IN DEFENSE OF OUR SCHOOLS
CREATE SOFTWARE TO FACILITATE INFORMATION-SHARING

NARRATIVE:

Information sharing between law enforcement and schools can be complicated. First understanding what can be shared or should be shared is the key to developing the software. Information sharing can assist school and law enforcement personnel with identifying potentially dangerous individuals and with preventing attacks at schools.

Many schools struggle with when and how to involve police when they suspect a student of possible criminal behavior or just threatening behavior. Once schools and law enforcement understand this information sharing can be a great tool.

This group would like to develop an app to gather/organize/disseminate information regarding potential threats. Students could develop this as part of a real-world class assignment.

Depending on the nature of the threat and privacy issues, access could be modified so that authorized people with security clearing and specialized training would receive a greater amount of information.

The Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) is a Federal law that protects the privacy of students. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children’s educational records. These rights transfer to the student when they reach the age of 18.

According to the Balancing Student Privacy and School Safety: A Guide to the FERPA for Elementary and Secondary Schools: many school districts employ a security staff to monitor safety and security in and around the schools. Some use off-duty police officers, private security and/or school administrators to perform these duties. According to the FERPA any reports or records generated by these individuals are not subject to the FERPA.

Law enforcement unit officials who are employed by the school should be designated in its FERPA notification as “school officials” with a “legitimate educational interest.” As such, they may be given access to personally identifiable information from students’ education records.

The school’s law enforcement unit officials must protect the privacy of education records it receives and may disclose them only in compliance with FERPA. For that reason, it is advisable that law enforcement unit records be maintained separately from education records.
IN DEFENSE OF OUR SCHOOLS

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Information Policy Analysis Division
Minnesota Department of Administration

Minnesota has put together and informational sheet regarding information sharing between law enforcement and schools. The information looks at both state and federal law as they relate to information sharing in the context of school safety and law enforcement.

Using this example as how to make it easier for schools and law enforcement to understand what information can be shared would be a great benefit.

Develop a Computerized Information-Sharing System

In creating software there are several issues that need to be looked at prior to developing the software.

- Overall policies and procedures covering the purposes of the information system.
- The importance of limiting information.
- Methods of interagency cooperation and information sharing.
- Notices to clients and other protections of clients' interests.
- System security measures.
- The type of data contained in the computerized files.
- The individuals and agencies authorized to receive data.
- The purposes for which data will be used.
- The relationship between the system and the clients/juveniles whose records are in the data bank.
- Confidentiality protections.

Using the students to develop the app would help in keeping the costs down but information would have to be regulated.

RESOURCES AND POTENTIAL COST NECESSARY FOR IMPLEMENTATION:

Minimal, especially if students worked on the project.
IN DEFENSE OF OUR SCHOOLS

CREATE SOFTWARE TO FACILITATE INFORMATION-SHARING

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REFERENCES:


http://www.ipad.state.mn.us/docs/eddatasafety.html

www.americanbar.org/content/.../Daggett_Paper.authcheckdam.pdf


SUBMITTED BY:

Collaborative idea from all Group #11 members.

Additions and modifications made by:

Officer Heidi Johnston OPPD
The Family Educational Rights and Privacy Act

Guidance for Eligible Students

February 2011

The following guidance provides eligible students with general information about the Family Educational Rights and Privacy Act (FERPA). This document is a compilation and update of various letters and guidance documents previously issued that respond to a variety of questions about FERPA. While this guidance reflects our best and most current interpretation of applicable FERPA requirements, it does not supersede the statute or regulations. We will attempt to update this document from time to time in response to questions and concerns.

FERPA is a Federal law that is administered by the Family Policy Compliance Office (Office) in the U.S. Department of Education (Department). 20 U.S.C. § 1232g; 34 CFR Part 99. FERPA applies to all educational agencies and institutions (e.g., schools) that receive funding under any program administered by the Department. Parochial and private schools at the elementary and secondary levels generally do not receive such funding and are, therefore, not subject to FERPA. Private postsecondary schools, however, generally do receive such funding and are subject to FERPA.

Once a student reaches 18 years of age or attends a postsecondary institution, he or she becomes an "eligible student," and all rights formerly given to parents under FERPA transfer to the student. The eligible student has the right to have access to his or her education records, the right to seek to have the records amended, the right to have control over the disclosure of personally identifiable information from the records (except in certain circumstances specified in the FERPA regulations, some of which are discussed below), and the right to file a complaint with the Department. The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution.

FERPA generally prohibits the improper disclosure of personally identifiable information derived from education records. Thus, information that an official obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information, unless the official had an official role in making a determination that generated a protected education record.

Under FERPA, a school is not generally required to maintain particular education records or education records that contain specific information. Rather, a school is required to provide certain privacy protections for those education records that it does maintain. Also, unless there is
an outstanding request by an eligible student to inspect and review education records, FERPA permits the school to destroy such records without notice to the student.

**Access to Education Records**

Under FERPA, a school must provide an eligible student with an opportunity to inspect and review his or her education records within 45 days following its receipt of a request. A school is required to provide an eligible student with copies of education records, or make other arrangements, if a failure to do so would effectively prevent the student from obtaining access to the records. A case in point would be a situation in which the student does not live within commuting distance of the school.

A school is not generally required by FERPA to provide an eligible student with access to academic calendars, course syllabi, or general notices such as announcements of specific events or extra-curricular activities. That type of information is not generally directly related to an individual student and, therefore, does not meet the definition of an education record.

Under FERPA, a school is not required to provide information that is not maintained or to create education records in response to an eligible student's request. Accordingly, a school is not required to provide an eligible student with updates on his or her progress in a course (including grade reports) or in school unless such information already exists in the form of an education record.

**Amendment of Education Records**

Under FERPA, an eligible student has the right to request that inaccurate or misleading information in his or her education records be amended. While a school is not required to amend education records in accordance with an eligible student's request, the school is required to consider the request. If the school decides not to amend a record in accordance with an eligible student's request, the school must inform the student of his or her right to a hearing on the matter. If, as a result of the hearing, the school still decides not to amend the record, the eligible student has the right to insert a statement in the record setting forth his or her views. That statement must remain with the contested part of the eligible student’s record for as long as the record is maintained.

However, while the FERPA amendment procedure may be used to challenge facts that are inaccurately recorded, it may not be used to challenge a grade, an opinion, or a substantive decision made by a school about an eligible student. FERPA was intended to require only that schools conform to fair recordkeeping practices and not to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations. Thus, while FERPA affords eligible students the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade or an individual’s opinion, or a substantive decision made by a school about a student. Additionally, if FERPA’s amendment procedures are not applicable to an eligible student’s request for amendment of education records, the school is not required under FERPA to hold a hearing on the matter.
Disclosure of Education Records

Under FERPA, a school may not generally disclose personally identifiable information from an eligible student's education records to a third party unless the eligible student has provided written consent. However, there are a number of exceptions to FERPA's prohibition against non-consensual disclosure of personally identifiable information from education records. Under these exceptions, schools are permitted to disclose personally identifiable information from education records without consent, though they are not required to do so. Following is general information regarding some of these exceptions.

One of the exceptions to the prior written consent requirement in FERPA allows “school officials,” including teachers, within a school to obtain access to personally identifiable information contained in education records provided the school has determined that they have “legitimate educational interest” in the information. Although the term “school official” is not defined in the statute or regulations, this Office generally interprets the term to include parties such as: professors; instructors; administrators; health staff; counselors; attorneys; clerical staff; trustees; members of committees and disciplinary boards; and a contractor, volunteer or other party to whom the school has outsourced institutional services or functions.

A school must inform eligible students of how it defines the terms “school official” and “legitimate educational interest” in its annual notification of FERPA rights. A school official generally has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. Additional information about the annual notification of rights is found below in this guidance document.

Another exception permits a school to disclose personally identifiable information from an eligible student's education records, without consent, to another school in which the student seeks or intends to enroll. The sending school may make the disclosure if it has included in its annual notification of rights a statement that it forwards education records in such circumstances. Otherwise, the sending school must make a reasonable attempt to notify the student in advance of making the disclosure, unless the student has initiated the disclosure. The school must also provide an eligible student with a copy of the records that were released if requested by the student.

FERPA also permits a school to disclose personally identifiable information from education records without consent when the disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to: determine the eligibility for the aid; determine the amount of the aid; determine the conditions for the aid; and/or enforce the terms and conditions of the aid. With respect to this exception, the term "financial aid" means payment of funds provided to an individual (or payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at a school.

Another exception permits a school to disclose personally identifiable information from education records without consent when the disclosure is to the parents of a "dependent student" as that term is defined in Section 152 of the Internal Revenue Code. Generally, if either parent...
has claimed the student as a dependent on the parent's most recent year's income tax statement, the school may non-consensually disclose the eligible student's education records to both parents under this exception.

Postsecondary institutions may also disclose personally identifiable information from education records, without consent, to appropriate parties, including parents of an eligible student, in connection with a health or safety emergency. Under this provision, colleges and universities may notify parents when there is a health or safety emergency involving their son or daughter, even if the parents do not claim the student as a dependent.

FERPA also permits a school to disclose personally identifiable information from education records without consent when the disclosure is to the parents of a student at a postsecondary institution regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance. The school may non-consensually disclose information under this exception if the school determines that the student has committed a disciplinary violation with respect to that use or possession and the student is under 21 years of age at the time of the disclosure to the parent.

Another exception permits a school to non-consensually disclose personally identifiable information from a student's education records when such information has been appropriately designated as directory information. "Directory information" is defined as information contained in the education records of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information could include information such as the student's name, address, e-mail address, telephone listing, photograph, 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, the most recent previous educational agency or institution attended, grade level or year (such as freshman or junior), and enrollment status (undergraduate or graduate; full-time or part-time).

A school may disclose directory information without consent if it has given public notice of the types of information it has designated as directory information, the eligible student’s right to restrict the disclosure of such information, and the period of time within which an eligible student has to notify the school that he or she does not want any or all of those types of information designated as directory information. Also, FERPA does not require a school to notify eligible students individually of the types of information it has designated as directory information. Rather, the school may provide this notice by any means likely to inform eligible students of the types of information it has designated as directory information.

There are several other exceptions to FERPA’s prohibition against non-consensual disclosure of personally identifiable information from education records, some of which are briefly mentioned below. Under certain conditions (specified in the FERPA regulations), a school may non-consensually disclose personally identifiable information from education records:

- to authorized representatives of the Comptroller General of the United States, the Attorney General of the United States, the U.S. Secretary of Education, and State and local educational authorities for audit or evaluation of Federal or State supported
education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs;

• to organizations conducting studies for or on behalf of the school making the disclosure for the purposes of administering predictive tests, administering student aid programs, or improving instruction;

• to comply with a judicial order or a lawfully issued subpoena;

• to the victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense concerning the final results of a disciplinary hearing with respect to the alleged crime; and

• to any third party the final results of a disciplinary proceeding related to a crime of violence or non-forcible sex offense if the student who is the alleged perpetrator is found to have violated the school’s rules or policies. The disclosure of the final results only includes: the name of the alleged perpetrator, the violation committed, and any sanction imposed against the alleged perpetrator. The disclosure must not include the name of any other student, including a victim or witness, without the written consent of that other student.

As stated above, conditions specified in the FERPA regulations at 34 CFR § 99.31 have to be met before a school may non-consensually disclose personally identifiable information from education records in connection with any of the exceptions mentioned above.

Annual Notification of Rights

Under FERPA, a school must annually notify eligible students in attendance of their rights under FERPA. The annual notification must include information regarding an eligible student's right to inspect and review his or her education records, the right to seek to amend the records, the right to consent to disclosure of personally identifiable information from the records (except in certain circumstances), and the right to file a complaint with the Office regarding an alleged failure by a school to comply with FERPA. It must also inform eligible students of the school's definitions of the terms "school official" and "legitimate educational interest."

FERPA does not require a school to notify eligible students individually of their rights under FERPA. Rather, the school may provide the notice by any means likely to inform eligible students of their rights. Thus, the annual notification may be published by various means, including any of the following: in a schedule of classes; in a student handbook; in a calendar of school events; on the school’s website (though this should not be the exclusive means of notification); in the student newspaper; and/or posted in a central location at the school or various locations throughout the school. Additionally, some schools include their directory information notice as part of the annual notice of rights under FERPA.
Law Enforcement Units and Law Enforcement Unit Records

A “law enforcement unit” means any individual, office, department, division or other component of a school, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by the school to: enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any law against any individual or organization; or to maintain the physical security and safety of the school. The law enforcement unit does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the school, including investigation of incidents or conduct that constitutes or leads to a disciplinary proceeding against a student.

“Law enforcement unit records” (i.e., records created by the law enforcement unit, created for a law enforcement purpose, and maintained by the law enforcement unit) are not “education records” subject to the privacy protections of FERPA. As such, the law enforcement unit may refuse to provide an eligible student with an opportunity to inspect and review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the eligible student’s prior written consent. However, education records, or personally identifiable information from education records, which the school shares with the law enforcement unit do not lose their protected status as education records because they are shared with the law enforcement unit.

Complaints of Alleged Failures to Comply with FERPA

FERPA vests the rights it affords in the eligible student. The statute does not provide for these rights to be vested in a third party who has not suffered an alleged violation of their rights under FERPA. Thus, we require that a student have "standing," i.e., have suffered an alleged violation of his or her rights under FERPA, in order to file a complaint.

The Office may investigate those timely complaints that contain specific allegations of fact giving reasonable cause to believe that a school has violated FERPA. A timely complaint is defined as one that is submitted to the Office within 180 days of the date that the complainant knew or reasonably should have known of the alleged violation of FERPA. Complaints that do not meet FERPA’s threshold requirement for timeliness are not investigated.

If we receive a timely complaint that contains a specific allegation of fact giving reasonable cause to believe that a school has violated FERPA, we may initiate an administrative investigation into the allegation in accordance with procedures outlined in the FERPA regulations. If a determination is made that a school violated FERPA, the school and the complainant are so advised, and the school is informed of the steps it must take to come into compliance with the law. The investigation is closed when voluntary compliance is achieved.

Please note that the eligible student should state his or her allegations as clearly and specifically as possible. To aid us in efficiently processing allegations, we ask that an eligible student only include supporting documentation that is relevant to the allegations provided. Otherwise, we may return the documentation and request clarification. This Office does not have the resources
to review voluminous documents and materials to determine whether an allegation of a violation of FERPA is included. An eligible student may obtain a complaint form by calling (202) 260-3887. For administrative and privacy reasons, we do not discuss individual allegations and cases via email. Please mail completed complaint forms to the Office (address below) for review and any appropriate action.

Complaint Regarding Access

If an eligible student believes that a school has failed to comply with his or her request for access to education records, the student may complete a FERPA complaint form and should include the following specific information: the date of the request for access to the education records; the name of the school official to whom the request was made (a dated copy of any written request to the school should be provided, if possible); the response of the school official, if any; and the specific nature of the information requested.

Complaint Regarding Amendment

If an eligible student believes that a school has failed to comply with his or her request for amendment of inaccurate information in education records or failed to offer the student an opportunity for a hearing on the matter, the student may complete a FERPA complaint form and should include the following specific information: the date of the request for amendment of the education records; the name of the school official to whom the request was made (a dated copy of any written request to the school should be provided, if possible); the response of the school official, if any; the specific nature of the inaccurate information for which amendment was requested; and evidence provided to the school to support the assertion that such information is inaccurate.

Complaint Regarding Disclosure

If an eligible student believes that a school has improperly disclosed personally identifiable information from his or her education records to a third party, the student may complete a FERPA complaint form and should include the following specific information: the date or approximate date the alleged disclosure occurred or the date the student learned of the disclosure; the name of the school official who made the disclosure, if that is known; the third party to whom the disclosure was made; and the specific nature of the education records disclosed.

This guidance document is designed to provide eligible students with some general information regarding FERPA and their rights, and to address some of the basic questions most frequently asked by eligible students. You can review the FERPA regulations, frequently asked questions, significant opinions of the Office, and other information regarding FERPA at our Website as follows:

If, after reading this guidance document, you have questions regarding FERPA which are not addressed here, you may write to the Office at the following address:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC  20202-8520
Transfer of Education Records

Finally, under FERPA, school officials may disclose any and all education records, including disciplinary records and records that were created as a result of a student receiving special education services under Part B of the Individuals with Disabilities Education Act, to another school or postsecondary institution at which the student seeks or intends to enroll. While parental consent is not required for transferring education records, the school's annual FERPA notification should indicate that such disclosures are made. In the absence of information about disclosures in the annual FERPA notification, school officials must make a reasonable attempt to notify the parent about the disclosure, unless the parent initiated the disclosure. Additionally, upon request, schools must provide a copy of the information disclosed and an opportunity for a hearing. See 34 CFR § 99.31(a)(2) and § 99.34(a).

Contact Information

While the education agency or institution has the responsibility to make the initial, case-by-case determination of whether a disclosure is necessary to protect the health or safety of students or other individuals, U.S. Department of Education staff members are available to offer assistance in making this determination. For further information about FERPA, contact the Department’s Family Policy Compliance Office.

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C.  20202-5920
202-260-3887

For quick, informal responses to routine questions about FERPA, school officials may also e-mail the Family Policy Compliance Office at FERPA@ED.Gov.

For inquiries about FERPA compliance training, e-mail FERPA.Client@ED.Gov.

Additional information and guidance may be found at FPCO’s Web site at: http://www.ed.gov/policy/gen/guid/fpco/index.html.
School officials are regularly asked to balance the interests of safety and privacy for individual students. While the Family Educational Rights and Privacy Act (FERPA) generally requires schools to ask for written consent before disclosing a student’s personally identifiable information to individuals other than his or her parents, it also allows schools to take key steps to maintain school safety. Understanding the law empowers school officials to act decisively and quickly when issues arise.

**Health or Safety Emergency**

In an emergency, FERPA permits school officials to disclose without consent education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals. At such times, records and information may be released to appropriate parties such as law enforcement officials, public health officials, and trained medical personnel. See 34 CFR § 99.31(a)(10) and § 99.36. This exception is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student’s education records.

**Law Enforcement Unit Records**

Many school districts employ security staff to monitor safety and security in and around schools. Some schools employ off-duty police officers as school security officers, while others designate a particular school official to be responsible for referring potential or alleged violations of law to local police authorities. Under FERPA, investigative reports and other records created and maintained by these “law enforcement units” are not considered “education records” subject to FERPA. Accordingly, schools may disclose information from law enforcement unit records to anyone, including outside law enforcement authorities, without parental consent. See 34 CFR § 99.8.

While a school has flexibility in deciding how to carry out safety functions, it must also indicate to parents in its school policy or information provided to parents which office or school official serves as the school’s “law enforcement unit.” (The school’s notification to parents of their rights under FERPA can include this designation. As an example, the U.S. Department of Education has posted a model notification on the Web at: [http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html).)

Law enforcement unit officials who are employed by the school should be designated in its FERPA notification as “school officials” with a “legitimate educational interest.” As such, they may be given access to personally identifiable information from students’ education records. The school’s law enforcement unit officials must protect the privacy of education records it receives and may disclose them only in compliance with FERPA. For that reason, it is advisable that law enforcement unit records be maintained separately from education records.

**Security Videos**

Schools are increasingly using security cameras as a tool to monitor and improve student safety. Images of students captured on security videotapes that are maintained by the school’s law enforcement unit are not considered education records under FERPA. Accordingly, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit might consider designating an employee to serve as the “law enforcement unit” in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.

**Personal Knowledge or Observation**

FERPA does not prohibit a school official from disclosing information about a student if the information is obtained through the school official’s personal knowledge or observation, and not from the student’s education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information, and the teacher may disclose what he or she overheard to appropriate authorities.
Data Sharing Between Law Enforcement and Schools

This is a summary of some of the provisions in state and federal law that relate to sharing education data in the context of school safety and law enforcement.

Note: Minnesota law uses the phrase educational data to describe data related to students maintained by a public school and federal law uses the phrase education records. This document will use the phrase education data to cover both the federal and state law phrases.

What are education data?

Education data are maintained by a public educational agency or institution and relate to a student or parent, and include health data of students under age 18. Data held by contractors performing an institutional service or function are also education data. (Minnesota Statutes, section 13.32, subdivisions 1 and 2 and the regulations implementing the federal Family Educational Rights and Privacy Act (FERPA), 34 CFR 99.3)

- **Disciplinary data.** FERPA allows a school to include as education data, disciplinary action for conduct that posed a significant risk to the safety or well-being of the student, other students, or other members of the school community. (20 USC 1232g(h))

- **Special education data.** The federal Individuals with Disabilities Education Act (IDEA) governs data about students who receive special education services. IDEA and its regulations indicate that FERPA governs the privacy and access of special education data. (20 USC 1417(c) and 34 CFR 300.610 to 300.626) Schools should treat special education data like other education data unless a statute or rule expressly provides otherwise. For example, copies of a student’s special education and disciplinary data must be transmitted to the appropriate authorities, to the extent permitted by FERPA, if it is alleged that the student committed a crime. (34 CFR 300.535).

What are “law enforcement unit” data?

“Law enforcement unit” data are those that are kept by a separate law enforcement unit, such as a school liaison officer. They are not education data and are not subject to FERPA or Minnesota Statutes, section 13.32. Even though a school’s law enforcement unit data are not education data, they may be law enforcement data under Minnesota Statutes, section 13.82, or peace officer records of children under Minnesota Statutes, section 260B.171. Education data in the possession of a school’s
law enforcement unit retain their classification as education data pursuant to FERPA and Chapter 13. (34 CFR 99.8)

**What education data can a school share with the juvenile justice system?**

- **Data schools must release.** Upon request, a school must release these data to the appropriate authorities prior to adjudication: (1) the student’s full name, home address, telephone number, date of birth; (2) a student’s school schedule, attendance record, and photographs, if any; and (3) parents’ names, home addresses and telephone numbers. (Minnesota Statutes, section 13.32, subdivision 8(a))
- **Data schools may release.** The authorities may also ask for these data if the request is accompanied by an explanation of how it would serve the juvenile: (1) use of a controlled substance, (2) assaultive or threatening conduct that could result in dismissal from school, (3) possession or use of weapons or look-alike weapons, (4) theft, or (5) vandalism or other damage to property. (Minnesota Statutes, section 13.32, subdivision 8(b); 34 CFR 99.38)
- **Emergencies and crimes.** A school may disclose data to the juvenile justice system if necessary to protect the health or safety of the student or other individuals. The school makes this determination. (Minnesota Statutes, section 13.32, subdivisions 3(d) and (l); 34 CFR 99.36) A school may also report a crime on school premises or at a school event. This is allowed because the report may consist only of personal knowledge and does not include education data or the crime is an emergency under 34 CFR 99.36.

**What other education data must a school share?**

- **Child maltreatment.** School personnel are mandated reporters of maltreatment and must report to law enforcement or social service agencies. (Minnesota Statutes, section 626.556, subdivision 3)
- **Wounds from dangerous weapons.** School medical staff must notify law enforcement if they treat a student for an injury from a firearm or other dangerous weapon. (Minnesota Statutes, section 626.52, subdivisions 2 and 3)
- **Unlawful firearm possession.** Each school board must adopt a policy requiring that the appropriate school official report a student possessing an unlawful firearm to the criminal or juvenile justice systems as soon as practicable. (Minnesota Statutes, section 121A.05)
- **Dangerous weapons report.** Schools must report to the state Department of Education incidents involving the use or possession of a dangerous weapon in school zones. The name of the student cannot be included in the report. Without this personally identifying information, the report is not education data and is public. (Minnesota Statutes, section 121A.06)
- **Missing child flag data.** A school must flag a student record at the request of law enforcement if the child is reported as missing. The school must then notify law enforcement if the missing child’s education data are requested. (Minnesota Statutes, section 123B.08, subdivision 3)
- **Directory information.** A school must disclose directory information to anyone who requests it, unless a parent has opted out of including the
student’s information as public directory information. Annually, schools have discretion on what data, if any, they designate as directory information. (Minnesota Statutes, section 13.32, subdivision 5; 34 CFR 99.37)

What data about students must law enforcement share with schools?

- **Alcohol and drug violations.** Law enforcement must report a drug or alcohol violation to a school’s chemical abuse preassessment team if there is probable cause to believe that a K-12 student committed the violation. (Minnesota Statutes, section 121A.28)
- **Serious juvenile offenses.** Law enforcement must notify the principal or superintendent if there is probable cause to believe that a juvenile committed (1) an adult crime, (2) the victim is a student or staff, and (3) notice is reasonably necessary to protect the victim. Notice to the school is also required if there is probable cause to believe a juvenile committed a serious crime (described in Minnesota Statutes, section 260B.171, subdivision 3(a)), regardless of the victim’s status. (Minnesota Statutes, section 260B.171, subdivision 5(e))
- **Juvenile court dispositions.** A probation officer must provide a copy of the disposition to the school if a juvenile is adjudicated delinquent for an act (1) committed on school property or (2) one of the statutory listed adult criminal offenses. The probation officer may notify a school if a student is adjudicated delinquent and on probation for other offenses. The probation officer must notify the juvenile’s parents about the disclosure and must notify the school that it may get additional information with parental consent. The probation officer must notify the school when the student is discharged from probation. (Minnesota Statutes, section 260B.171, subdivision 3)

How can schools share education data if there are no statutory provisions for sharing?

- **Consent.** A school or law enforcement may ask parents to consent to release of education data. (Minnesota Statutes, section 13.32, subdivision 3(a))
- **Court orders, search warrants, or subpoenas.** A school must release education data in response to a court order. (Minnesota Statutes, section 13.32, subdivision 3(b)) In most circumstances, FERPA permits release with a subpoena if the school makes a reasonable effort to notify the parent or the eligible student in advance of compliance. (34 CFR 99.31(a)(9))

http://www.ipad.state.mn.us/docs/eddatasafety.html
2012 EDUCATION LAW SYMPOSIUM AND FALL MEETING

Sharing Student Information with Police:
Balancing Student Rights with School Safety

Lynn M. Daggett, J.D., Ph.D.
Professor, Gonzaga Law School
P.O. Box 3528
Spokane, WA 99220
(509) 313 6400
ldaggett@lawschool.gonzaga.edu

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Introduction

The issue of schools’ sharing information about their students with the police is in the spotlight. Most notably, it has been reported that Jared Loughner, the alleged “Tucson shooter” of Rep. Gabby Giffords and many others, engaged in disruptive and threatening behavior resulting in his suspension from community college, but not in the school’s notification of the police. These facts eerily echo those involving the shootings at Virginia Tech, where the school knew of the student shooter’s apparent mental illness and behavioral concerns and did not reach out to the parents or to law enforcement authorities. Immediately after the tragic 2007 on-campus killings by a student at Virginia Tech, the country learned that the shooter had a history of mental illness, and had received both mental health treatment and discipline on campus. Some media commentators seemed to suggest the student’s parents and classmates and others should have been made aware of this information. A report commissioned by Virginia’s governor to investigate includes a finding that a misunderstanding of FERPA prevented appropriate sharing of information about the student to parents, school employees, and others.

Schools struggle with whether, when, and how to involve police, both when students appear to present a threat to others, as in these high profile cases, and also when the school suspects a student of criminal behavior. Perhaps even more frequently, police approach schools

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1 USA Today reported that Pima Community College personnel notified campus law enforcement officials of Loughner’s threatening behavior. “Pima Community College, where Loughner had been a student until last fall, created teams to help assess whether students are potentially dangerous. The college suspended Loughner last year for classroom and library disruptions, according to a statement from the school. Officials briefed his parents, and told Loughner to come back only after a mental health professional had assessed that he was not a danger to himself or others. After that, ‘there was no further college contact with Loughner,’ the college says.” Mary Beth Marklein and Brad Heath, Second-guessing red flags, action taken in Tucson case, USA TODAY Jan. 13, 2011, available at http://www.usatoday.com/news/nation/2011-01-12-students12_ST_N.htm.


3 See id. at 24-29.

4 See id. at 31–53 (providing twenty-plus page mental health history of the shooter).

5 In fact, from a student privacy perspective, one wonders why the English professor and other Virginia Tech employees, as well as the authors of the investigative report, were publicly sharing details of the student’s discipline and health records as well as his academic assignments.

6 Id. at 68.
seeking information about students.

As a simple example, suppose one student has beaten up a classmate, causing significant injuries requiring some outpatient medical treatment. Can/must/should the school report this to the police? After all, the fight may be chargeable criminally as assault.

To a significant extent, a school’s decisions about this fight, and these issues generally, is not a legal one. Schools reasonably disagree about the extent to which student behavioral issues should be dealt with internally, or should be referred to parents, or should be referred to the police or other outsiders. This paper does not attempt to tackle that difficult educational policy question.

This paper focuses instead on the (also complex and difficult) body of laws governing schools’ sharing of student information with police, an issue in both K-12 and higher education, and in both public and private schools. It is most obviously FERPA and other privacy laws which inform these decisions. In addition to privacy law, there are actually many other laws relevant to the issue: 1) disability law, 2) student constitutional rights, 3) discrimination laws, 4) state statutory requirements to report crimes and/or to cooperate in investigations, and 5) possible tort liability for failing to prevent harm to, or by, students.

The paper examines the extent to which each area of law forbids, requires, or permits but does not require, schools to share information with police. The paper also notes potential consequences for violations (such as sharing information when the law forbids it, or not sharing information when the law requires it). These consequences may be direct: liability or penalties for violations of the relevant laws. There may also be indirect consequences; for example, if a school’s sharing of information with police violates FERPA, is that information inadmissible in resulting criminal proceedings? The paper then explores the variety of arrangements police have with schools, and how these arrangements impact legal regulation of information sharing by schools.

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7 The focus of the paper is on schools’ sharing student information with police, either in response to police request or at the school’s initiative. The legal terrain when police share information about students with schools is beyond the scope of this paper. It should be noted, however, that student information given by police to schools, which the school then maintains in its records, becomes governed by FERPA. The issue of school (and joint school-police) collection of information from students (such as criminal activity) which might be shared with police is also beyond the scope of this paper. It should be noted, however, that the PPRA (20 U.S.C. § 1232h) limits K-12 schools’ collection of information from students about criminal activity or other illegal activity via certain surveys and evaluations. Moreover, to the extent a school collects information through search and seizure of students, or interrogations, there are obvious constitutional limitations. This paper’s focus is on existing student information in a school’s possession and whether it can, must, or must not be, shared with the police.
I. Privacy law

A. FERPA

FERPA is a federal statute regulating student records. It applies to any school, public or private, K-12 or higher education, which receives federal education funds. FERPA makes student records and the information in them confidential. FERPA does not provide for a right of access to student records, except a right of access by the parent/adult student to the student’s own records, and a right of access by the military to certain information about non-objecting high school students for recruiting purposes. Beyond this, FERPA has a long list of exceptions which permit but do not require schools to release student information without consent. FERPA contains no specific exception permitting nonconsensual disclosure to police. However, several of FERPA disclosure provisions may allow schools to share information with police in specific circumstances.

1. The emergency exception. Under the emergency exception, recently broadened by new regulations, if a school perceives a “articulable and significant threat” under the “totality of the circumstances” and documents this in a student’s records access log, it can share records as appropriate without parent or student consent. Under the new regulation, FPCO (the enforcing agency for FERPA) defers to a school’s judgment about whether there is an emergency so long as

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8 20 U.S.C. § 1232g.

9 34 C.F.R. § 99.36. The prior FERPA regulation on sharing “in connection with an emergency” “if necessary to protect the health or safety of the student or other individuals” explicitly provided that it was to be “strictly construed.” Id. The new FERPA regulation removes the “strictly construed” language and substitutes a standard of an “articulable and significant threat” under the “totality of the circumstances.” Id. Further provides that FPCO will defer to a school’s judgment applying this standard whenever that judgment is supported by a rational basis. Id. Schools which release a student’s records under the emergency exception must record the disclosure, its basis, and to whom records were disclosed in the student’s records log. Id.

Another “emergent” scenario recently the subject of much public concern is a pandemic involving H1N1 flu or another condition. On September 1, 2009, the Department of Education issued guidance on these issues generally, and the application of FERPA’s emergency exception specifically. While the document notes extensive FERPA guidance will be issued at a later date, it notes that schools facing a flu pandemic may appropriately decide there is an emergency and share relevant information (presumptive names and contact information of infected students) with law enforcement and health authorities under the emergency exception. The document cautions that wholesale sharing of affected students’ education records would not be appropriate. Guidance on flexibility and waivers for SEAs, LEAs, postsecondary institutions, and other grantee and program participants in responding to pandemic influenza (H1N1 virus), available at http://www.ed.gov/lead/safety/emergencyplan/pandemic/guidance/flexibility-and-waivers.doc (Sept. 1, 2009).
that judgment is supported by a rational basis. A recent FPCO opinion illustrates how broadly that agency now construes this exception. FPCO found no FERPA violation by a school which shared student records with the doctor who had performed hand surgery on the student as part of a discussion of post-surgical care. FPCO deferred to the school’s judgment that an emergency existed, permitting nonconsensual disclosure.\textsuperscript{10} It is unclear that a court would take a similar approach. An earlier decision held that nonconsensual disclosure to a diabetic student’s physician falls outside the emergency exception.\textsuperscript{11}

2. **Law enforcement unit records.** Schools may have a law enforcement unit which at (including but not limited to campus security at a university). To the extent members of that law enforcement unit create and maintain records which at least in part concern possible illegal activity (i.e., not mere violations of school rules) those records are excluded from FERPA protection.\textsuperscript{12} Thus FERPA would not prohibit sharing them with police, or other outsiders.

3. **Sharing when police are agents of the school.** In some schools, police act as agents of a school. Perhaps, for example, a school has a threat assessment team or other group of professionals to sort out issues involving at-risk students, and invites a local police officer to serve on the team. FERPA permits nonconsensual internal sharing for legitimate educational reasons as defined in a school’s FERPA policy.\textsuperscript{13} While this exception traditionally involves teachers and other educational employees, to the extent “police” are actually agents of the school, they could fall under this exception. However, police which learn information about students in their capacity as school agents could not then use it in their capacity as police officers.

4. **Sharing with police as outsourced security services.** A new FERPA regulation permits nonconsensual sharing with persons performing outsourced services on behalf of a school.\textsuperscript{14} A school might outsource security services to police officers.\textsuperscript{15} The regulation requires

\begin{itemize}
\item \textsuperscript{10}Letter to Anonymous, 111 LRP 19105 (FPCO 2010) (repeatedly referring to FERPA’s so-called “health and safety exception” without reference to “emergency”).
\item \textsuperscript{11}See, e.g., Irvine (CA) Unified Sch. Dist., 23 IDELR 1077, 1078 (FPCO Feb. 20, 1996) (explaining that a student's non-urgent medical condition and associated safety concerns are not emergencies justifying sharing records with student's doctor without parental consent).
\item \textsuperscript{12}34 C.F.R. § 99.8.
\item \textsuperscript{13}34 C.F.R. § 99.31.
\item \textsuperscript{14}Id.
\item \textsuperscript{15}The school’s definition of “school officials” referenced above should include any such persons.
\end{itemize}
that such persons be under the school’s control with regard to education records, and provides that may only redisclose information as permitted by FERPA. Hence, just as with police serving as school agents, police receiving student information in their capacity as outsourced school security could not then use the information in their capacity as police officers.

5. Sharing directory information information with police. FERPA provides that a school’s FERPA policy may designate certain not-too-private information such as addresses and phone numbers as directory information. Students must have an opportunity to object to release of this information. Schools are permitted to release directory information of nonobjecting student without consent to any person, including police.

Recent FERPA regulations ban nonconsensual release of directory information about a specific student when the request includes the student’s SSN or other nondirectory information (e.g. date of birth) to help identify the student. For example, a police officer might supply a school with a name and SSN and ask the school to verify dates of attendance and degrees received. In such a case, written consent is required if the school uses the SSN to locate release or confirm the information (hopefully in such a case the police request includes such written consent). The theory is that to do so implicitly confirms the accuracy of the SSN, which amounts to a disclosure of an education record for which consent is required. The school receiving such a request could choose to supply the requested information, while also clarifying that it did not use and is not confirming the student’s SSN. Alternatively, if the same request listed only the student’s name without SSN, the school could nonconsensually release the requested directory information unless the student had filed a directory information objection.

The regulations also provide that when a school reasonably believes the requester knows the identity of the student about whom records are requested, the records are protected by FERPA. This new provision is intended to deal with targeted requests. For example, if a police officer knew student Chris Jones had been expelled on a specific date, and asks a school for records of all students expelled on that date with names redacted, the records would be protected from disclosure.

6. Sharing which does not involve personally identifying information, such as disclosure of campus crime data under the Clery Act. The Clery Act has long required reporting of campus crime data. It was modified after Virginia Tech to require colleges to make emergency warnings to the campus community of specific threats to campus safety. In

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16 34 C.F.R. §§ 99.3; 99.37.
17 Id.
18 34 C.F.R. §99.31(b).
20 Id. at § (f)(1)(j).
conjunction with FERPA’s emergency exception, these warnings might include some student information. Colleges must also create a public log of crimes reported to them. The Clery Act also requires a statement of

- the law enforcement authority of campus security personnel; and
- (ii) the working relationship of campus security personnel with State and local law enforcement agencies, including whether the institution has agreements with such agencies, such as written memoranda of understanding, for the investigation of alleged criminal offenses; and (iii) policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies.22

The federal Department of Education (DOE) may investigate Clery Act violations and impose civil penalties.23 DOE is currently investigating Penn State in connection with the sexual assault of children on campus by former assistant football coach Jerry Sandusky.24

7. Sharing information in response to a subpoena. FERPA does not establish a privilege for student information. FERPA does not extend blanket protection of covered records from subpoena, nor does FERPA set out any substantive standard for schools or courts to apply in deciding whether to enforce or to comply with a subpoena of student information.26 What FERPA does do is establish procedural requirements for schools served with subpoenas of student records. First, while a request for student records (via subpoena, public records request, parent request for access, or otherwise) is pending, the requested records may not be destroyed. The other procedural requirements (advance notice to the parents before compliance and recording of the request in an access log) vary depending on which of FERPA’s three types of subpoenas are involved.

In general, FERPA requires schools to give make a “reasonable effort” to provide pre-

21Id. at § (f)(4).
22Id. at § (f)(1)(c).
23Id. at § (f)(13).
2520 U.S.C. § 1232g(j); 34 C.F.R. § 99.31(a)(9).
26However, for subpoenas other than those for law enforcement purposes, the advance notice requirement, and its purpose of providing families with an opportunity to quash or modify subpoenas does indicate an intent to provide some protection of student information from the subpoena power.
compliance notice to the parent/adult student whose records have been subpoenaed (such subpoenas are hereinafter referred to as “general FERPA subpoenas”). FERPA also provides that courts (and federal grand juries) may issue subpoenas of student records for law enforcement purposes, and that these law enforcement subpoenas may direct the school to keep them confidential even as to the involved student/parents (such subpoenas are hereinafter referred to as “confidential law enforcement FERPA subpoenas”). A third type of FERPA subpoena was created by a provision of the USA Patriot Act. This makes it easier for federal law enforcement authorities to obtain ex parte secret subpoenas of student records relevant to terrorism investigations. Like the pre-existing law enforcement subpoena language, these subpoenas must be issued by courts (such subpoenas are hereinafter referred to as “confidential terrorism investigation-related FERPA subpoenas”).

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27 For general subpoenas, FERPA requires schools to make a “reasonable effort” to provide notice to parents/adult students in advance of compliance, in order to afford an opportunity to ask a court to quash or modify the subpoena. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9); id. at 99.31(a)(9)(ii) (noting that advance notice is “so that the parent or eligible student may seek protective action”). For good cause, subpoenas or court orders issued by federal courts or grand juries for law enforcement or anti-terrorism purposes may require the school to comply without disclosing the issuance of the subpoena to the parent/adult student. 20 U.S.C. at § 1232g(b)(1)(J) (federal law enforcement subpoenas); id. at § 1232g(j) (ex parte court orders to investigate and prosecute terrorism).

For discussions of FERPA’s approach to subpoenas generally, as well as earlier reported decisions, see Dixie Snow Huefner and Lynn M. Daggett, FERPA Update: Balancing Access to and Privacy of Student Records, 152 EDUC. L. REP. 469, 480-481 (2001); Lynn M. Daggett, Bucking up Buckley I: Making the Federal Student Records Statute Work, 46 CATH. U. L. R. 617, 634-635 (1997).

28 Id. at §1232g(b)(2)(B).

29 Id. at §1232g(b)(1)(J).


31 Normally the application to the court for the subpoena will be by the U.S. Attorney General’s Office, but the Attorney General’s Office does not have the power to access student records on its own; a court-issued subpoena must be obtained. The statute provides that some other federal employees may apply for confidential terrorism-investigation related subpoenas. The section refers specifically to “the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General).” Id.
Schools presented with FERPA subpoenas sometimes go to court to ask that the subpoena be quashed or modified. In a case decided soon after FERPA’s enactment, a federal district court adopted a balancing test to decide a motion to quash a subpoena of student records, reviewing the records in camera and weighing the need for the information contained in any relevant subpoenaed records against the intrusion on the student’s privacy. Most courts reviewing subpoenas of student records continue this in camera review of the subpoenaed records and balancing of interests in deciding to what extent (if any) to enforce the subpoena.

8. Sharing with juvenile justice authorities as permitted under pre-1974 state law. State law in existence prior to FERPA’s enactment which permits schools to share student information with juvenile justice authorities is unaffected by FERPA.

9. Sharing by institutions of higher education of the results of certain school discipline. Higher education institutions may inform the public at large of the outcomes of certain disciplinary proceedings in which students are found to have engaged in behavior which violates the school rules and also amounts to a crime of violence or a nonforcible sex offense. Disclosure is limited to the name of the guilty student, the violation committed and the sanction imposed. Thus, for example, if a college found after a disciplinary hearing that student Pat Smith stole a classmate’s laptop, and was suspended for a semester by the school for this behavior, the college could share Pat Smith’s name, the determination of laptop theft, and the suspension with the police as part of the public generally. The police might then decide to pursue larceny charges against Smith.

In the case of general FERPA subpoenas, the family of the student whose records were subpoenaed could also go to court.

See, e.g., Fed. R. Civ. Proc 45 (c)(3)(A)(iii) (motion to quash civil subpoena may be made if the subpoena “requires disclosure of privileged or other protected matters”). Some courts require an attempt to confer with the subpoena-er’s attorney before filing such a motion.

At least for some civil subpoenas, schools can serve timely written objections to the subpoena, which eliminates their obligation to comply unless and until the subpoena-er makes a successful motion to a court to compel compliance.


Id.

Id.
10. **Sharing observed behavior with personal knowledge.** According to FPCO, the federal agency which enforces FERPA, sharing personal knowledge of observed behavior rather than information taken from student records does not violate FERPA.40

11. **Enforcement of FERPA.** FERPA violations generally are not enforceable through private lawsuits. FERPA has no private cause of action, and has been found to be not actionable under Section 1983.41 There is an administrative complaint process through the FPCO which does not involve a hearing nor any private remedies.42 Courts have not been receptive to the argument that student information obtained or shared in violation of FERPA is fruit of the poisonous tree and inadmissible in criminal proceedings.43

**B. Other privacy laws may protect student information to a greater extent than FERPA**

When (mental) health records are involved, HIPAA and other health records laws may limit disclosure beyond FERPA’s protections. School nurses, counselors, and other health care workers in schools may create or maintain records. Confidentiality provisions in health records

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40See, e.g., Letter to Anonymous 107 LRP 48036 (FPCO 2007) (school aide’s report to police of student’s observed behavior (“Student had pulled her hair,” ‘behaviors were escalating,’ ‘Student was out of control at home and school,’ Student was ‘very strong’ and a ‘big kid that continues to hurt people’”) did not violate FERPA; “FERPA does not protect the confidentiality of information in general. FERPA does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge, personal observation, or hearsay, and not specifically obtained from an education record, is not protected from disclosure under FERPA; . . . . These statements appear to be observational or the speaker's opinion.”). This carve-out for observed behavior is not explicit in the statute or regulations, nor in case law. It is unclear if courts will defer to it as a reasonable interpretation by an enforcing agency.


43For example, in one case, a public university called police when it appeared that an adult student was using school computers to access child pornography. The student claimed he was doing so as research for a class. The student also claimed that informing the police about his school computer work violated his FERPA rights, and the search warrants and search results obtained by the police as a result of the school’s tip should be voided as fruit of the poisonous tree. A federal court suggested that even if FERPA was violated, it would not void the resulting searches. United States v. Bunnell, 2002 Westlaw 981457, *1 (D.Me. 2002) (also noting that the school gave the police access to the recycling bin in its computer facility).
laws may limit sharing those records with police to a greater extent than does FERPA. In November 2008, FPCO and HHS issued joint guidance on FERPA and HIPAA and student health records, available from the FPCO website. Briefly, the joint guidance paper clarifies that FERPA and not HIPAA applies to student health records in most cases; when HIPAA does apply, it would largely be in post secondary education.

II. Disability law

A. IDEA and criminal referrals of special education students

The IDEA, the federal special education statute applicable to public K-12 schools, specifically permits criminal referrals of special education students; regulations limit related school records disclosures to the extent FERPA permits. The IDEA does not require disclosure of records in connection with a criminal referral. One court has suggested that failure to turn over an IDEA student’s records in connection with her criminal referral would not invalidate the criminal proceedings.

B. IDEA confidentiality requirements

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4734 C.F.R. §300.535(b)(2). “Circumstances will determine whether records may be transmitted generally will determine whether a specific request from a law enforcement official would need to be made, to whom the records would be transmitted, and the extent of the information provided.” 64 Fed. Reg. 12362 (1999). See, e.g., Northside Independent School District, 28 IDELR 1118 (SEA TX 1998).

48A court held that an alleged violation of IDEA requirements regarding sharing of special education records when a criminal referral is made for an IDEA student did not justify dismissal of the criminal conviction. In that case, an IDEA student was referred to police for drug possession. The student challenged his criminal conviction on several grounds, including the school’s failure to share his FERPA records with the police. The court held that any IDEA violation did not justify dismissal of the criminal conviction. Commonwealth v. Nathaniel N., 764 N.E.2d 883,888 (Mass. App. 2002) (also noting that the IDEA did not specify when during the criminal process the records were to be shared, that in fact the student had provided some records to the court).
The IDEA incorporates FERPA’s confidentiality requirements and adds others not especially relevant to information sharing with police.\(^49\) Note, however, that IDEA confidentiality violations, including violations of incorporated FERPA requirements, may be actionable through the IDEA.\(^50\) These claims begin with a formal administrative hearing resulting in a written decision that may be appealed to a court.\(^51\)

C. Criminal referrals and substantive IDEA obligations

While IDEA explicitly permits criminal referrals and its confidentiality provisions do not limit information sharing with police to a greater extent than does FERPA, sharing information about a special education student with the police may violate the IDEA and/or other disability law.

One scenario in which criminal referral may violate the IDEA involves the school’s motive for referring the student to the police. A state appellate court has noted that a school may not file a juvenile court petition with the intent of interfering with a student's IDEA rights.\(^52\) For example, making a false report to police to avoid IDEA evaluation or services obligations would violate disability and other law.\(^53\) Similarly, offering to forego a criminal referral if parents of a

\(^{49}\)20 U.S.C. § 1415 (b)(1); 34 C.F.R. § 300.501.

\(^{50}\)See, e.g., C.M. v. Bd. of Educ. of Union County Reg'l High Sch. Dist., 128 F. App'x 876, 880 (3d Cir. 2005) (determining that if the plaintiff had not been provided access to certain information in her school records, injunctive relief under IDEA may be appropriate although the plaintiff had graduated); J.P.E.H. v. Hooksett Sch. Dist., No. 07-CV-276-SM, 2007 WL 4893334, at *4-7 (D.N.H. Dec. 18, 2007) (holding that claims by a parent of a disabled student that the school improperly shared information about her child may proceed as a violation of IDEA records confidentiality, but dismissing parent's FERPA claims); cf. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 (2d Cir. 2005) (holding that a failure to provide a parent with class profiles that the school district has not yet created does not violate IDEA); K.C. v. Fulton County Sch. Dist., No. 1:03-CV-3501-TWT, 2006 WL 1868348, at *9-11 (N.D. Ga. June 30, 2006) (alleging that the school denied parents access to their child's records; the court found that this was a very limited denial of access which did not limit the parents' ability to participate in their child's education and therefore did not violate IDEA); Combier v. Biegelson, No. 03 CV 10304 (GBD), 2005 WL 477628, *1, *4-5 (S.D.N.Y. Feb. 28, 2005) (finding that an IDEA parent lacked standing to claim a FERPA violation resulting from a school's disclosure to her of records that contained information about other students), aff'd sub nom. Combier-Kapel v. Biegelson, 242 F. App'x 714 (2d Cir. 2007).

\(^{51}\)See 20 U.S.C. § 1415 (f), (g), (i).


\(^{53}\)Cf. Camac v. Long Beach City Sch. Dist., 57 IDELR 35 (E.D.N.Y, 2011) (school personnel who allegedly falsely reported student was suicidal to emergency personnel, resulting
special education student kept the student at home and the school did not have to provide FAPE
would violate disability law. Special education programs are costly for some students. Some
special education students have behavioral or other issues which a school may find difficult to
deal with. Schools cannot attempt to avoid unwanted costs, or difficult student issues, or
retaliate against parents of special education students, by referring the student to the police.

With these concerns in mind, if an IDEA student is at risk to engage in criminal behavior,
is it appropriate to include the possibility of criminal referrals in the student’s IEP? If the
possibility is not included in an IEP, can the school still make a criminal referral for that student?
One court found that where an IDEA student’s BIP did not prohibit the principal from calling the
police, doing so was not disability discrimination nor a violation of the student's constitutional
rights. If a child’s behavior makes police involvement foreseeable, perhaps the possibility of
criminal referral should be written into the IEP. If such a referral results in arrest it likely is not a
change in placement for stay put purposes. Once again, however, schools cannot make
criminal referrals of special education students which are motivated by the school’s desire to
avoid its special education obligations to those students.

D. Criminal referrals and disability discrimination

All students, K-12 and higher education, public and private, are protected by federal
statute (Section 504 and/or the ADA Titles II and III) from disability discrimination. Making
criminal referrals for students with disabilities can amount to illegal discrimination. Most
obviously, schools must refer students with disabilities to police on the same basis as students
in student’s psychiatric hospitalization; court finds triable issues under disability and civil rights
laws; it is not clear if it is claimed school did so in order to avoid evaluation obligations under
special education law).

54 See Lake Pend Oreille (ID) Sch. Dist. 84, 51 IDELR 22 (OCR 2008) (so holding).

55 See infra note 63 and accompanying text.


57 See Poteet Independent Sch. Dist.,29 IDELR 423 (SEA TX 1998) (a student’s learning
disability did not immunize him from truancy charges nor require a manifestation determination
prior to referral). See also Jonesboro Public Schools 26 IDELR 1073 (SEA AR 1997) (also so
holding).

58 Cf. Osseo Sch. Dist., Independent Sch. Dist. 279-01, 53 IDELR 35 (SEA MN 2009) (no
FAPE violation where an ED student was referred for fighting, resulting in juvenile charges,
pursuant to school policy. The referral did not lessen access to special education services or
supports).

59 See 29 U.S.C. § 794 (Section 504); 42 U.S.C. §§ 12131 - 12134 (ADA Title II –state
and local government including public schools) Id. at §§ 12181 -121289 (ADA Title III for
places of public accommodation explicitly including private schools).
without disabilities. In some circumstances, reporting suspected abuse or neglect to police or other authorities may be actionable as disability discrimination.  

The Education Department has noted that while the IDEA does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student," schools should "take care not to exercise their responsibilities in a discriminatory manner." On the other hand, criminal referrals for legitimate nondiscriminatory reasons are valid. For example, OCR found no discrimination by a school which called the police about a student’s rude/disruptive behavior, verbal abuse and profanity. After first trying to use the student's BIP strategies unsuccessfully and out of concern for danger to other students, the principal suspended the student for three days and contacted the police. OCR decided the district had a legitimate, nondiscriminatory reason for its actions. In this case retaliation for advocacy under disability law was also claimed as a basis for the criminal referral. OCR found the school did not retaliate against the student for his parent's advocacy.

Criminal referral practices which have a disparate impact on students with disabilities may violate disability law. There has not been data collection and analysis of criminal referral rates for students with disabilities. However, data patterns for school suspensions, which logically would be predicted to be similar to those for criminal referrals, are of some help in examining this issue. In fact, recent multi-state data concerning school suspension rates for students with disabilities is troubling. The IDEA limits exclusion from school for conduct which is caused by a student’s disability, which suggests suspensions from school should be lower for special education students. In fact, the suspension rate for students with disabilities (13%) is almost double that for general education students. The disparity is even starker for

\[\text{References}\]


61 Fed. Reg. 12631 (1999). See also In re Student with a Disability v. Sch. Bd. of Palm Beach County, 31 IDELR 209 (S.D. Fla. 1999) (claims that the district's behavioral support practices and criminal referral policy caused a disparate impact on students with disabilities).


63 Id.

64 20 U.S.C. § 1415(k).

black students with disabilities, whose suspension rate is over 25%.\textsuperscript{66} It thus seems likely that criminal referrals of students are disproportionately students with disabilities and students of color.

Schools can establish policies and practices concerning criminal referrals of students to minimize impact on students with disabilities. A school district can enact a policy which sets out the district’s general approach to police involvement, identifies underlying policy reasons (e.g. school safety, training students to become responsible citizens), limits who has authority to talk with police about students, and identifies behaviors which will result in criminal referral. Centralized decision makers (for example, the principal of each school is the designated person for any communication with police) promotes consistency. To protect students with disabilities and comply with any relevant IEP provisions, perhaps the policy would require consultation with a special education professional before criminally referring a special education student. Identifying behaviors which will result in criminal referral (drug possession? drug use? property crime above a certain value? violent crime?) and perhaps including the age of the student (as appropriate for various stages of child development) and the student’s state of mind (e.g. willful behavior only?) as considerations helps ensure referral decisions are made in a nondiscriminatory way. Schools should always identify a nondiscriminatory reason for deciding to make a referral, assuming not every student suspected of criminal activity is referred to the police.

Keeping records on criminal referrals and other communications with police about students can help schools identify and respond to any patterns which indicate students with disabilities are being treated differently. These records should include demographic information such as disability status, race, religion, and gender, to be sure that referrals are made in a nondiscriminatory manner. These records should also include incidents for which the school decided not to make a criminal referral, to help ensure that students in certain demographic groups (for example girls, or white students) are not being treated differently.

E. Disability law enforcement
IDEA violations are of course actionable through IDEA due process hearings and appeals to court.\textsuperscript{67} Section 504 and ADA disability discrimination claims may prompt lawsuits.\textsuperscript{68}

III. Retaliation for exercise of rights/discriminatory reporting

As discussed above, disability law forbids decisions about criminal referrals of students

\textsuperscript{66}Id. Black general education students have a 17% suspension rate compared with 5% for white general education students.

\textsuperscript{67}\textit{See} 20 U.S.C. § 1415 (f), (g), (i).

\textsuperscript{68}\textit{See} 42 U.S.C. § 12133 (ADA Title II); \textit{id.} at § 12188 (ADA Title III).
based on their disability, or in order to avoid obligations under disability law. 69 Similarly, schools cannot make criminal referrals of students in retaliation for their exercise of First Amendment free speech or other constitutional rights. Schools also need to take care that criminal referrals are made without regard to protected status such as race, national origin, gender, or religion. OCR is now collecting data, disaggregated by race and gender, on student discipline. 70 Recently released data concerning discipline rates are troubling. 71 For example, “African-American students are over 3½ times more likely to be suspended or expelled than their peers who are white.” 72 With regard to criminal referrals specifically, “Over 70% of students involved in school-related arrests or referred to law enforcement are Hispanic or African-American.” 73 The policy and record keeping practices described in Section II.D supra should help schools avoid illegal retaliation or discrimination on these bases.

Schools must on the other hand be careful not to interfere with reporting decisions by employees who are victims of student crimes against them. A recent federal appeals court held that school employees who report criminal activity against them to the police engaged in constitutionally protected speech and cannot be retaliated against for doing so. 74

IV. Laws requiring reporting of crime and child abuse

Sharing student information with police is sometimes required by laws requiring reporting of suspected child abuse, or by laws requiring reporting of crimes.

As to child abuse, K-12 schools are well familiar with statutory requirements to report suspected child abuse or neglect. 75 The reporting obligation may include suspected abuse not only by adults but also at the hands of a peer. 76 Child abuse reporting statutes may permit

69 See supra Sections IIC and IID.

70 Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Datam Arch 2012, available at Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Data.


72 Id.

73 Id.

74 Gschwind v. Heiden, No. 12-1755 (7th Cir. Aug. 31, 2012)

75 See, e.g., R.C.W. §§ 26.44.010 - .900.

reporting to police.\textsuperscript{77} These laws may require schools to cooperate in investigations.\textsuperscript{78}

In the wake of events at Pennsylvania State University, in which an assistant football coach was convicted of multiple counts of on-campus sexual assault of children, some states have amended their child abuse reporting laws to add certain employees of colleges and universities as mandatory reporters.\textsuperscript{79}

More generally, in some states witnesses to certain crimes are required to call 911 or otherwise make a report.\textsuperscript{80} Failure to report suspected crimes\textsuperscript{81} or child abuse\textsuperscript{82} may result in

\textsuperscript{77}See, e.g., R.C.W. §§ 26.44.030(1).

\textsuperscript{78}For example, in Washington, a statute specifically requires schools to cooperate with law enforcement authorities when issued a valid subpoena and to the extent permitted by FERPA. R.C.W. §28A.600.475 (emphasis added). At CPS interviews with children suspected of abuse or neglect, the child must be asked whether she wants a third party (such as a school employee) to be present. If the child wants a third party present, CPS or the police must make reasonable efforts to include that third party in the interview, unless it would jeopardize the investigation. See R.C.W. §26.44.030(12). Under state law, CPS has access to all records of the reporter and the reporter's employer. Id.; W.A.C. §388-15-132(3)(d)(I). CPS may also interview the reporter and any collateral sources. R.C.W. §26.44.030(17).

\textsuperscript{79}See, e.g., Wash. Sen. Bill 5991 (2012), to be codified at Rev. Code. Wash. §§ 26.44.030(1)(f) (mandatory reporters include “administrative and academic or athletic department employees, including student employees, of [public] institutions of higher education, . . . and of private institutions of “); id. at § 28B.10.___ (for public institutions of higher education, adding requirements that 1) employees who are not mandatory reporters themselves must report suspected abuse or neglect to a supervisor or designated administrator, and 2) such institutions must act to educate employees about the new reporting responsibilities.

\textsuperscript{80} For example, Washington statute requires reporting by eyewitnesses to certain crimes. R.C.W. §9.69.100. The statute is limited to eyewitnesses to the commission of certain crimes (“violent offenses” or preparation for a violent offense, felony sex offenses, or attempts to commit such offenses, against children, or an assault of a child “that appears reasonably likely to cause substantial bodily harm to a child”). Such eyewitnesses must report what they have seen “as soon as reasonably possible” to prosecutors, police, medical assistance, or “other public officials.” A report, or attempt to report, by phone or other means is sufficient. The reporting obligation does NOT trump a legal privilege such as that between attorneys and clients. Reporting is also not required where the eyewitness reasonably thinks making a report would place the victim or a household member in immediate physical harm.

\textsuperscript{81}See, e.g., R.C.W. § 9.69.100 (Not making a report of witnessed crime when one is required is a gross misdemeanor);

\textsuperscript{82}See, e.g., R.C.W. §26.44.030 (liability for failing to report suspected child abuse).
criminal or civil liability. There may be immunity for good faith reporting.\textsuperscript{83}

V. Tort liability

As a matter of state tort law, a school may have an obligation to warn or to take other steps if a student poses a threat to herself or others.\textsuperscript{84} Presecondary schools have an affirmative legal duty to reasonably supervise students, which may require taking reasonable steps to prevent harm to students, and harm caused by students.\textsuperscript{85} This tort liability based obligation does not specifically require reports to the police; it is “reasonable” steps to protect that are required. In some cases, for example, the duty to take reasonable steps might be fulfilled by informing parents, or by initiating a mental health evaluation. Nor is informing the police necessarily sufficient to fulfill the duty; more may be required.\textsuperscript{86}

In some circumstances, reasonable steps may involve notifying the police. In fact, the seminal case on this issue involved a university therapist to whom a student patient articulated a credible and specific threat to one Tatiana Tarasoff. The therapist informed campus police but not outside law enforcement. The student patient followed through on the threat and killed Tarasoff. The court found a triable issue on whether the school had fulfilled its duty to take

\textsuperscript{83}See, e.g., \textit{id.} at 26.44.060(1). ADD 4.24

\textsuperscript{84}See \textit{generally} \textsc{Restatement (Third) of Torts: Liab. Physical Harm} § 41 (Proposed Final Draft No. 1, 2005). Courts have held schools to a duty to intervene with regard to a disabled student making suicidal statements, who carried out a murder-suicide pact. See, e.g., Eisel v. Board of Educ., 18 IDELR 402 (Md. 1991) (duty to intervene arises when school has notice of student's suicidal intent, reasonable intervention may consist of notifying the parent).


\textsuperscript{85}This obligation includes taking reasonable intervention steps to prevent foreseeable harm to students from others in the school community, including classmates. See, e.g., J.N. v. Bellingham Sch. Dist., 74 Wash. App. 49 (1994) (school owes reasonable care to prevent assault of a 1st grader by another student at school); Peck v. Siau, 65 Wash. App. 285 (1985) (school owes duty to protect student from assault by librarian, if it is foreseeable).

\textsuperscript{86}For example, in a recent tragic case involving Morgan State student Alex Kinyua who murdered and cannibalized a family friend, the school had reported concerns to the police. The student had an earlier outburst which resulted in his expulsion from ROTC. An instructor told the police that Kinyua was “Virginia Tech waiting to happen.” Another student who was beaten by Kinyua, who had been arrested for the assault, and was free on bond when the murder occurred, is considering litigation against Morgan State. Sarah Brumfield, “Morgan State University Evaluated Alex Kinyua Before Attack,” June 8, 2012, available at http://www.huffingtonpost.com/2012/06/09/morgan-state-university-e-n_1583302.html.
reasonable steps to protect the eventual victim.\textsuperscript{87}

Failure to take reasonable steps which causes injury from the threat posed to or by the
student may result in tort liability, and in some cases civil rights liability.\textsuperscript{88}

Conversely, a false report to police or other outsiders of a student threat to self or others
may result in liability.\textsuperscript{89}

State anti-bullying statutes, and school policies regarding bullying, may set out
procedures for schools to follow. A school’s violation of these obligations may amount to breach
of the legal duty of reasonable supervision. Available data suggests bullying is hardly a rare
occurrence in K-12 schools.\textsuperscript{90}

VI. SROs and other police arrangements involving schools

A. The variety of school-police arrangements

At the K-12 level, schools and police traditionally were separate entities. Many schools
did not have designated security personnel and those that did hired their own non-police security
employees. At the university level some campus police forces were comprised of nonpolice
university employees and others of commissioned law enforcement officers.

More recently, schools and police have entered into a variety of cooperative arrangements
to ensure school safety. In some cases, police have assigned officer(s) to a school. Officers in
this arrangement are often referred to as “school resource officers” (“SROs”). SROs remain

\textsuperscript{87}Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425 (1976).

\textsuperscript{88}Cf. Doe v. Big Walnut Local Sch. Dist., 111 LRP 5176 (S.D. Oh. 2011) (school avoids
civil rights liability for peer bullying of student because school had made reasonable efforts to
prevent the bullying). In another recent case, a student sexually assaulted a classmate, and later
raped another classmate whom he had dated in the past. The second victim claimed the school
had a legal duty to warn her of the danger this student presented, and also claimed that failure to
warn her amounted to deliberate indifference, triggering liability under Title IX. Doe v. Ohio St.
Univ., 2006 WL 2813190 (S.D. Oh. 2006). The court rejected the Title IX claim, noting that at
the time of the plaintiff’s rape the first complaint had been filed and the school was processing it
but there had been no adjudication, and declined to decide the duty to warn claim, but did take
the time to include a lengthy and graphic description of the rape from the victim’s deposition. \textit{Id.}
at *2-3.

\textsuperscript{89}Cf. Camac v. Long Beach City Sch. Dist., 57 IDELR 35 (E.D.N.Y, 2011) (school
personnel who allegedly falsely reported student was suicidal to emergency personnel, resulting
in student’s psychiatric hospitalization; court finds triable issues under disability and civil rights
laws).

\textsuperscript{90}A recent NCES study suggests 25% of students experienced bullying during a school
year. NCES, Student Reports of Bullying and Cyber-Bullying: Results From the 2009 School
employees of the police. They may have education and counseling as well as law enforcement responsibilities, and their salaries are often paid for with federal COPS funds. Some schools have hired off duty officers to provide security and/or hired full-time police officers. As discussed above, campus police at public universities may have some law enforcement powers. Police officers may serve on school multidisciplinary crisis management or threat assessment teams.

B. Police as school agents: nonconsensual sharing and redisclosure

These different arrangements affect who is the “school” and who is the “police” and thus alter legal requirements governing information sharing. There are two issues. First, under what circumstances is an SRO or other school security official a person acting for a school with whom information can be nonconsensually shared under FERPA? Second, what if any limits exist on redisclosure of information learned in this way? For example can a police officer who learns information by participating in a school threat assessment team share and act on that information as a police officer?

Cases involving student searches by SROs offer some guidance on these issues, at least by analogy. Under the Fourth Amendment, police searches generally require probable cause and a warrant, while school searches of students do not require warrants and are governed by a lower reasonable suspicion standard. Courts have been asked to decide whether a student search at school by an SRO is governed by the police or school standard. Most recently, the Washington Supreme Court held in *State v. Meneese* that an SRO’s search of a student’s backpack had to meet the higher police standard. Because that standard was not met, the evidence (air pistol) found in the backpack was inadmissible in criminal proceedings against the student. The majority reasoned that the lower standard for school searches had been created at least in part because school officials do not have the search and seizure expertise of law enforcement officials, and school searches are not performed for law enforcement purposes; their actual

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95*Id.* at *2, *5.
purpose (school discipline) requires swift action.\textsuperscript{96}

The reach of the \textit{Meneese} decision is unclear and may be limited. The search in question occurred after the student had been arrested and handcuffed by the SRO\textsuperscript{97} strongly suggesting the search was for law enforcement purposes. The opinion reserves the question of what standard would apply to a search made at least in part for school purposes.\textsuperscript{98} The agreement between the school and police department stated SROs were school officials\textsuperscript{99} but did not provide for any school discipline authority for the SRO;\textsuperscript{100} in fact the SRO remained on call while assigned to the school to respond to other police matters.\textsuperscript{101} The decision was made under the state constitution.\textsuperscript{102} The court was not unanimous.\textsuperscript{103} Even the dissent, however, would apply the police standard to some SRO searches such as those which are a “subterfuge for unrelated law enforcement activities.”\textsuperscript{104} Nationally the courts are split, with many allowing SRO searches which have a school purpose under the lower school standard.\textsuperscript{105}

\textsuperscript{96}Id. at *3.

\textsuperscript{97}Id. at *1.

\textsuperscript{98}Id. at *5 n. 4.

\textsuperscript{99}Id. at *8 (Stephens, J., dissenting, joined by Johnson, J.)

\textsuperscript{100}Id. at *1.

\textsuperscript{101}Id. Although not mentioned in the opinion, state statute limits authority for school searches to certain school officials. Rev. Code Wash. §28A.600.230 (limiting authority for student searches to “school principal, vice principal, or principal's designee”).

\textsuperscript{102}Id. at *4.

\textsuperscript{103}See id. at *5 (Stephens, J., dissenting, joined by Johnson, J.)

\textsuperscript{104}Id.

Applying the reasoning of these cases, key to sorting out these matters is agency, which depends on many factors such as who the officer reports to and who pays her salary, what title and duties within the school the officer has, and what purpose(s) the information sharing serves. It would seem that an officer who has official duties at a school is a person acting for the school when performing those duties. For example, a police officer may be a full-time employee of a police department but also serve some role within a school such as membership on the school threat assessment team. In such a situation, the school may share some information with the police officer in her capacity as an agent of the school.

This does not mean, however, that the police officer can take this information gleaned in her school role and use it in her law enforcement capacity. Similarly, teachers who learn student information at school about kids in their neighborhood cannot use it in their capacity as neighbors. However, a police officer on site may observe student behavior of interest. Or a police officer at a school may be a part of a school’s enforcement unit, creating records which are not protected by FERPA.


106 See supra Section I.A.10.

107 See supra Section I.A.2.