

BUILDING AN INFORMATION SHARING BRIDGE BETWEEN THE SCHOOL & LAW ENFORCEMENT COMMUNITY: A STRATEGIC APPROACH

Author's Note: This document is not intended to serve as a legal tutorial or procedural mandate. It is simply a suggested set of guidelines, coupled with key elements of Federal and Virginia law, with the goal of enhancing the ability of school and police personnel to share information in order to reduce risk to students, staff, and police personnel within the school environment and beyond.

Understanding and Navigating the Family Educational Rights & Privacy Act (F.E.R.P.A.)

F.E.R.P.A. is an intricate federal law whose purpose it is to protect the rights and privacy interests of both parents and students with regards to the student's educational records. F.E.R.P.A. is codified in Title 34 of the Code of Federal Regulations, Section 99 et. Seq. F.E.R.P.A. was designed to protect the **maintained educational record of the student.**

The main thrust of F.E.R.P.A. was essentially to provide four basic rights:

- To provide the parent to inspect and review their child's educational record.
- To allow the parents the right to request an amendment to those records by way of due process.
- To provide the parent with some right of control over the disclosure of information from those educational records of their child by requiring the school district to obtain the "prior consent" of the parent before such educational record would be released to an authorized party.
- To provide the student the right upon turning the age of 18 or upon entering college to have the parent's control over the record transferred with all existing rights to the student. The student, upon turning 18 or entering college, becomes "an eligible student" thereby obtaining full rights over the records.

F.E.R.P.A. also requires school districts to notify parents and eligible students on an annual basis of their specific rights under the Act.

The term "educational record" can include the following examples:

- report cards
- surveys
- assessments
- health unit records
- specialized records
- disciplinary records
- information about parents
- personal identification information on students
- correspondence between schools about students

The educational record of the student may also include other materials such as films, tapes, or photographs containing information directly related to a student that an educational agency or institution or person acting for the agency has actually recorded into the education record of the student and maintains that record.

The simple placing of a document into a student's file or the fact that a document related to the student simply exists does not automatically bring F.E.R.P.A. protection to that item or that document. Consider the following two examples:

- Investigative Statements Acquired From Students
 - Any statement acquired from a student, verbal or written, during the course of a school investigation is not automatically by its nature part and parcel of a student's permanent educational record at the time that the statement is taken or made.
 - If the statement is obtained during the course of a school disciplinary investigation for school disciplinary purposes, it may be shared with police officers for the purpose of pursuing a criminal investigation and determining whether the statement contains any evidence of criminal activity or involvement in a crime.
 - Generally speaking, a copy of the written statement can be given to law enforcement officials investigating the school-related incident for the sole purpose of determining its relationship to the investigation.

- School Cameras – Students on Film
 - Schools across Virginia have exercised their right to place cameras in legally approved areas within the three school authority zones in Virginia, which are school buildings and grounds, school buses and other official school transportation vehicles, as well as school-sponsored activities. The purpose of the camera system is to gather evidence of school violations which may or may not be criminal acts.
 - Schools own the cameras and the film. Film which contains the image of the student and the actions recorded is not automatically protected by F.E.R.P.A. The film may be used as evidence for purposes of student due process or criminal prosecution.

It is important to emphasize that once an investigative statement and/or film of the student becomes part of their permanently maintained educational record, it has the ability to gain the protection of F.E.R.P.A. Schools generally have broad discretion on how these items are handled.

F.E.R.P.A. protection, in its simplest terms, means that anyone requesting access to a student's permanently maintained educational record cannot access any document or item that falls within that record unless one of three conditions have been met:

- The individual or entity has obtained the prior, written consent of the parent to access that particular record if the student is under the age of 18;

- The individual or entity has obtained the prior, written consent of the student to access that particular record if the student is 18 or older;
- The individual or entity qualifies under one of the enumerated exceptions to the F.E.R.P.A. prior consent requirements, meaning, they can access the record without the prior written consent of the parent or student depending upon the circumstances (34 C.F.R. 99 et. Seq.)

Example: A local employer, who regularly hires high school students, visits the high school to request a copy of a student's grade transcripts. That particular student had filled out an application for employment and did not attach their grade transcripts as requested. The employer does not qualify under any of the enumerated exceptions to F.E.R.P.A. and, therefore, must obtain the prior, written consent of the parent if the student is under the age of 18 or the student if the student is 18 or older to access and obtain that transcript.

Notable Exceptions to the Prior Consent Requirement of F.E.R.P.A.

An educational agency need not obtain prior consent of the parent or the student before allowing access to the record/information being requested if the requesting individual or agency meets by example one of the following exceptions:

- To other school officials, including teachers, within the school or school district who have been determined to have legitimate educational interests. (A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.) (See 99.31 (a) (1) of the F.E.R.P.A. regulations.)
- To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll. (See 99.34 of the F.E.R.P.A. regulations.)
- To state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are being released. (See 99.31(a)(5) and 99.38 of the F.E.R.P.A regulations.)
- To comply with a judicial order or lawfully issued subpoena. The regulations direct the school to make a reasonable effort to notify the parent or eligible student of the court order or subpoena in advance of compliance. (See appendix C for sample court orders.) However, the IASA amendments removed this notification requirement for instances in which a court or other agency issues either a Federal Grand Jury subpoena or a subpoena for a law enforcement purpose and the court has ordered the school not to disclose the existence of the subpoena. (See 99.31(a)(9) of the F.E.R.P.A. regulations.)
- In connection with a health or safety emergency. (See 99.31(a)(10) of the F.E.R.P.A. regulations.)
- To teachers and school officials in other schools who have legitimate educational interests in the behavior of the student when the information concerns disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student,

other students, or other members of the school community. (See 99.36 of the F.E.R.P.A regulations.)

- To provide information that the school district has designated as “directory information.” (See 99.37 of the F.E.R.P.A. regulations.
- To provide information from the school’s law enforcement unit records. (See 99.3 definition of “education records” and 99.8 of the F.E.R.P.A. regulations

The last two exceptions noted above, the “directory information” exception and the law enforcement unit exception, warrant further comment as they are heavily used by school districts and police departments. A school may disclose the directory information from the educational record of the student without prior parental consent so long as the school gives notice to the parent of its intention to release that information, giving the parent the option to object.

- Directory Information Exception includes, but is not limited to, the following information:
 - The student’s name
 - The student’s address and telephone number
 - The student’s date and place of birth
 - The student’s major field of study
 - Official activities that the student participates in, such as officially recognized sports and other school related activities
 - The student’s dates of attendance at that particular school, including enrollment date and leave date which would also include date of graduation, if applicable
 - The weight and height of the student if the student is a member of an athletic team
 - Degrees, awards and honors received by the student
 - Name and address of most recent school or educational institution that the student had previously attended
 - A photograph of the student
- The Law Enforcement Unit Exception:

The second often used and notable exception worth further discussion is the law enforcement unit record exception. Information obtained from a school’s law enforcement unit record is not a violation of F.E.R.P.A. (as opposed to the student educational record).

F.E.R.P.A. further specifically designates educators with the power to employ commissioned police officers, who are responsible for enforcing laws or officially designated individual in the school district, to carry out the responsibilities of a law enforcement unit. This designated individual is often called a school resource officer (SRO) who, on a daily basis, carries out the responsibilities of the law enforcement unit. This arrangement should always be formalized in writing by way of a formal memorandum of understanding or agreement (MOU/MOA). This document is the official formal designation of the individual entity (SRO) being called a law enforcement unit.

If the law enforcement officer opens, supervises, and maintains the record that is utilized for the purpose of gathering information directly to a law enforcement investigation, that record does

not fall under the purview of F.E.R.P.A., therefore, parents and students do not have the automatic right to access that record and information from that record can be released without the prior consent of the parent/student.

It is important to emphasize that F.E.R.P.A. governs record access only and is not the gatekeeper nor does it control oral communications, observations, oral history, reactions, or opinions that are related to the student, their words, and/or actions. F.E.R.P.A. does not serve as a hurdle to the oral exchange of information that pertains to the safety and well being of a student. Only if the oral information is being obtained directly from a review of the record does F.E.R.P.A. protection apply.

Key examples of information exchanged by school and police personnel that are not protected by F.E.R.P.A. include but are not limited to the following:

- Communicated threats of violence
- Threatening behavior
- Unusual or significantly disrupted behavior
- Stalking
- Harassment, intimidation and/or bullying
- Suicidal ideation

School and police personnel hear and see the warning signs every day promulgated by a student who is “at risk.” This information can be exchanged freely.

Applicability of F.E.R.P.A. to the Virginia School Threat Assessment Process

Scenario: A student posts a threat on Facebook and references a recent school shooting. The student was involved in a prior altercation and specifically related to that altercation, he informed another student he would bring a gun to school to settle the score, which lead to the resulting Facebook posting.

In response to this posed threat, school and law enforcement officials may act immediately and cultivate information from what they hear, see, smell, and feel regarding the incident. They may also consider prior observations and communications of the student, the reaction of the student once confronted, and the atmosphere within the school related any way to the incident. All of this falls outside the control of F.E.R.P.A. as no record access at this time is being attempted.

Some key law enforcement options are:

- Interviewing the students, parents, and witnesses
- Obtaining a lawful search warrant, if circumstances permit, to search the student’s house
- Lawful search of the student based upon probable cause before the student re-enters the school zone

Some key school options are:

- Interviewing the students involved and witnesses
- Meeting with the parents to gain an understanding of the student’s home environment and circumstances surrounding the incident

- Performing a lawful search of the student and/or their belongings based upon reasonable suspicion of a potential school violation that is related to the incident
- Determining the appropriate process for handling the incident through the school's threat assessment team protocols

It is the decision by either law enforcement or schools to access the student's maintained educational record that triggers F.E.R.P.A. protection. School and law enforcement personnel have discretion under F.E.R.P.A. to access the student's records without the prior consent of the parent/student by way of the following examples:

- The school may access the student's record because it has a legitimate educational interest in doing so
- The school may access the student's record when the student's behavior poses a significant risk to the safety or well being of that student, other students, or members of the school community
- Further, the regulations promulgated by the Secretary of Education pursuant to F.E.R.P.A. may disclose to appropriate parties, including law enforcement, personally identifiable information from the educational record of the student if the release of that information is in connection with an emergency and knowledge of that information is necessary to protect the health or safety of the student or other individuals. In making this decision, an educational agency may take into account the totality of the circumstances pertaining to a threat, to the health, or safety of a student or other individuals. This is a judgment call by the school officials based on the information available. (See Commonwealth of Virginia Opinion of the Attorney General May 3, 2013, 12-096. Also see 34 C.F.R., Section 99.36(a).)
- Finally, under Section 22.1-287 of the Code of Virginia, a school official may permit local law enforcement to access a student's record for the purpose of seeking information related to the duties of that particular law enforcement officer and also may disclose identifying information from a student's record for the purpose of furthering the ability of the juvenile justice system to effectively serve the student prior to adjudication.

The magic word that is consistent throughout the F.E.R.P.A. regulations and set forth in the Virginia statute above is the word, "may," not must. It is, therefore, paramount for school and police personnel to reach an agreement on how, when, and why access to student records will take place when the basis for accessing those records is directly related to the safety and well being of that student, other students, or staff.

A Vital Tool for School and Law Enforcement Personnel: A Viable Memorandum of Agreement (MOA)

Too often, memorandums of agreement are hollow documents that merely memorialize the fact that schools and law enforcement should work together. Memorandums of Agreement, for purposes of information sharing, should, in fact, serve as an operational template to be utilized on a daily basis. It is suggested that the following components should be considered:

- School and law enforcement personnel have broad discretion to, at the very least, immediately share information regarding a potential safety threat without restriction.

- There should be a consensus on what general criteria will provide school personnel with a comfort level to allow law enforcement to access necessary student records with the understanding that the access to those records can be provide statutory protection at both the Federal and Commonwealth levels for both parties.
- Although required by law, which means you are protected by law, Section 22.1-27.3:1 of the Code of Virginia should be incorporated by reference into the MOA. That section covers in detail all of the acts committed by a student within the three key school zones (school property, school transportation vehicles, and school-sponsored activities) which police are required to report to schools and schools to police.
- Section 22.1-79.4 of the Code of Virginia, which authorizes and requires schools to establish threat assessment policies and procedures, form a threat assessment team (which law enforcement may participate in), and provide guidance to students and staff on recognizing and reporting threatening or aberrant behavior.
- Section 8.01-47 of the Code of Virginia should be emphasized as it grants immunity from civil liability to any person who, in good faith, reports actions or behavior to authorities that may pose a threat to others.
- Electronic devices possessed and used by students are the window to understanding their mindset and intent in making and carrying out threats or in exhibiting aberrant behavior. It is, therefore, incumbent upon school and police officials to incorporate a clear policy and procedure for the seizure and search of electronic devices and the requisites for doing so under criminal law by a police officer and under civil law by a school official. This information is not protected by F.E.R.P.A. but is subject to laws as they pertain to seizure and search in the Commonwealth.
- Subpoenas and search warrants are often issued out of necessity to gain information that can otherwise be provided voluntarily by schools without legal repercussion. However, it is important to note that these documents provide legal protection to both the requestor and the provider of the information being sought. It should be stressed in the MOA that cooperation is the key and subpoenas and search warrants are a necessary last resort without negative reflection on the police department or on the school.
- While it is important to note that F.E.R.P.A. views records kept by a school nurse as being protected by F.E.R.P.A., the same safety exceptions to access those records would apply. Further, access to medical records, including mental health history as protected by H.I.P.A.A., 45 C.F.R. 164.512(j) specifically allows a medical provider to disclose patient information, including records if necessary, to law enforcement, family members, or other persons (emphasis supplied) who may reasonably be able to prevent or lessen the risk of harm posed by the subject of that record to themselves or anyone else. This is most commonly utilized when there is a credible threat to inflict serious and imminent bodily harm. Again, the magic word is, “may.” This safety exception under H.I.P.A.A. has been codified under Virginia Code Section 32.1-127.1:03, Health Records Privacy, specifically, subsection (c)(6).

Summation

F.E.R.P.A. and corresponding Virginia law clearly allow police and school personnel the discretion to exchange information and to take steps to prevent, reduce, and/or respond to safety concerns that arise within the school environment or originate from outside the school environment under the statutory protection provided above. The bottom line is that school and police officials must have a meeting of the minds that places the safety of students, staff, and officers above all other issues and develop a formula for exchanging critical information that includes record access when it is necessary to do so. It is critical to leverage the many options afforded under F.E.R.P.A. and Virginia law, as set forth above, that reduce the risk to all.