

Teach On! Remote Group Instruction, Student Privacy, and FERPA in the Age of the Coronavirus

Education Law Notes

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In the otherwise forgettable Star Wars film *The Phantom Menace*, Emperor Palpatine proposes a course of action that his advisers warn is not legal, to which he succinctly responds: “I’ll make it legal!” If only life were that easy. Given the unprecedented nature of the current COVID-19 crisis, however, determinations as to what is or is not “legal” are being made regarding issues for which there is no clear guidance. This lack of clarity is reflected in the fact that the United States Department of Education has generated at least four advisories in the last week alone pertaining to the provision of remote learning, most of which still fail to

provide definitive standards. Instead, using a kind of Monty Pythonish “wink-wink-nudge-nudge-say-no-more,” approach, the Department appears to be attempting to loosen previously strict readings of applicable laws so as to better contour them to the unanticipated and exigent realities of this public health crisis.

Given that public schools are one of the most highly regulated entities on both the state and federal levels, they have become one of the primary crucibles of this new reality. A particularly pressing concern has been determining how to handle student privacy rights in the course of providing remote instruction. In fact, citing the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g [“FERPA”], some have even advised districts that they cannot provide remote group instruction. Such a narrow reading of the law, however, is simply unrealistic. Considering that school districts are confronting the Herculean challenge of educating thousands of students of different ages, abilities, and conditions inside their respective homes, a more reasonable reading of the Departmental tea leaves is that remote, group instruction does **not** constitute a violation of FERPA.

In its March 16, 2020 Fact Sheet, the United States Department of Education’s Office for Civil Rights [“OCR”] recognized that if students are “required or advised to stay home . . . for an extended period of time because of COVID-19, provision should be made to maintain education services.” In its March 21, 2020 Supplemental Fact Sheet, OCR reiterated: “The Department stands ready to offer guidance, technical assistance, and information on any available flexibility, within the confines of the law, to ensure that all students, including students with disabilities, continue receiving excellent education during this difficult time.” With respect to

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that “excellent education,” OCR went on to observe: “As school districts nationwide take necessary steps to protect the health and safety of their students, many are moving to virtual or online education (distance instruction).”

Given this “unique and ever-changing environment,” OCR admitted that both it “and OSERS recognize that these exceptional circumstances *may affect how all educational and related services and supports are provided*” (emphasis added). Consequently, “the Department will offer flexibility where possible,” acknowledging that with respect to disabled students in particular, “the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.” Although OCR’s March 21 supplemental guidance specifically references the IDEA, Section 504 of the Rehabilitation Act, and the ADA, it would be antithetical to its message of flexibility were it to simultaneously hold school districts to a strict reading of FERPA. It would also strain credulity to believe that the Department anticipates that virtual instruction will be delivered individually to each student.

Nonetheless, some have warned against remote group instruction because the electronic portal that enables teachers and students to connect may also make students visible to others within their respective homes. They assert this is a violation of FERPA. That argument, however, has no validity. In its December 8, 2003 *Letter to Mamas*, the Department stated that “FERPA does not specifically prohibit a parent or professional working with the parent from observing the parent’s child in the classroom.” In short, the fact that the observing parent will see other students in the classroom is not a violation of FERPA. The same is true in the context of virtual instruction, particularly given that in its most recent, March 2020 guidance, the Department’s Student Privacy Policy Office [“SPPO”] advised that *Letter to Mamas* “is also applicable to virtual classrooms.”

It must also be noted that the Department’s guidance regarding classroom observations extends to the parents of special education students as well as to the families of their typical peers. In fact, *Letter to Mamas* pertained to a special education student. Furthermore, and as previously noted, in its March 21, 2020 supplemental guidance, OCR recognized that special education will very likely be provided “virtually, online, or telephonically.”

Some objections to remote group instruction also pertain to the substance of what may be discussed in the course of the virtual instruction. Most rational instructional staff would not share a student’s educational records with other students while in the classroom, and there is no reason to believe they would act otherwise in a virtual setting. In its *Letter to Mamas*, the Department noted that “FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records.” FERPA defines “records” as “any information recorded in any way,” and virtual instruction is a kind of live instructional “broadcast.” While it is possible that a particular lesson might be taped in order to provide it to students who were absent, FERPA considers a video a record

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only if it is maintained by the school district, which this arguably would be, and if it is “directly related to a student,” which just as arguably this would not be.

It may be likely, however that a student’s name would be used, and the SPPO noted in its March 2020 FAQs that personally identifiable information – the disclosure of which can constitute a violation of FERPA – includes “a student’s name . . . as well as other information that can be used to distinguish or trace an individual’s identity.” FERPA, however, also considers a student’s name – as well as his or her image – as the sort of information that school districts can designate as “Directory Information,” which “means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” Given that FERPA itself does not consider the disclosure of directory information “harmful or an invasion of privacy,” it would be difficult for a parent or student to argue otherwise were the student’s image or name observed or heard by a third-party in a virtual instructional setting.

In any event, most districts issue a directory information notice at the start of every school year, and if a parent or adult student has not provided timely notice that it does not agree with the directory designation, then the district is free to use the student’s name and other information contained in that directory notice. If the district has not routinely issued such a notice, it could do so at this juncture, with a tight response deadline, but that could result in the conundrum of what to do next if some parents opt out of the directory designation. A district would obviously be hard-pressed to deny the students an education, and in issuing the new directory notice, it would have essentially admitted that the students’ names constitute personally identifiable information, thereby potentially admitting a FERPA violation if, in fact, the names were used. In short, it would be a lose-lose situation.

Therefore, perhaps it would be prudent to not take any such affirmative action at this juncture but instead rely upon directory notices previously sent or, at the very least, upon the Department’s *sotto voce* (in print form) reassurance about flexibility and understanding in this era of what OCR termed “exceptional circumstances.” While there are no guarantees that a district would emerge unscathed from a FERPA complaint, keep in mind OCR’s observation that “school districts nationwide [are taking] necessary steps to protect the health and safety of their students,” and that in taking those steps, both OCR and OSERS recognize that the COVID-19 pandemic “may affect how all educational and related services and supports are provided.”

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Tags: Family Educational Rights and Privacy Act (FERPA), Free Appropriate Public Education (FAPE), Office for Civil Rights (OCR), U.S. Department of Education, Virtual Learning