

Legally Speaking

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Student Records—Part 1 Background & Parental Rights

By David Koperski, School Board Attorney

The issues surrounding student records remain some of the most significant legal issues in public schools, even if parents, students, and staff have little occasion to think about them. These issues impact many aspects of our daily work, including inputting a student’s grades, pulling videos of incidents at schools, and evaluating a student for ESE services. Recently, the federal and state governments have renewed their focus on the privacy of student records and information, especially in light of the increased use of online educational services, whether they take the form of direct instructional services provided by vendors to students online, or district-level vendors providing system-wide products to assist us in serving families. In fact, as of the publication of this newsletter, the Florida Legislature is considering bills to enact a new Student Online Personal Information Protection Act. See SB 662 and HB 699 (2023).

This article is the first in a two-part series discussing the legal framework in this arena. It will

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Charter Schools as State Actors

By Laurie Dart, Staff Attorney

A North Carolina charter school’s dress code required that girls wear skirts, a jumper or skorts to school. The parents of three children complained, and the issue resulted in a federal lawsuit alleging a violation of the Fourteenth Amendment’s Equal Protection Clause and Title IX, the federal statute that prohibits sex discrimination in federally funded education programs.

Ultimately, the U.S. Court of Appeals for the Fourth Circuit concluded in *Peltier v. Charter Day School* that banning girls from wearing slacks or shorts is an impermissible gender stereotype in violation of the Equal Pro-

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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.

Student Records— Part I
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provide basic information on the law and discuss the four rights provided to parents and adult students. Part II of this series, which will be in the next issue of *Legally Speaking*, will detail the specific exceptions that allow us to release student records, and the information contained in them, without parental consent, as well as an in depth discussion of new rules regarding privacy and online educational service providers.

Student records are governed by Florida and federal law, and School Board Policy 8330. On the state level, we look to sections 1002.22-.225, Florida Statutes, as well as the 2021 Parents’ Bill of Rights located in Chapter 1014, Florida Statutes. These laws generally defer to state law on this issue, the Family Educational Rights and Privacy Act (“FERPA”). See 20 U.S.C. 1232g; and 34 C.F.R. Part 99.

Student Records Defined

Student records, or “education records” as they are referred to in the law, are defined as any information, whether we created or received it, recorded in any way that are: (1) directly related to a student; and (2) maintained by the school district or a party acting for us. This definition is very broad and encompasses not only the traditional records located in Focus and in a student’s cumulative file, but also other records such as videos used in student discipline matters and district forms submitted by parents. But, certain records are specifically exempted and are not entitled to be

treated as student records, such as records kept in the sole possession of the maker (like a teacher) and not shared with others, records created about a student after they have already left our system, and records of our PCS Police Department.

Parental Rights Under the Law

FERPA creates four rights for parents and adult students. These rights belong to parents, but transfer to their students when they reach 18 years of age or attend an institution of postsecondary education – these students are known as “eligible students.” In the case of eligible students, the parents may still review a student’s records so long as the student is a dependent of the parent for purposes of federal income taxation, which is usually determined by the student living in the parent’s household. This right of the parent of an eligible student is one of the exceptions to being able to release records without parental (or, in this case, an eligible student’s) consent, which will be discussed in Part II of this series.

Note that in the case of divorced or separated parents, both parents retain all of these rights unless a court order specifically severs them, such as an order stating that a parent cannot access the child’s records. Further, in the absence of a biological or adoptive parent, we may and should rely upon the direction of the person who meets the expanded statutory definition of “parent” that includes “any person in a parental relationship to a student, or any person exercising supervisory authority over a student in place of the parent.”

The rights that belong to parents and eligible students are:

1. The right of privacy and confidentiality of student records and the personally identifiable information contained in them. Absent an exception, which will be discussed in Part II, we may not release student records to outside persons or entities, or even other PCS employees who do not have a legitimate educational interest in the records, without written parental consent. A “legitimate educational interest” exists where the employee or vendor needs such record or information in order to do their job. In order to access a student’s education record, the school official must have an educational interest concerning that specific student.
2. The right to inspect and review student records maintained by the school. We are not legally required to provide copies of records unless certain criteria are present, such as a great distance making it impossible for parents to come to school to review the records. However, we may and usually do provide copies electronically or in hard copy, in which latter case we may charge 15 cents per page for the copies.
3. The right to seek amendments to records

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Parental Consent for the Columbia Protocol

By Sara Waechter, Assistant School Board Attorney

The Baker Act is a state law that allows courts, law enforcement officers, and certain medical personnel to order people who could do harm to themselves or others be involuntarily examined for up to 72 hours. In the school setting, prior to a student being subjected to an involuntary examination under the Baker Act, the Columbia Protocol questionnaire is administered to determine the level of risk and make recommendations for the safety and well-being of the student. The results of the Columbia Protocol help guide the decision on whether to proceed with an involuntary examination of the student.

Concerning this process, section 1001.42(8)(c), Florida Statutes, as amended by HB 1557 from the 2022 legislative session, requires schools to provide a copy of any student well-being questionnaire or health screening form to a student's parent(s)/guardian(s) and obtain their consent before administering the questionnaire or screening to students in kindergarten through 3rd grade. Importantly, parental consent is only required for students in kindergarten through 3rd grade and is not required for students in grades 4 through 12. As the Columbia Protocol directly concerns a student's health and well-being, it is governed by section 1001.42(8)(c), Florida Statutes. Consequently, before school-based mental health personnel can administer the Columbia Protocol to a student in kindergarten through 3rd grade, they must provide a copy the questionnaire to the student's parent(s)/guardian(s) and obtain their consent to proceed with the questionnaire. Simply put, if parental consent is not received, the Columbia Protocol cannot be administered to a student in kindergarten through 3rd grade.

However, while parental consent is required to administer the Columbia Protocol to students in kindergarten through 3rd grade, parental consent is not required to proceed with an involuntary examination of a student in any grade. In circumstances where consent is not given or cannot be obtained for the Columbia Protocol, school-based personnel cannot administer the questionnaire, but are still permitted to proceed with the involuntary examination of a student pursuant to the Baker Act.

Charter Schools as State Actors

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tection of the Equal Protection Clause of the U.S. Constitution.

The case attracted a great deal of briefs filed in support of the opposing positions. The interest in the case, however, was not because the organizations necessarily cared whether the girls wore skirts or pants. Rather, the case generated debate because the charter school's primary argument was that a claim alleging a violation of the constitutional right to equal protection can only be brought against a person or entity acting under "color of law" and they argued that the school was not a "state actor" for purposes of the constitutional claim. In a divided ruling, the Fourth Circuit disagreed stating:

CDS operates a "public" school, under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state's constitutional obligation to provide free, universal elementary and secondary education to its residents. Accordingly, we hold that in operating a school that is part of the North Carolina public school system, CDS performs a function traditionally and exclusively reserved to the state. ...

Ultimately, the state action inquiry in this case is not complicated: (1) North Carolina is required under its constitution to provide free, universal elementary and secondary schooling to the state's residents; (2) North Carolina has fulfilled this duty in part by creating and funding the public charter school system; and (3) North Carolina has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools.

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that parents believe are inaccurate, misleading, or otherwise in violation of the student's privacy rights. School Board Policy 8330 provides the procedure for asking for such an amendment and the impartial hearing that is required by law.

4. The right to file a complaint or sue the school district concerning alleged failures to comply with the law. Complaints can be filed with the USDOE's Student Privacy Policy Office. Under Florida law, aggrieved parents may also file a civil lawsuit and be awarded attorney's fees if successful.



Staff, especially school-based staff, should always be cognizant of these rights. If you are unsure how to resolve a specific student records issue, please seek input from your school administration or the Legal Department. In our next issue, we will explore the various exceptions to the general rule that we cannot release student records without parental consent, as well as discuss the new rules regarding online educational

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Accordingly, the public-school operator at issue here, CDS, implemented the skirts requirement as part of the school's educational mission, exercising the "power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law." Under these circumstances, we will not permit North Carolina to delegate its educational responsibility to a charter school operator that is insulated from the constitutional accountability borne by other North Carolina public schools.



This past fall, the charter school petitioned the United States Supreme Court to review the case arguing that the Fourth Circuit ignored Supreme Court precedent and decisions from sister circuits finding that private non-profit charter schools were not state actors. Several organizations have filed amicus curiae briefs in support of the charter school's petition asking the Supreme Court to review and overturn the decision of the Fourth Circuit. In January, the Supreme Court invited the Solicitor General to weigh in and express the views of the administration. If the Supreme Court accepts the case for review, it will likely be decided next year.

***The School Board Attorney
and Staff Attorney Offices
would like to wish you and
your families a Safe and
Happy Summer!***