Pinellas County School Board Attorneys Office

Legally Speaking

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PCS PINELLAS COUNTY SCHOOLS

Vision
100% Student Success
Mission
Educate and prepare each student for college, career and life.

Student Records—Part 2
Release of Student Records & New Privacy Rules

By David Koperski, School Board Attorney

This article is the second in a two-part series discussing the legal framework surrounding student records, including the rights of parents and students. The last issue of *Legally Speaking* provided definitional background in this area and summarized the four basic rights of parents and students under the Family Educational Rights and Privacy Act ("FERPA"), which is the federal law that governs student records that has essentially been adopted as the law in the State of Florida. Remember that student records, or "education records" as the law calls them, are defined as any type of record that "directly relates" to a student and that is maintained by the school or the district. However, there are some records that are excluded from the definition, such as records in the sole possession of the teacher, or other author, that are not shared with others; please refer to the last article for more information on these exclusions. Lastly, remember that these rights belong to parents of minor students, but transfer to students once they turn 18 years of age. This article

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Legal Department Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the Superintendent and the District by ensuring timely and accurate legal advice and effective representation on all legal matters.

9th Circuit Rules in Favor of Christian Club

By Laurie Dart, Staff Attorney

In September 2023, the 9th Circuit Court of Appeals issued a decision which reinstated the Fellowship of Christian Athletes (FCA) as a student club at a California High School. See, *Fellowship of Christian Athletes v. San Jose Unified School Dist. Bd. Of Educ.,* 2023 U.S. App. LEXIS 24260. The case started when a teacher at the school learned that the FCA required its student leaders to affirm certain core religious beliefs in FCA's Statement of Faith. The Statement of Faith included the belief in the authority of the Bible, the virgin birth, the death and resurrection of Jesus, the ministry of the Holy Spirit, and God's design for marriage. The teacher was particularly offended that student leaders had to affirm the belief that sexual intimacy

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will first address the student record issue that receives the greater number of questions and litigation – namely, when may a school district, without the consent of the parent, release student records or the information contained in them to an outside person or organization. Next, this article will summarize recent developments to enhance the privacy and protection of student records.

The most significant of the four parental rights discussed in the last issue is the right to privacy and confidentiality of student records. Recall that you may always release student records with signed written parental consent. Federal and state law, however, provide exceptions to the general rule of confidentiality. If one or more of these exceptions apply, then we may, and in some cases must, release student records without parental consent. FERPA lists 17 exceptions and Florida law adds others. The following is a summary of the more common of these exceptions. Most of them contain detailed security and non-redisclosure requirements that must be adhered to by the district releasing the records or information and the person or entity receiving them.

1. Other district staff or contractors who are conducting district business. This exception allows records to be released to "school officials" who have a "legitimate educational interest" in viewing the records. For example, a second grade teacher may share a student's records with the third grade teacher who will be teaching the student next year, but cannot share that student's records with a teacher at another PCS school because it is of personal interest. Further, this exception allows us to share records with outside vendors under contract with PCS who are performing an education-related function, but our contract with them would contain restrictions on the use and redisclosure of the records.
2. Officials of other K-12 or post -secondary educational institutions where the student seeks to enroll.
3. Release in connection with state laws that meets certain conditions – numbers 7 and 8 below are examples of exemptions that Florida has added.
4. Parents of eligible students who are dependents of the parents. This exception allows the parents of an 18 year old student who is still a dependent of the parents to view the student's records; otherwise, since the rights of a parent transfer to a student at age 18 (see last issue for a discussion of "eligible student"), a parent would not be able to view their child's records.
5. Court orders or subpoenas, under certain conditions. If we receive a court order or subpoena allowing a third party to view student records, such as a guardian ad litem or a party to a lawsuit in which the family is involved, we must send the parents a notice advising them of this documentation.
6. Health or safety emergency. This exception would allow medical professionals to access a student's health information in an emergency situation.
7. Parties to an interagency agreement between Florida schools, the Florida Department of Juvenile Justice (DJJ), law enforcement, and other related agencies for use in determining the appropriate juvenile and delinquency programs and services for the student and family.
8. Release is to one of a variety of agencies, including DJJ, law enforcement, and the DOE, if the records are reasonably necessary to ensure the safety of the student or others.

Thus, unless one of the legal exceptions applies, we must secure signed written parental consent before releasing student records or any information contained in them to outside persons or entities.

Over the last two years, the Florida Legislature and the DOE have created additional requirements to protect families' privacy rights. First, the 2023 Legislative General Session yielded the Student Online Personal Information Protection Act, which began as Senate Bill 662 (2023). This new law applies to companies operating online services that are intended primarily for student use in K-12 schools. These companies are now prohibited from engaging in certain activities, such as selling student information, using student information to advertise other products, and otherwise disclosing student information unless one of a variety of exceptions applies. The exceptions are very similar to the exceptions discussed above, such as a court order or for safety reasons. Companies that violate this new law can be investigated by the Florida Attorney General, who

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is to be expressed only between one man and one woman within the context of marriage. The teacher posted the FCA statement on a whiteboard in his class asking students how they felt about it and sent e-mails to the principal requesting that they "move right to the question of whether [FCA's] views need to be barred from a public high school campus." He said that "attacking these views is the only way to make a better campus." After a meeting with a "Climate Committee" followed by a meeting with district administrators, the FCA was denied recognition as a school club because it violated the District's non–discrimination policy. The principal testified that the FCA was allowed to continue meeting on school grounds because of the school's obligations under the Equal Access Act, but it was denied the benefits of official recognition under its Associated Student Body (ASB) program. An approved ASB club enjoyed important recruiting tools such as inclusion in the official club list and the student yearbook, and priority access to meeting spaces on campus.

The FCA sued the school district requesting a preliminary injunction which would preclude the district from denying the FCA official recognition. The lower court denied FCA's motion but a divided panel of judges from the 9th Circuit reversed. The full court then granted a re-hearing and reversed the lower court's denial of a preliminary injunction. In framing the argument, the Court stated:

> "Anti-discrimination laws undeniably serve valuable interests rooted in equality, justice, and fairness. And in a pluralistic society, these laws foster worthy goals such as inclusion and belonging. The Constitution also protects the right for minorities and majorities alike to hold certain views and to associate with people who share their same values. Often, anti-discrimination laws and the protections of the Constitution work in tandem to protect minority views in the face of dominant public opinions. However, this appeal presents a situation in which the two regrettably clash."

The Court found that the district selectively enforced its policy citing as examples clubs that only admitted female students (the "Girls Circle," "Big Sister Little Sister Club," and "Girls Who Code") as well as clubs that prioritized membership by ethnicity (the "South Asian Heritage Club"). Additionally, the Court focused on the animosity and hostility exhibited by members of the "Climate Committee." One member accused the FCA of "choos[ing] darkness" and "perpetuat[ing] ignorance," calling them "charlatans," who "conveniently forget what tolerance means." Ultimately, the Court stated that the "Plaintiffs are likely to succeed on their Free Exercise claims because the District's policies are not neutral and generally applicable and religious animus infects the District's decision making."

As a reminder, the Equal Access Act prevents secondary schools that accept federal funds from discriminating against student clubs based on the viewpoint or content of the group's speech. The federal law is described in School Board policy 5730 and provides that when schools allow clubs to use the school facilities, all clubs must have access on the same basis. The clubs must be entirely student led and employees must not participate in the meetings or the agenda but may only supervise to ensure the safety of the students and the facility.

Student Searches and Seizures

By Sara Waechter, Assistant School Board Attorney

Throughout the year, questions arise regarding student searches and seizures at our schools. While the facts of each situation are unique, the law concerning student searches is well-settled.

The Fourth Amendment to the U.S. Constitution protects citizens from unreasonable searches and seizures and requires that search warrants be based upon probable cause. These constitutional safeguards extend into our public schools, although not necessarily to the same extent they would in your private residence or visiting a public park.

While public school students are protected from unreasonable searches and seizures under the Fourth Amendment, the level of that protection is modified. In the 1985 case of *New Jersey v. T.L.O.*, the U.S. Supreme Court ruled that school officials need only possess a "reasonable suspicion," as opposed to "probable cause," to justify a search or seizure of a public school student. The Court recognized the unique status of public schools in our society and the need to protect the learning environment. Based upon these reasons, the Court concluded that school officials do not need a warrant or probable cause before searching a student suspected of breaking school rules or committing a criminal offense.

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can also bring certain enforcement actions in court.

Second, and in alignment with the new law above, the DOE recently amended State Board of Education Rule 6A-1.0955. The amendments enhance security measures that school districts must implement to protect student information from potential misuse and protect students and families from outside companies' data mining and targeted advertising.

Our School Board and District have always prohibited our vendors from re-disclosing student information or using it beyond what is needed for them to perform their work. We require robust contractual provisions that contain the necessary provisions and hold our vendors accountable for any data breaches that occur under their watch.

Student information, and the confidentiality of it, is one of the most significant legal issues in public schools. All district staff, regardless of how often you are exposed to student information, needs to be informed of the basic rules in this area and remain vigilant to not disclose it unless needed for an employee or contractor to do their job, or some other exception applies.

When in doubt, please contact the Legal Department.

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The Court outlined a two-prong test to determine whether a school official has reasonable suspicion to search a student. First, the search must be justified at its inception. This prong is met if there are reasonable grounds for suspecting the search will reveal evidence that the student has violated or is violating the law or school rules. In practice, the more severe or imminent the threat (for example, a firearm or other weapon), the more latitude will be given to search. Second, the search must be reasonably related in scope to the objectives of the search and not excessively intrusive in view of the age and sex of the student and the nature of the infraction.

In the years following the Court's opinion in *T.L.O.*, Florida courts have built upon that foundation and clarified that reasonable suspicion requires proof that school officials have specific and articulable facts that, when taken together with the rational inferences from those facts, reasonably warrant the intrusion. A "gut feeling," "hunch," or other generalized suspicion that something is wrong does not give rise to reasonable suspicion to justify a search. The factual basis used to support the search of a student may be based on direct observation and/or information provided by others. Additionally, the reasonable suspicion standard also applies to law enforcement officers employed by outside police departments who are working as full-time school resource officers in our schools.

In alignment with the Courts, the reasonable suspicion standard for student searches has long been codified in Sec. 1006.09 (9), Fla. Stat. More recently, HB 1537 created Sec. 1006.09 (10), Fla. Stat., during the 2023 Legislative Session and requires that any search of a student's personal belongings be conducted discreetly to maintain the student's privacy. Further, personal items that are not prohibited on school grounds must be immediately returned to the student.

For case-specific questions concerning student searches, please contact your Area Office or the Legal Department for assistance.

The School Board Attorney and Staff Attorney Offices would like to wish you and your families a Safe and Happy Holiday Season