



FERPA's Health or Safety Exception: Balancing Compliance While Keeping Your Campus Safe


TDOE Student Discipline Institute
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- By Kari D. Shoopman, General Counsel
- Bartlett City Schools


Objectives

- Examine FERPA's Health or Safety Exception
 - A. Define "health or safety emergency"
 - B. Identify FERPA concerns in health or safety situation
- Review Additional Related Authority
- Discuss Limited Guidance and Case Studies

FERPA: Protecting Student PII

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- FERPA generally prohibits release of education records, or PII contained therein, to third parties without written consent.
 - Education Records – “records, files, documents, and other materials which (i) *contain information directly related to a student*; and (ii) *are maintained by an educational agency or institution...*”
 - Personally Identifiable Information (PII) – direct and indirect identifiers that include, but are not limited to, names, address, SSN, student ID, biometric record, date/place of birth, and mother’s maiden name

FERPA: Protecting Student PII


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- Personally Identifiable Information (PII) also includes “other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty” and
 - “Information requested by person who the educational agency or institution reasonably believes knows identity of the student to whom the education record relates”

34 C.F.R. § 99.3


FERPA: Exceptions to Consent Requirement

- Several exceptions to FERPA's written consent requirement can be found at 20 U.S.C. § 1232(g)(b); (h) – (j); and 34 C.F.R. § 99.31. Two exceptions to consider in a health or safety related situation include:
- Directory information – “information...that would not generally be considered harmful or an invasion of privacy if disclosed”
- Emergency exception – “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals”


FERPA: Directory Information Exception

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- Directory information – “information...that would not generally be considered harmful or an invasion of privacy if disclosed”
 - Consult your Board Policy
 - Examples of directory information include, but are not limited to, the following:
 - Name, address, telephone number, e-mail, birth date, place of birth
 - Photograph, grade level, enrollment status, dates of attendance
 - Major field of study, degrees, honors, awards
 - Participation in sports/activities, height/weight of team members; and
 - Most recent educational agency or institution attended


FERPA: Health or Safety Exception

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- “An educational agency or institution may disclose personally identifiable information from an education record to **appropriate parties**, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals”
 - Law enforcement, public health officials, trained medical personnel, and parents.
 - Sometimes includes emergency management agencies


FERPA: Health or Safety Exception

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- “An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, **in connection with an emergency** if knowledge of the information is necessary to protect the health or safety of the student or other individuals”
 - Determined on a case-by-case basis, taking into account the totality of the pertinent circumstances
 - Emergency exists “if the educational agency or institution determines that there is **articulable and significant threat to the health or safety of a student or other individuals**”

FERPA: Health or Safety Exception

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- “An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency **if knowledge of the information is necessary to protect the health or safety of the student or other individuals**”
 - Flexible standard. If rational basis for determining an articulable and significant threat, then DOE will defer to school officials’ judgment. No second guessing
 - Disclosure limited in time and scope. District must record in the student’s records the threat that formed the basis of the disclosure and to whom information was disclosed

Hypothetical


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- Student becomes involved in a verbal dispute with teacher. Dispute escalates, and student directs insults and expletives toward teacher. Teacher sends radio message for admin support to escort student to office. SRO responds to accompany student. On the way out, student throws backpack down, hitting teacher in the leg and says, “Don’t worry. I’ll be back.” Student is expelled 180 days. SRO contacts the local PD, issues a juvenile summons, and requests the student’s discipline file.
 - Do the facts as presented establish a health or safety emergency?
 - Should principal provide discipline records to SRO?
 - Can SRO share records with the prosecutor?
 - What if student hadn’t thrown backpack? Different HSE determination?
 - Should additional facts or details be considered?

Additional Considerations


- Consider other laws related to student records and mandatory reporting. Identify potential conflicts
- Individuals with Disabilities Education Act (IDEA)
- Tennessee Public Records Act (TPRA)
- Mandatory Reports - Child Abuse, Crime, and Health



IDEA: Is the Student at Issue a SWD?


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- The IDEA provides that districts may report to authorities a suspected crime committed by SWD, and in so doing, the district **must**:
 - “...**ensure that copies of** the special education and disciplinary **records of the child are transmitted for consideration by the appropriate authorities** to whom the agency reports the crime”; and
 - “**An agency reporting a crime** under this section **may transmit** copies of the child's special education and disciplinary **records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.**”

Tennessee Public Records Act


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- Tennessee Public Records Act (“TPRA”)
 - “The records of students in public educational institutions shall be treated as confidential...Statistical information not identified with a particular student may be released to any person, agency or the public; and **information relating only to** an individual student’s **name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded** may likewise be disclosed.”
 - More restrictive than definition of directory information under FERPA. Consult District Policy to identify potential conflict

T.C.A. § 10-7-504(a)(4)(A)

Mandatory Reporting Statutes

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- Mandatory Child Abuse Reports (T.C.A. § 37-1-403; T.C.A. § 37-1-605)
 - Must report known or suspected child abuse, neglect, or exploitation. Includes internal investigations and on-campus or supervised events.
 - Mandatory Crime Reports (T.C.A. § 49-6-4209; T.C.A. § 49-6-4301)
 - Must report drugs, weapons, assault and battery, or vandalism endangering life, health, or safety. May report additional crimes
 - “whatever additional information is requested by the law enforcement agency”
 - Mandatory Health Reports (TRR/MS 1200-14-01-.02)
 - “All...other persons knowing of or suspecting a case, culture, or specimen of a reportable disease or event shall report that occurrence to Department of Health...”

Considering Mandatory Reports

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- When investigating/reporting, consider FERPA obligations and the following definitions:
 - Education record
 - Directory information
 - Health or safety emergency
 - Mental impressions, personal observations, personnel records, etc. are not education records
 - Do the events giving rise to the report/disclosure create a health or safety emergency?
 - If no, can/should the report be limited to directory information and personal observations?


Guidance and Related Cases

- Schools often face a difficult balance between maintaining FERPA compliance and following prudent reporting/disclosure practices. What can you tell “them”?
- Most obvious potential/perceived conflicts appear when a student has allegedly committed a crime, but may appear in a variety of health or safety related circumstances such as incidents of bullying, self-harm, physical or mental illness, or child abuse.
- Review related guidance for direction when analyzing your situation on a case-by-case basis



Letter to Anonymous,

115 LRP 33141 (FPCO 05/08/15)

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- Student safety incident compels school to conduct a threat assessment. Team determines student is “high level of risk,” so principal discloses the assessment to local PD and surrounding schools. Parent alleged FERPA violation
 - FPCO concluded it would not substitute its judgment for the district because rational basis for the determination, and no FERPA violation occurred. Good explanation of how emergency exception applies in a practical context
 - The following events have been recognized as an emergency:
 - Student’s suicidal statements, coupled with unsafe conduct and threats against another student. Note: not a blanket exception (*Letter to University of New Mexico* FPCO 11/29/04)
 - Student essay describing/fantasizing about suicide (*Cox v. Warwick Valley Central Sch. Dist.*, 654 F.3d 267 (2d Cir. 2011))
 - Six student deaths from unknown causes within five (5) months (*Letter to J. Chris Toe, President, Strayer University* FPCO 03/11/05)
 - Outbreak of measles, rubella, mumps, or polio (*Letter to Holloway* FPCO 02/25/04)


Letter to Watkins,

118 LRP 45851 (FPCO 02/21/08)


- Dispute arose after a student's shoe went missing in class. Principal asked SRO to investigate on the basis of an alleged theft. Principal and SRO interviewed multiple students and found statements inconclusive, so anticipated no further action. However, SRO prepared incident report and sent it to prosecuting attorney. Attorney then sent letter and report to multiple students' parents. Parent alleged FERPA violation.
 - SRO drafted incident report using information obtained from student education records (complainant and witnesses)
 - FPCO found district violated FERPA when it disclosed, without consent, names, addresses, SSNs, and DOB to SRO
 - In this scenario, if considering SRO as "school official," SRO may not re-disclose PII unless an exception to consent requirement applies




Letter to Strayer University Finding re: School Official Using Access to Education Records...Limits of Health or Safety Emergency Exception (FPCO 3/11/05)

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- Employee and student have verbal disagreement over student's use of fax machine. Two days later, the two “exchanged unpleasantries and [student] allegedly threw a brass business cardholder at [employee]. Employee felt threatened and called police to report the next day
 - Employee allegedly accessed student database to obtain name, address, DOB, race, height, weight, etc. for purposes of filing a police report charging student with assault. Student alleged FERPA violation
 - University argued, among a number of defenses, that health or safety emergency applied
 - FPCO rejected assertion saying fact pattern “does not support a conclusion that there was, in fact, an emergency”

Letter to Strayer University Finding Re: School Official Using Access to Education Records...Limits of Health or Safety Emergency Exception (FPCO 3/11/05)

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- “Department has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”
 - Employee didn’t report the threat until the next day
 - University made no initial determination of whether disclosure was necessary and did not adhere to disclosure record keeping protocols
 - Employee is not authorized to access education records without consent “for anything other than legitimate educational interests.” Employee’s conduct reflected misuse of records and disclosure for personal reasons

Health or Safety Emergency Take Away

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- Health or Safety Exception intended to be an aid during an emergency situation rather than a constraint or impediment
 - Health and safety must remain the LEA's top priority. The “totality of the circumstances pertaining to a threat” allows districts flexibility to make real time decisions.
 - Limited exception. However, districts are not required to wait for 100% certainty in determining a health or safety emergency
 - When in doubt:
 - Can you name the immediate threat and explain why it's credible?
 - Is the disclosure recipient appropriate?
 - Once records are shared, record the disclosure appropriately

Questions?

This presentation is intended for informational purposes only and does not constitute legal advice. The materials should not be construed as legal advice on any specific set of facts or circumstance. Please contact your local Board attorney with questions regarding a specific situation or concern.

Kari D. Shoopman
General Counsel
Bartlett City Schools
(901) 202-0855