firepower to school districts, thus seemingly supporting the right to observe:

> School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. . . .IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

546 U.S. 49 (2005). For parents' expert to match the opposition, the expert must have the same right to observe. Indeed, Courts have held that little weight should be given to parents' witnesses who have not observed in the classroom and greater weight be given to school district witnesses because they have extensively observed the child. *See, e.g., J.H. v Henrico Co. Sch. Bd.*, 395 F.3d 185 (4th Cir. 2005); *Renollett v. ISD No. 11*, 42 IDELR 201 (D. Minn. Nov. 18, 2005).

When parents obtain an IEE at public expense, the school district must apply the same criteria as it does to its own evaluations, including permitting the evaluation to occur in the same

location, 34 C.F.R. §300.502(e). *See also Letter to Wessels*, 16 EHLR 735 (1990) (If agency observed the child or its assessment procedures permit observation, independent evaluator has the right to observe in the classroom. If the agency did not observe, and parents believe it essential, parents may challenge the district's evaluation as inappropriate.); *Letter to Mamas* (OSEP 2004) (same); *Cal. Educ. Code* § 56329(b)-(c) (independent educational assessor has right to observe if the school district observed child, or its assessment procedures permit observation.

Parent Observation. Parents themselves should also have the right to observe the current and proposed placements. This is consistent with parents' right to "meaningfully" participate in determining the IEP and placement. *See Honig v. Doe*, 484 U.S. 305 (1988); *Burlington School Committee v. Mass. Dept. of Ed.*, 471 U. S. 359 (1985). As other IEP team members have had the opportunity to observe and gather information about the classroom, parents should have the same right, so they may participate in IEP and placement meetings on equal footing. Indeed, Given parents' unique knowledge of their child, they should be able to observe in the classroom, subject to reasonable school district steps to prevent interference with instruction. This is necessary to effectuate their meaningful participation in IEP development. *In re Michael C.*, 401 EHLR 237 (Pa. 1988). Receiving information from school staff is not a sufficient substitute for personal observation. *Id.* But, an Alaska hearing officer held that the school district could enforce its existing visitation policy and limit a parent's access, without violating the IDEA or the parent's existing IEP. The district, however, had denied the child FAPE when it refused to convene the IEP team to discuss parents' request for greater access. *A.G. v. Matanuska-Susitna Borough Sch. Dist.*, No. 07-07 (AK 2007). In *Carmel Central Sch. Dist.*, 48 IDELR 144 (NY 2007), the parent wished to observe her child who was significantly below grade level with motor impairments. She planned to assess the appropriateness of the child's classes and methodology of instruction and to see her movements in the building. But the hearing officer denied the parent the opportunity to observe, asserting that IDEA does not require it and that the parent could receive information from staff.

Effect of FERPA and Privacy Interests. FERPA does not prevent observation by parents or their professional representatives. FERPA only protects tangible records and information derived from them. Letter to Mamas (FPCO 2003). FERPA does not protect information which might appear in school records but also be known by members of the school community through conversation and personal contact. *Daniel S. v. Bd. of Educ.*, 152 F.Supp.2d 949 (N.D. Ill. 2001)*; Letter to Bresler* (FPCO 2006) (FERPA does not prohibit the disclosure of information obtained through personal observation even if the same information exists in education records). Conversations are not protected under FERPA. *Jennings v. Univ. of N.C.*, 40 F.Supp.2d 679 (M.D.N.C. 2004). Schools may not prevent parents from observing by relying on some generalized right of privacy. Children do not have a generalized expectation of privacy in the classroom and FERPA does not create such a right. *Owasso Independent School District, v. Falvo*, 534 U.S. 426 (2002).

Of interest is the decision in *Santamaria v. Dallas Indep. Sch. Dist.*, No. 06-692 (N.D.Tex. May 16, 2006), a race discrimination case. The court held that FERPA did not bar parents' expert from observing in the classroom, and ordered that the district allow her to, even

though it could cause some disruption and impose some burden. Providing the expert with assessments and evaluation data was not a substitute for observation. The court entered a protective order prohibiting the expert from reviewing education records and permitting a school district representative to be present during the observation.