

January 31, 2007

Mr. LeRoy Rooker
Director
Family Policy Compliance Office
400 Maryland Avenue, SW
Washington, DC 20202-5920

Dear Mr. Rooker:

The National School Boards Association (NSBA) is a federation of state school boards associations that represents the nation's nearly 14,500 local school boards. The NSBA Council of School Attorneys (the Council) is a membership organization of 37 affiliate state councils, over 3,000 attorneys nationwide, who work to improve the practice of school law and prevent lawsuits against public schools.

Over the last few years, and with increasing frequency of the last few months, school attorneys have been raising concerns about the status of video images under the Federal Education Rights and Privacy Act (FERPA). In the typical scenario, campus or school bus cameras capture student altercations on video. Parents of the students involved in the fight or standing by, the media, the district attorney, attorneys for the students involved in the altercation, and others may ask the school district to view or receive a copy of the video. School districts struggle to understand whether FERPA, state student records laws, state public records laws, court cases, and Family Policy Compliance Office (FPCO) letters permit or require the district to give these parties access to the video images.

In Letter re: Berkeley School District, FPCO stated that a parent may only inspect a school videotape showing his or her child engaged in misbehavior if no other students are pictured. In *Rome City School District v. Grifasi*, 2005 N.Y. Slip.Op. 25525 (Oct. 28, 2005), a New York court disagreed. Two opinions by the Texas Attorney General (OR2006-07701 and OR2006-00484) have increased confusion over this common issue, as have rumors of an unofficial, unpublished new position by FPCO. Formal, written guidance by FPCO clarifying its current position on the status of video images under FERPA would be a useful and practical tool for school lawyers.

To assist FPCO in developing guidance in this area, we pose the following scenario and questions, for your consideration. After each question, we provide suggestions, ask additional questions, or provide background information, as appropriate.

HYPOTHETICAL: X and Y students get into a fight and Z student watches. All three students are captured on video at the same time. School district does not have a law enforcement unit.

1. Is a video image of all three students an education record for each student?

In discussing this issue with members, our understanding is FPCO's long standing position has been that video images are education records for each student depicted in a video image. However, we also understand FPCO's new position is that video images are education records only for students "directly related" to the subject of interest to the school district, in this case, the two students in a fight, X and Y, and not Z, a bystander.

The advantage to FPCO's new position, as we understand it, is if the video images are not an education record for Z, school districts have one less party's rights to worry about when deciding whether to allow the video images to be viewed or copied and released. The disadvantage of FPCO's new position is while it allows X and Y, in the scenario above, to *view* the tape/disc without each others consent or redacting the tape/disc, it does not allow either party to *obtain* a *copy* of the tape/disc without each others consent. Receiving a copy of the tape/disc can be key for both parties to defending themselves in a school district or criminal proceeding or deciding whether to pursue a civil action or a criminal prosecution.

The problem with a video image of all students (X, Y, and Z in this case) being an education record is if a parent wants to view an image of his or her child and the videotape/disc contains images of other students, the tape/disc could only be viewed if images of other students are redacted. Redaction is expensive, time consuming, and not always possible.

2. May a school district designate all video images of students as directory information, so that all such images may be released without parental consent or redaction under FERPA? If not, why not?

If districts could designate all video images as directory data, they could release video images without the constraints imposed by FERPA. In short, allowing districts to designate video images as directory data would resolve many, if not most, conflicts over whether video images can be viewed and released. Moreover, the FERPA regulations support the conclusion that a video image could be directory data. Specifically, the

definition of directory data includes “photographs,” and video images are at least arguably nothing more than moving photographs. 34 § CFR 99.3.

FPCO's new position is apparently that video images cannot be designated as directory data because they are not education records, except in instances such as the one described in the above hypothetical. If this is the case, could a district prospectively designate video images as directory data to the extent that they *are* education records?

If the video image is NOT an education record for all three students:

3. Is the video image an education record for students X and Y but not student Z? If so, why?

As discussed above, we understand FPCO’s position to be that the videotape/disc is an education record for X and Y students but not student Z. This is because students X and Y are “directly related” to the subject of the video that is of interest to the district.

"Directly related" is not defined in the FERPA statute or regulations. What makes the video image of a fight between X and Y "directly related" so that the image becomes an education record for both X and Y? Is it the fact that X and Y are active participants in a fight and the district has a specific reason to be interested in this behavior, *i.e.*, districts typically discipline students for fighting?

What if the school district records a student concert and wants to play it on the cable access channel? Are the images of all of the students participating “directly related” to each student, meaning they are education records for each student? If so, why? Would the images be education records if the students’ grades were affected by participating in the concert because the students’ performance would be of interest to the district? Would the images not be education records if the concert was a voluntary, not graded event?

4. If the video image is an education record for students X and Y, may the video image in its entirety be *viewed* without redaction by X’s parents without consent of Y’s parents and vice versa. If so, why?

We understand FPCO’s position to be that since the video image is X's education record, he or she gets to review it under 34 CFR § 99.10(a) without Y's consent and without redaction. How does FPCO reconcile this position with 34 § CFR 99.10(a) which states: “If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student”?

5. If the video image is an education record for students X and Y, may the video image in its entirety be *copied and released* without redaction to X's parents without consent of Y's parents and vice versa? If not, why not?

If an education record can be viewed and inspected, pursuant to 34 § CFR 99.10(d), X has no right under FERPA to receive a copy of the recording. However, whether a district is *permitted* to give X a copy is a different question. We understand FPCO's position to be that X would need Y's consent to receive a copy of the tape, because the tape contains personal information about Y. If X has a *right* to review the video image containing Y, why cannot X be *permitted* to receive a copy of the image containing Y? Practically speaking, if X is to properly defend himself or herself in a court action or a school disciplinary proceeding, the recording may be relevant to X, and the school district should be permitted to release it to him or her.

6. If the video image is an education record for students X and Y, and the media wants to review or receive a copy of the recording, must consent be granted by:

- a. X's parents **or** Y's parents; or,
- b. X's parents **and** Y's parents?

Why?

FERPA does not require a school district to allow the media to view the videotape/disc or receive a copy of it. We surmise FPCO's position is both parents have to consent to allow the tape/disc to be reviewed or released to the media or another third party. If FPCO takes the position X must receive Y's permission to receive a copy of the tape/disc, and vice versa, it stands to reason the media would not have greater rights to have a copy of, or even view, the tape.

7. The district attorney is investigating the fight and wants a copy of the tape/disc. He or she issues a subpoena requesting a copy. Pursuant to 34 CFR § 99.31(9)(ii), does the school district have to notify X, Y, and Z's parents about the subpoena, or only X's and Y's parents?

We assume FPCO's position is that because the tape/disc is not an education record for student Z, he or she should not have to be notified about release of the tape pursuant to a subpoena.

8. What if student A was also captured on the same tape/disc at the same time stealing from a vending machine while the fight was taking place?

- a. Is the video image an education record for student A?

It seems likely that FPCO's position is that student A likely will be disciplined; therefore, the image is directly related to student A and is a student record.

- b. May the video image be *viewed* by A as is without the consent of X's *and* Y's parents or X's *or* Y's parents? Why?

It seems likely that FPCO's position is that student A can view the tape without X or Y's consent pursuant to 34 CFR § 99.10(a). However, does it make any difference that student A's behavior is not "directly related" to the behavior of students X and Y?

- c. May the video image be *copied and released* to A as is without the consent of X's *and* Y's parents or X's *or* Y's parents? Why?

It seems likely FPCO's position will be that the video image only may be copied and released to A with the consent of X's and Y's parents. However, practically speaking for student A to properly defend himself or herself in a court action or a school disciplinary proceeding, the tape may be relevant to A, and the school district should be permitted to release the tape/disc to him or her.

9. What if, on closer look, the district determines that X was the offender and Y the victim and only X will be disciplined? Can X view the tape/disc and have a copy of it without Y's consent and vice versa? Why?

In this instance it seems arguable that the tape/disc is an education record for both X and Y. As discussed above, it makes practical sense that a copy of the tape/disc could be released to X without Y's consent and to Y without X's consent. X may want a copy of the tape/disc to defend himself or herself in a school district or criminal proceeding. Y may want a copy of the tape/disc to determine whether he or she wants to bring a civil action against X or encourage the district attorney to bring criminal charges against X.

If the video image IS an education record for all three students:

10. If X's parents want to view the tape/disc or receive a copy of it, must it be turned over to them with Y and Z redacted out?

This is our understanding of FPCO's position until recently. As discussed above, the difficulty with this position is redaction is expensive, inconvenient, and not always possible. However, if school districts can simply designate video images as directory data, redaction or consent are not necessary.

11. If a non-parent wants to view the tape/disc or receive a copy of it, must consent be granted by X, Y and Z's parents?

We understand FPCO's former position on this question to be yes. One practical difficulty with this position is that often numerous students, not just one, are in the background. Receiving consent from all students captured in a video image could be difficult or impossible.

12. If redaction is required, can the person requesting the redacted tape/video be charged for the cost of the redaction?

Whether a school district can charge a requester the cost of redaction is not discussed 34 § CFR 99.11. We support FPCO taking the position that this fee could be charged to the requester.

Miscellaneous:

13. What obligations under FERPA do school districts have to keep video images of students generally and video images of subjects of interest to the district such as a fight?

A record is only an education record if it is "maintained" by the school district. School districts typically erase and reuse videotapes unless they contain an image of interest to the district such as a fight. School districts have new legal obligations under the E-Discovery Federal Rules of Civil Procedure to make sure electronic data related to potential litigation is not destroyed. Does the district have any legal obligations under FERPA to retain or "maintain" video images of students? If so, when and why?

We appreciate your time and consideration of this matter and await your response.

Sincerely,

Lisa E. Soronen
NSBA Staff Attorney