

## **Student E-Mails, FERPA and FOIA: What School Districts Must Disclose (and When)?**

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### **Education Law Notes**

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Among other things, the federal Family Educational Rights and Privacy Act (“FERPA”) grants parents access to educational and related records concerning their child. Under FERPA, “education records” are broadly defined as those records “that contain information directly related to a student and are maintained by an educational agency” or a party acting on its behalf. Similarly, the Connecticut State Department of Education regulations governing special education provide that parents have the right to inspect and review “any education records relating to their child which are collected, maintained or used by the board of education.”

While these definitions are broad, an issue has repeatedly arisen as to whether e-mails between school employees about a student are education records covered by FERPA, especially if they are not maintained centrally in the student’s files. At least two courts had answered this question in the negative. S.A. v. Tulare County Office of Education, 2009 WL 3126322 (E.D. Cal 2009) (“education records” as understood under FERPA are those that are maintained by a single custodian; and that Congress could not have meant every single record kept by any individual related to a student); B.F. v. Fulton County Sch. Dist., 2008 WL 4224802, \*21 (N.D. Ga. 2008). As such, these courts ruled that school districts were not required to provide staff e-mails to parents under FERPA.

The Connecticut Department of Education’s Bureau of Special Education (“BSE”) recently opined on this issue and appears to agree with the logic of these court decisions. In Complaint No. 19-0486, (Schierberl, 2019), a parent of a student receiving special education made a written request of a school district for a complete copy of the student’s education record, and specifically sought all e-mail communications, including e-mails regarding the parents. The district conducted a search for all responsive e-mails on its computer operating systems, which yielded over 4,000 pages of e-mails. These e-mails were not found in one location (such as a child-specific computer folder). The e-mail messages were not printed and placed in the student’s permanent physical files. The district generally did not provide the e-mail communications to the parents.

The BSE concluded the e-mails retrieved by the district were not education records covered by FERPA. The BSE referred to the above definitions of education records in FERPA and the Connecticut regulations, which both referred to records that are “maintained” by a school district. The BSE noted that the ordinary meaning of the word “maintain” is “to keep in existence, preserve and retain.” The BSE found that e-mails “that are used as a communication tool and not maintained do not fit within the definition of an education record”

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under these laws. While finding that e-mails that are deliberately maintained by being printed and placed in a student's physical file would be viewed to be education records, the BSE determined that e-mails "that are merely stored in a public school's computer network system and not treated in a special way, organized or printed, would not be reasonably viewed as being maintained" and would not constitute education records under FERPA.

**What does this all mean (i.e., "not so fast")?** While e-mails that are not placed in a student's physical files are not covered by FERPA (and its mandate to maintain and provide access to records for parents), this is not the end of the story. Even if they are not education records under FERPA, such e-mails may still be subject to a request by a parent for the e-mails under Connecticut's Freedom of Information Act ("FOIA"), not to mention a subpoena issued during legal proceedings. There are student privacy protections that are incorporated into the FOIA, which protect against the disclosure of student names and addresses (and by extension other personally identifiable information) without a parent's consent. However, a parent could use the FOIA to request and obtain records concerning his/her **own** child, since there would be no such invasion of privacy (and since parents can obviously consent to the disclosure of information regarding their own child). *Understanding Connecticut's Freedom of Information Act*, by Mark J. Sommaruga, (5<sup>th</sup> Edition, 2018), p. 62. In addition, the FOIA and Connecticut's record retention laws would prohibit a school district from simply deleting these types of e-mails (regardless if covered by FERPA). **PLEASE NOTE:** While entitled to one free copy of "education records" under the Connecticut special education regulations, parents would have to pay applicable fees for copies of records provided under the FOIA.

**Posted in** Special Education, The Freedom of Information Act (FOIA)

**Tags:** CT State Department of Education (CSDE), Family Educational Rights and Privacy Act (FERPA)