

FOIA, FERPA and Other Acronyms Not Necessarily Beginning with 'F': A Review of Information Privacy Issues in Public Education in the Information Age

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I. INTRODUCTION

Schools have been collecting student and employee data for decades. Until fairly recently, however, most organizational data resided on paper in filing cabinets and desk drawers, which made effective utilization of the information from these records nearly impossible. Wayman and Stringfield¹ have noted that the inaccessibility of these data to most educational practitioners created situations where schools were 'data rich' but also 'information poor.'

In recent years, schools have responded to the demands of the federal No Child Left Behind Act² and other accountability-related challenges by creating or purchasing technology systems that allow them to aggregate, store, and analyze their data in order to improve organizational and academic decision-making. These systems can reside at the district, building, and/or classroom levels and are designed to meet a multitude of educators' data-related needs.³

¹ Jeffrey C. Wayman & Sam Stringfield . *Information, please: User-friendly software gets student data to the practical educator*. American School Board Journal (September 2004). <http://www.asbj.com/specialreports/0904SpecialReports/S2.html> (accessed November 30, 2006)..

² No Child Left Behind Act of 2001, Section 1001, Pub. L. No. 107-110, 115 Stat. 1425.

³ Scott McLeod, *Technology Tools for Data-Driven Teachers* (2005), at <http://www.microsoft.com/education/ThoughtLeadersDDDM.mspx>; Jim Ysseldyke & Scott McLeod, Using Technology to Facilitate Response to Intervention Monitoring, in *The Handbook of*

At the core of most school districts' data storage efforts is some kind of student information system. Student information systems are centralized databases that contain student contact information, attendance records, discipline records, and other similar data. Users are able to easily enter data and print basic reports that summarize the data contained within the system. A recent trend is for student information systems to integrate with electronic gradebook and/or parent portal software to enhance the utility and accessibility of the data for teachers, administrators, and parents.⁴

In addition to a student information system, school districts often have separate software to manage their budgeting, human resources, transportation, food service, technology support, facility scheduling, library management, curriculum planning, community education, and other administrative needs. Additionally, many academic records, such as scores on state or other standardized achievement tests, exist in data files separate from the student information system. Districts are increasingly using data management and analysis (DMA) systems, or data warehouses, to link all of these important databases together. Educators use built-in analysis tools such as pre-designed reports, pivot tables, and graphs to make meaning from the various data sources contained within DMA systems.⁵

Response to Intervention: The Science and Practice of Assessment and Intervention (Shane R. Jimerson, Matt K. Burns, & Amanda M. VanDerHeyden eds., forthcoming 2007).

⁴ McLeod, *supra*.

⁵ Eduventures, *Making Sense of the Data: Overview of the K-12 Data Management and Analysis Market* (2003); Laboratory for Student Success, *Technology Tools for the Analysis of Achievement Data: An Introductory Guide for Educational Leaders* (2004).

Building-level educators often supplement district data systems with more localized software and databases. For example, many schools use instructional management and assessment (IMA) systems to administer more frequent, formative assessments of student learning.⁶ In addition, electronic spreadsheet, word processing, relational database, and electronic survey software packages are being used by many teachers, principals, guidance counselors, media specialists, nurses, and others for data collection and management purposes. Other technology systems, such as school web sites, e-mail, instant messaging, and course management systems, also contain a wide variety of useful information. These data sources typically are not connected to district-level technology systems and wide variation exists in terms of data quality, accessibility, and utility.⁷

The purpose of all of this technological and data-related activity is to enhance educators' ability to make informed organizational and pedagogical decisions. If organizational data can be considered simply as "structured records of transactions,"⁸ educators turn those data into information by imbuing them with significance and making them functional. In other words, data are transformed into information when people add meaning and value to them and then act upon them for the benefit of students and employees.

⁶ McLeod, *supra* n. 3; Nancy S. Sharkey & Richard J. Murnane, *Tough Choices in Designing a Formative Assessment System*, 112 *Am. J. Educ.* 572, 578 (2006).

⁷ McLeod, *supra* n. 3.

⁸ Thomas H. Davenport & Lawrence Prusak, *Working Knowledge: How Organizations Manage What They Know 2*, (Harvard Business School Press, 1998).

Digital technologies have accelerated the richness and utility of information ecologies within local and state education agencies, allowing them to better respond to the demands of our current accountability-driven climate. However, the widespread and often unconnected nature of data collection and storage in most school organizations also raises a number of organizational and legal challenges. As data management systems become more complex, and as they become accessible to more individuals within and outside of school organizations, it is imperative for administrators to understand their organization's legal responsibilities related to data and information.

The purpose of this article is twofold: to review the information-related laws relevant to education and to offer conclusions and recommendations for educators and attorneys who work with public schools. The first section of this article offers a comprehensive survey of the legal and regulatory framework around data, student records, and public schooling. The next section summarizes the legal and regulatory terrain and offers suggestions and guidelines for educational and legal professionals who must strike an ongoing balance between data privacy and public access to information. This article focuses primarily on issues related to P-12 schooling rather than postsecondary education and also focuses on student records rather than records of adult employees. Additionally, in certain circumstances (e.g., special education records) other laws and procedures beyond what we discuss here also may be relevant.

II. INFORMATION AND THE LAW IN PUBLIC EDUCATION

“Public schools are information-collection machines. Public schools are also the government.”⁹ And that is where the legal issues begin. That is to say, local education agencies must understand the legalities of the collection, maintenance, and disclosure of personally identifiable information about students, generated both by the schools themselves and by students. Those legal issues are essentially captured under the general notion of ‘information privacy’¹⁰ which has been defined as “the result of legal restrictions and other conditions, such as social norms, that govern the use, transfer, and processing of personal data.”¹¹ Because public schools are governmental entities that serve private citizens who happen to be, for the most part, legal minors, information privacy in education is a particularly complex proposition codified by an intricate web of laws and regulations.

A. Freedom of Information / Open Records Laws

The starting point for any analysis of information privacy in public education is the various ‘freedom of information’ laws that exist in our country. Freedom of information, or open records, laws¹² begin with the primary assumption that data and information collected and maintained by public agencies are open to public inspection. Concerns about government secrecy,

⁹ Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 Neb. L. Rev. 1158, 1159 (2006).

¹⁰ See e.g. Paul M. Schwartz & Joel R. Reidenberg, *Data Privacy Law* 5-17 (1996); Paul M. Schwartz, *Property, Privacy and Personal Data*, 117 Harvard L. Rev. 2056, 2058 (2004); Daniel J. Solove, Marc Rotenberg & Paul M. Schwartz, *Information Privacy Law*, 2nd.Ed. (Aspen Publishers, 2006).

¹¹ Schwartz, *supra* at 2058.

¹² These laws also are sometimes referred to as ‘sunshine laws.’

and concurrent desires for greater governmental transparency, have fueled the development of these laws. Beyond the default position of transparency, these laws and other regulations also delineate when disclosure of education records can be restricted or prohibited.

1. The Federal Freedom of Information Act

The Freedom of Information Act (FOIA)¹³ was originally passed by Congress in 1966 and has been amended several times since.¹⁴ The law represents federal recognition of the need, in an open democracy, to provide public access to government information.¹⁵ Shortly after the FOIA's passage, the Attorney General of the United States issued a memorandum that stated, “[t]his legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”¹⁶ Under the law's predecessor, the Administrative Procedure Act,¹⁷ government agencies tended to find ways to withhold information and restrict access to records, “and the law came to be regarded as more of a withholding statute than a disclosure

¹³ 5 U.S.C. § 552 (1994) [hereinafter referred to as the FOIA].

¹⁴ Amendments to the FOIA were made in 1974, 1976, 1986 and 1996.

¹⁵ See Michael Hoefges, Martin E. Halstuk, & Bill F. Chamberlain, *Privacy Rights versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 *Wm. & Mary Bill of Rts. J.* 1, 2-3 (2003) (“In crafting FOIA, Congress recognized the important need for citizens in a democracy to have access to government information in order to participate in self-rule”); Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 *Comm. L. & Pol’y* 111, 111 (1999) (“The Freedom of Information Act is potentially one of the most valuable tools of inquiry available to the public to learn what the federal government is doing”).

¹⁶ Attorney General's memorandum on the public information section of the administrative procedure act. (<http://www.usdoj.gov/oip/67agmemo.htm>)

¹⁷ 5 U.S.C. § 1002 (1946),

statute.”¹⁸ The FOIA established a different legal presumption and creates a judicially-enforceable general presumption of disclosure of federal government records.¹⁹

The FOIA mandates that federal agencies grant access to all records that do not fall under one of nine exemptions: (1) information classified for national security, (2) internal agency personnel information, (3) information exempted by other statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law-enforcement investigation records, (8) reports from regulated financial institutions, and (9) geological and geophysical information.²⁰ These exemptions represent legislative recognition of the government’s need to keep some information from public disclosure: “Congress created the exemptions to balance the social value of the public’s statutory right to know against the government’s need to keep some information secret.”²¹

2. State Open Records Laws

While the FOIA applies only to federal agencies, every state legislature also has statutorily codified the degree to which government information within the states can be accessed.²² In fact, “[s]tate Open Records Laws date back to

¹⁸ Halstuk, *supra* n. 16, at 115.

¹⁹ S. Rep. No. 89-813 (1965), reprinted in Freedom of Information Act Source Book: Legislative Materials, Cases, Papers 38 (1974).

²⁰ 5 U.S.C. § 552 at §§(b)(1)-(9).

²¹ Halstuk, *supra* n. 16, at 111-12.

²² See Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 738 (1981); *Comment, Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except..."*, 45 Fordham L. Rev. 1105, 1114 (1977).

as early as 1849 when Wisconsin provided for inspection of public records.”²³

Only nine states lacked open records laws at the time the federal FOIA was enacted. In the two decades since, many states have used the FOIA as a template to either develop or modify their statutes.²⁴ Today every state has an open records law. State open records laws vary greatly in implementation, however, because of different statutory language and divergent interpretation by state judiciaries.

At least three commentators have attempted to categorize the various state open records laws according to degree of openness.²⁵ However, as Akers, Naples and Chiarelli have noted:

[r]egardless of the form of the federal or state laws, the major objective is .

. . . to provide the public with full and complete information regarding the

²³ Michael D. Akers, Gregory J. Naples, & Luke J. Chiarelli, *Federal And State Open Records Laws: Their Effects On The Internal Auditors Of Colleges And Universities*, 3 Marq. Sports L.J. 161, 172 (1993).

²⁴ See *Id.*

²⁵ *Id.* at 174-75 (The authors create three categories for state open records laws, with the distinction depending “on the amount of material that each should allow to be open to public inspection.”); Braverman & Heppler, *supra* n. 24 (The authors used four categories for the State Open Records Laws. The categorization included two liberal and two restrictive definitions. The first liberal interpretation includes all records in the possession of a public agency, regardless of their origin or the reason for their creation or acquisition, unless the state code specifies otherwise. The second liberal interpretation includes records made or received in connection with or relating to a law, duty of the agency, or transaction of public business, or any record containing information regarding those matters. The first of the restrictive definitions includes only public records which are required to be kept by law. The second is similar, stating that public records are only those records made pursuant to the law.); Comment, *supra* note 24 (The comment employed six categories for the State Open Record Laws, which in order of decreasing restrictiveness includes: (1) A limited Class of Specifically Identifiable Documents or a General Definition of Records but Limited for Public Inspection Purposes by Specific Qualifications; (2) Records Required to be Made by Law, Necessary to be Kept in the Discharge of a Duty Imposed by Law, or Directed by Law to Serve as a Written Memorial of Something Written, Said or Done; (3) Records made or Received Pursuant to Law or as a Convenient and Appropriate Mode of Discharging the Duties of an Office; (4) Records Made or Received in Connection with the Transaction of Public or Official Business; (5) Any Writing Containing Information Relating to the Conduct of the Public's Business; and (6) All Documentary Materials in the Possession of a Public Body.)

affairs of government and the official acts of those who represent them as public officials and employees.²⁶

In other words, like the FOIA, the general philosophy or presumption underlying all state open records laws is full disclosure unless an explicit statutory or regulatory exception applies.

B. Information Privacy Laws and Education Records

Student records in public schools are often protected by federal and/or state law.²⁷ Other than perhaps some employee data, state and local education agency information other than student records generally is subject to full disclosure. These public records include, but certainly are not limited to, administrative contracts, minutes of school board meetings, aggregate statistical reports on academic outcomes, and other organizational data. Because these types of information speak to the functioning of a public entity, they generally are available to the public upon request. However, information that contains personally-identifiable information about individual students is fraught with a number of potential dangers. As a result, a number of federal and state laws and regulations explicitly prevent disclosure of information directly related to individual students, referred to interchangeably as 'education records' or 'student records.'

²⁶ *Id.* at 173.

²⁷ Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. Va L. Rev. 361 (Winter 2005).

1. Federal Information Privacy Laws in Education

The Family Educational Rights and Privacy Act (FERPA) of 1974,²⁸ which applies to all educational agencies or institutions that receive federal funds, is the seminal federal law that protects the privacy of student education records. The “education records” protected by the law are defined as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution”.²⁹ The law explicitly lists four types of records that are not considered to be “education records,”³⁰ including records maintained by a law enforcement unit of an educational agency that were created for the purpose of law enforcement.³¹ One statutory exclusion that is particularly difficult to interpret is “records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute”.³²

FERPA’s two major provisions relate to students’ access to their own educational records³³ and to the disclosure of educational records to others.³⁴

²⁸ 20 U.S.C. §1232 (2002).

²⁹ 20 U.S.C. §1232g(a)(4)(A) (2002).

³⁰ 20 U.S.C. §1232g(a)(4)(B)(i)-(iv) (2002).

³¹ 20 U.S.C. §1232g(a)(4)(B)(ii) (2002).

³² 20 U.S.C. §1232g(a)(4)(B)(iv) (2002). The United States Supreme Court offered a small semblance of clarity when it held that the practice of peer grading and having quiz grades read aloud by students do not constitute a violation of this section of FERPA. Specifically, the Court held that papers initially graded by student peers are not “maintained” by the teacher at that point and that students are not persons acting for educational institutions. (“The instant holding is limited to the narrow point that, assuming a teacher’s grade book is an education record, grades on students’ papers are not covered by the Act at least until the teacher has recorded them.”).

Owasso Independent School Dist. No. 1011 v. Falvo, 534 U.S. 426, 427.

³³ 20 U.S.C. §1232g(a) (2002).

³⁴ 20 U.S.C. §1232g(b) (2002).

That is, generally, students (and their parents) have the right to review their own records and to challenge the material contained within those records.³⁵

Additionally, schools must have written consent from the student or a parent in order to release information from a student's education record to an outside party.³⁶ The default position thus is one of nondisclosure unless a statutory or regulatory exception applies that permits disclosure. For example, a major exception to the need for written consent is the ability of educational institutions to disclose "directory information", which is defined as "information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed."³⁷ However, should an educational agency or institution choose to designate certain data as 'directory information,' it must give public notice of the categories of information it intends to release and allow a "reasonable period of time after such notice has been given" for parents to opt any or all of their child's information out of the public disclosure.³⁸ This process must reoccur on a yearly basis.

After establishing the default position of nondisclosure without written parental consent, FERPA includes a list of nine exceptions.³⁹ The exception that is arguably the most open to interpretation is the provision allowing states to disclose education records to "school officials" that have a "legitimate educational

³⁵ 20 U.S.C. §1232g(a) (2002).

³⁶ 20 U.S.C. §1232g(b)(1) (2002).

³⁷ 34 CFR 99.3; Further defined as including, but not limited to, the students' name, address, telephone listing, date and place of birth, major field of study, participation in officially-recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended (U.S.C. §1232g(a)(5)(A); 34 CFR 99.3).

³⁸ 20 U.S.C. §1232g(a)(5)(B) (2002).

³⁹ 20 U.S.C. §1232g(b)(1)(A)-(I) (2002).

interest” in the information.⁴⁰ Schools and school officials have the discretion to decide, *a priori*, what constitutes a legitimate educational interest. Other listed exceptions include the release of information to officials of other schools to which a student seeks to transfer or enroll,⁴¹ and the release of information in connection with a student’s application for financial aid.⁴²

Educational agencies or institutions must annually notify parents, and students if they are 18 or older, of all of their rights under FERPA.⁴³ The actual means of notification is left to the discretion of the educational agency or institution. Violations of FERPA can be reported to the United States Department of Education’s Family Compliance Office (FPC)⁴⁴, but complaints must be made within 180 days of the alleged violation.⁴⁵

One of the key instances in which information privacy is increasingly an issue occurs when independent agencies, organizations, or individuals conduct research on data provided by local education agencies. This relationship might exist at the behest of the education agency or at the independent initiative of the external researcher(s). Regardless of who instigates the relationship, the current era of standards, accountability and assessment has resulted in the generation of more student achievement data than ever before and the creation of database technologies that increase the ease and efficiency with which data can be transferred. As the sheer quantity of educational research opportunities is

⁴⁰ 20 U.S.C. §1232g(b)(1)(A) (2002).

⁴¹ 20 U.S.C. §1232g(b)(1)(B) (2002).

⁴² 20 U.S.C. §1232g(b)(1)(D) (2002).

⁴³ 20 U.S.C. §1232g(e) (2002).

⁴⁴ 34 CFR 99.63.

⁴⁵ 34 CFR 99.64(c).

magnified, the potential for compromising the privacy of education records also increases dramatically.

The potential for a breach of information privacy resulting from associations between researchers and public education agencies has long been a concern of some federal lawmakers.⁴⁶ The Protection of Pupil Rights Act (PPRA)⁴⁷ was passed in 1984 to address some of these concerns. Also known as the 'Hatch Amendment,' the PPRA originally contained two major provisions. The first gave parents the right to review instructional materials when "new or unproven teaching methods or techniques" were being implemented,⁴⁸ and the second required parental consent before students participated in any testing or surveying where students would have to reveal personal information about themselves. This latter requirement protected personal information related to (1) political affiliations; (2) mental and psychological problems potentially embarrassing to the student or his family; (3) sex behavior and attitudes; (4) illegal, anti-social, self-incriminating and demeaning behavior; (5) critical appraisals of other individuals with whom respondents have close family relationships; (6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; and (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program) without the prior consent of

⁴⁶ See e.g. Beth Garrison, *Children are Not Second Class Citizens: Can Parents Stop Public Schools from Treating their Children Like Guinea Pigs?*, 39 Val. U.L. Rev. 147, 163-181 (2004).

⁴⁷ 20 U.S.C. § 1232h (2002).

⁴⁸ 20 U.S.C. § 1232h(a) (2002).

the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.⁴⁹

The PPRA has been modified twice since its inception. In 1994, as part of the reauthorization of the Elementary and Secondary Education Act (ESEA) through the Goals 2000: Educate America Act, the original language⁵⁰ of the PPRA was changed to cover “surveys, analysis, or evaluations” instead of psychiatric or psychological examination, testing, or treatment. Additionally, three new subsections were introduced. The first new subsection required educational agencies and institutions to give parents and students effective notice of their rights under the statute.⁵¹ The other subsections⁵² gave the United States Secretary of Education additional power to enforce the PPRA, including requiring the Secretary to establish a PPRA office and review board.

A second set of revisions accompanied passage of the federal No Child Left Behind Act of 2001.⁵³ The revisions added “religious practices, affiliations, or beliefs of the student or student's parent” as an eighth category of personal information that could trigger a PPRA violation.⁵⁴ Additionally, rather than simply mandating parental notice of potentially invasive surveys, the revisions require local education agencies to (1) develop and adopt policies with parents concerning parents' PPRA rights, and (2) provide annual notice of scheduled

⁴⁹ 20 U.S.C. § 1232h(b) (2002).

⁵⁰ The law originally regulated psychiatric and psychological examination, testing, or treatment. 20 U.S.C. § 1232h(b) (1982).

⁵¹ 20 U.S.C. § 1232h(c) (1994).

⁵² 20 U.S.C. § 1232h(d)-(e) (1994).

⁵³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083-88.

⁵⁴ 20 U.S.C. § 1232h(b)(7) (2001).

surveys and opportunities for parents to opt out.⁵⁵ These revisions had a clear goal of “protect[ing] parents and students from invasive surveys.”⁵⁶

Together, FERPA and PPRA constitute the federal government’s legislative efforts to protect the information privacy rights of public schools students. Public educational institutions that violate FERPA or PPRA are subject to potential loss of federal funding. In the recent case of *Gonzaga University v. Doe*,⁵⁷ the United States Supreme Court declined to extend the enforceability right of the federal government to private individuals. In other words, by holding that there is no rights-creating language in the nondisclosure aspect of FERPA, aggrieved individuals cannot bring suit for violations of FERPA. As a result, the only consequences for local education agencies that engage in the practice of, or have a policy that results in, disclosure of education records or the denial of parental access to records is the loss of federal funding. While such a punitive measure is not *de minimis*, the *Gonzaga* decision effectively rendered FERPA toothless. To date there are no recorded instances of the loss of federal funds as a direct result of a FERPA violation.⁵⁸ Additionally, at least one commentator has suggested that the *Gonzaga* decision will have a chilling effect on any PPRA cases.⁵⁹

As a procedural effect of the *Gonzaga* case, students or parents who are aggrieved by an educational institution’s alleged information privacy violation

⁵⁵ See 20 U.S.C. § 1232h(c) (2001).

⁵⁶ Garrison, *supra* n. 50, at 177.

⁵⁷ 536 U.S. 273 (2002).

⁵⁸ Stuart, *supra* n. 9 at 1163.

⁵⁹ Garrison, *supra* n. 50, at 193-94 (“...because the statutes are so similar in text, the Supreme Court’s treatment of FERPA likely predicts the Court’s treatment of the PPRA.”).

must turn for individual redress to the quagmire of state-level laws related to educational data privacy.

2. State-Level Information Privacy Laws in Education

The starting point for state-level educational information privacy protection is state open records laws. Ironically, “sunshine laws - the antithesis of privacy - provide some of the most specific protections for student records.”⁶⁰ While most states’ open records laws fail to mention education records explicitly, a few state’s laws statutorily exempt education records from the general policy of disclosure of public records. For example, the open records laws of Arkansas,⁶¹ Connecticut,⁶² and Texas⁶³ incorporate FERPA directly by reference. In other words, those laws protect student records from disclosure by mandating compliance with FERPA.

The State of Michigan also has incorporated FERPA’s disclosure framework directly into its open records law.⁶⁴ Additionally, Michigan law exempts the release of directory information (defined by FERPA) for commercial

⁶⁰ Stuart, *supra* n. 29 at 391.

⁶¹ A.C.A. § 25-19-105(b)(2)(2006) (“It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:… (2) Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act.”)

⁶² Conn. Gen. Stat. § 1-210(b)(17) (2006) (“Nothing in the Freedom of Information Act shall be construed to require disclosure of… [e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g…”)

⁶³ Tex. Gov’t Code § 552.026 (2006) (“This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.”)

⁶⁴ Mich. Comp. Laws § 15.243(2) (2001 & Supp. 2005). (“A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974.”)

purposes, “unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students.”⁶⁵

Colorado’s open records law contains some complicated provisions about the disclosure of student records, but makes direct reference to FERPA. Strangely enough, in a section of the Colorado law about exceptions to disclosure, immediately after referencing FERPA the statute reads, “information directly related to a student and maintained by a public school or by a person acting for the public school shall be available for release if the disclosure meets one or more of the following conditions...”⁶⁶ In other words, student records generally are protected by FERPA, but provisions for disclosure are codified in the state law.

In some state laws, the exemption of student records from public disclosure is explicit if not entirely clearly defined. For example, New Hampshire law states generally that all citizens have the right inspect public records, but among the listed exemptions is “personal school records of pupils.”⁶⁷ While it is not clear what constitutes personal school records of pupils, the New Hampshire Supreme Court ruled that names and addresses of public school students are part of personal school records and therefore exempt from public inspection.⁶⁸ Given FERPA’s directory information provision, one might assume that the

⁶⁵ Mich. Comp. Laws § 15.243(2) (2001 & Supp. 2005). (“A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by section 444 of subpart 4 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students.”)

⁶⁶ C.R.S. 24-72-204(3)(e)(2006).

⁶⁷ RSA 91-A:5(III)(2006).

⁶⁸ Brent v. Paquette, 132 N.H. 415, 567 A.2d 976, 1989 N.H. LEXIS 123 (1989).

exemption in the New Hampshire open records law is to be construed as broadly as possible. Similarly concise and presumably broad exemptions exist in open records laws in Iowa⁶⁹, Tennessee⁷⁰, and Vermont.⁷¹

Other state open records laws refer to student records but are not as broad. Those statutes typically enumerate the specific forms of student records that are exempt from disclosure. In Wyoming for example, custodians of public records must deny the right of inspection to, among other exceptions, “[s]chool district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability of any student except to the person in interest or to the officials duly elected and appointed to supervise him [sic].”⁷² The State of Colorado has similarly-detailed language, protecting “medical, mental health, sociological, and scholastic achievement data on individual persons.”⁷³

The open records law of Oklahoma states that “public educational institutions and their employees *may* [emphasis added] keep confidential ... individual student records.” Additionally, “personal communications concerning individual students” may be kept confidential. Use of the permissive modifier “may” by the statute suggests that those institutions and employees are not obligated to keep such records or communications confidential. However, under

⁶⁹ Iowa Code § 22.7(1) (2005). (Holding confidential “[p]ersonal information in records regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records.”)

⁷⁰ Tenn. Code Ann. § 10-7-504(a)(4) (2006). (“The records of students in public educational institutions shall be treated as confidential.”)

⁷¹ Vt. Stat. Ann. tit. 1, § 317(c)(11) (2006). (“The following public records are exempt from public inspection and copying...student records, including records of a home study student, at educational institutions or agencies funded wholly or in part by state revenue...”)

⁷² Wyo. Stat. § 16-4-203 (2006).

⁷³ C.R.S. 24-72-204(3)(a)(I) (2006).

a separate statute, it is considered a misdemeanor in Oklahoma for a teacher to “reveal any information concerning a student obtained by a teacher in their capacity as a teacher except as may be required in the performance of the contractual duties of the teacher”⁷⁴ and except to the parent or guardian of the student.

Even where statutory exemptions protect student records, there often are exceptions to the exemptions. That is, an open records law might make school or education records exempt from public disclosure except in certain necessary cases. One example is when students transfer from one school to another, when it makes sense for the sending school to transfer the student’s records to the receiving school. So, for example, in Oklahoma, “[a] public school district may release individual student records for the current or previous school year to a school district at which the student was previously enrolled for purposes of evaluating educational programs and school effectiveness.”⁷⁵

Maryland’s public records law is somewhat unique because it includes a set of rules for many different types of records. The section on student records states that custodians of public records may not disclose “a school district record about the home address, home phone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student.” The law then lays out circumstances where student records may be released. For example, student records may be released to the student or “an elected or appointed official who supervises the student.” The law also deals with

⁷⁴ 70 O.S. 2001, Section 6-115.

⁷⁵ 51 Okl. St. § 24A.16 (2005).

information that might otherwise be considered directory information by stating that custodians of information “may permit inspection of the home address or home phone number of a student of a public school.”

One final way that states accommodate privacy protection for student records within their open records laws is to incorporate relevant state or federal laws by general reference. For example, Oregon’s public records law includes an exemption for “student records required by state or federal law to be exempt from disclosure.”⁷⁶ New York⁷⁷ and Virginia⁷⁸ have similarly broad references to state and/or federal law. Those statutes do not specifically reference FERPA or any other law. However, a New York court has held that FERPA is a statute to which the state’s freedom of information law refers.⁷⁹

In addition to FERPA, PPRA and privacy provisions in state’s general open records laws, a number of states provide statutory protection for student records within their education laws. Similar to the legal protections in open records laws, the privacy provisions in education laws vary from brief or specific references regarding data confidentiality to full-scale student record privacy statutes. In some states, education laws regarding confidentiality of student records simply pull education records out from under the provisions of the open records law. In North Carolina, for example, the law states that “[t]he official record of each student is not a public record as the term ‘public record’ is defined

⁷⁶ ORS § 192.496(4) (2006).

⁷⁷ N.Y. Pub. Off. Law § 87(a) (2006).

⁷⁸ Va. Code Ann. § 2.2-3705.4.

⁷⁹ *Kryston v. Bd. Of Educ., E. Ramapo Cent. Sch. Dist.*, 430 N.Y.S.2d 688 (N.Y. App. Div. 1980).

by [the open records law]. The official record shall not be subject to inspection and examination as authorized by [the open records law].”⁸⁰

While FERPA stands as the baseline for privacy protection of student records across the country, states are free to build additional protections into state laws. Accordingly, states such as Arizona,⁸¹ Maine,⁸² Nevada,⁸³ and Utah⁸⁴ have education statutes that simply incorporate FERPA by reference while others have intricate statutes that protect the confidentiality of student records in a more comprehensive manner.

⁸⁰ N.C. Gen. Stat. § 115C-402(e) (2006).

⁸¹ A.R.S. § 15-141 (2006) (“A. The right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational and privacy rights act of 1974 (20 United States Code sections 1232g, 1232h and 1232i), and federal regulations issued pursuant to such act.”)

⁸² 20-A M.R.S. § 6001 (2005) (“1. FEDERAL AND STATE LAW. The provisions of this section, the United States Family Educational Rights and Privacy Act of 1974, Public Law 93-380, as amended by Public Law 93-568, and the United States Education of All Handicapped Children Act, Public Law 94-142 govern the dissemination of information about students, as well as written notices of intent to provide equivalent instruction through home instruction and all education records of students receiving equivalent instruction through home instruction.”)

⁸³ Nev. Rev. Stat. Ann. § 386.655 (2006) (“1. The Department, the school districts and the public schools, including, without limitation, charter schools, shall, in operating the automated system of information established pursuant to NRS 386.650, comply with the provisions of: ... (a) For all pupils, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and any regulations adopted pursuant thereto... 2. Except as otherwise provided in 20 U.S.C. § 1232g(b) and any other applicable federal law, a public school, including, without limitation, a charter school, shall not release the education records of a pupil to a person or an agency of a federal, state or local government without the written consent of the parent or legal guardian of the pupil;” and Nev. Rev. Stat. Ann. § 392.029 (2006) “1. If a parent or legal guardian of a pupil requests the education records of the pupil, a public school shall comply with the provisions of 20 U.S.C. § 1232g(a) and 34 C.F.R. Part 99. 2. If a parent or legal guardian of a pupil reviews the education records of the pupil and requests an amendment or other change to the education records, a public school shall comply with the provisions of 20 U.S.C. § 1232g(a) and 34 C.F.R. Part 99. 3. Except as otherwise provided in 20 U.S.C. § 1232g(b), a public school shall not release the education records of a pupil to a person, agency or organization without the written consent of the parent or legal guardian of the pupil.”)

⁸⁴ Utah Code Ann. § 53A-13-301 (2006) (“1) Employees and agents of the state's public education system shall protect the privacy of students, their parents, and their families, and support parental involvement in the education of their children through compliance with the protections provided for family and student privacy under Section 53A-13-302 and the Federal Family Educational Rights and Privacy Act and related provisions under 20 U.S.C. 1232 (g) and (h), in the administration and operation of all public school programs, regardless of the source of funding.”)

Unlike those states that reference and therefore fully incorporate FERPA, some state student record statutes selectively adopt certain portions of the federal law. For example, while the student records law in the State of Washington includes provisions about parents or students accessing education records and about disclosure of education records, only the latter provision refers directly to FERPA.⁸⁵ In New Hampshire, where the open records law plainly states that “personal school records of pupils” are exempt from disclosure,⁸⁶ a separate education law mirrors the directory information provision of FERPA.⁸⁷ To fully understand privacy issues related to student records in New Hampshire, then, one must be aware of two different statutes in separate areas of the state code.

Colorado also has multiple statutory provisions that govern the privacy of student records. After adopting FERPA’s definitions of “education records” and directory information,” Colorado’s education laws go on to state that “[a] school district shall not release directory information to any person, agency, or organization without first complying with the provisions of 20 U.S.C. sec. 1232g (a) (5) (B) [FERPA] related to allowing a parent or legal guardian to prohibit such release without prior consent.”⁸⁸ Then, separately, school districts also are required to “maintain the confidentiality of the addresses and telephone numbers

⁸⁵ Rev. Code Wash. (ARCW) § 28A.605.030 (2006) (“The parent or guardian of a student who is or has been in attendance at a school has the right to review all education records of the student. A school may not release the education records of a student without the written consent of the student’s parent or guardian, except as authorized by RCW 28A.600.475 and the family educational and privacy rights act of 1974, 20 U.S.C. Sec. 1232g.”)

⁸⁶ RSA 91-A:5(III)(2006).

⁸⁷ RSA 189:1-e (2006) (“A local education agency which maintains education records may provide information designated as directory information consistent with the Family Educational Rights and Privacy Act (FERPA).”)

⁸⁸ C.R.S. 22-1-123(IV)(2006).

of students enrolled in public elementary and secondary schools within the school district and any medical, psychological, sociological, and scholastic achievement data collected concerning individual students.”⁸⁹ These two provisions are in addition to Colorado’s open records law which exempts from disclosure “[a]ddresses and telephone numbers of students in any public elementary or secondary school.”⁹⁰

While some state statutes reference and/or incorporate FERPA directly, other state student record laws are what one commentator has called “mini-FERPAs.”⁹¹ A better name for these statutes might be ‘FERPA+’ since some are significantly more elaborate and sophisticated than the federal law. For instance, the student record privacy protections in California’s Education Code⁹² and Florida’s K-20 Education Code⁹³ are among the most comprehensive in the country. Similarly, the Illinois School Student Records Act⁹⁴ and Kentucky Family Education Rights and Privacy Act⁹⁵ offer significant protections for student records. Like Kentucky’s statute, Wisconsin’s student records law explicitly presumes confidentiality except where other portions of the student records law may require disclosure.⁹⁶ In addition to the intricate provisions of the Wisconsin student records law, the law states that local school boards “shall adopt regulations to maintain the confidentiality of such records.”⁹⁷ These and other

⁸⁹ C.R.S. 22-32-109.3(1) (2006).

⁹⁰ C.R.S. 24-72-204(3)(a)(VI) (2006).

⁹¹ Stuart, *supra* n. 29 at 380.

⁹² Cal. Educ. Code § § 49060-49079 (2006).

⁹³ Fla. Stat. § 1002.22 (2006).

⁹⁴ 105 ILCS 10/1 et seq. (2006).

⁹⁵ KRS § 160.700-.730 (2006).

⁹⁶ Wis. Stat. § 118.125(2) (2006).

⁹⁷ *Id.*

states have clearly codified the right to information privacy for public school students.

Delaware has taken a slightly different approach. In Delaware, privacy protections are embodied in both the education laws of the state and in State Department of Education regulations. The student records statute starts with the statement that “[e]ducational records of students in all public and private schools in this State are deemed to be confidential.”⁹⁸ That statement, however, is followed immediately by the provision that records “may be released, and personally identifiable information contained therein disclosed, only in accordance with rules and regulations of the Department of Education.”⁹⁹ The Delaware Department of Education’s Administrative Code simply incorporates FERPA by reference and indicates that school districts must develop, adopt, and maintain a student records privacy policy that is at least in accordance with FERPA.¹⁰⁰ In other words, the state statute refers to administrative regulations which tell local districts to develop and adopt a policy on student records.

Rather than using a hybrid statutory-regulatory approach such as Delaware’s, other states codify information privacy protections for public education records only in state regulations. Many of those regulatory schemes are as intricate as the state statutes.¹⁰¹ Like in Delaware, these regulations often mandate the development of student records privacy policies by local school

⁹⁸ 14 Del. C. § 4111(a) (2006).

⁹⁹ *Id.*

¹⁰⁰ 14 DE Admin. Code 251 (2005).

¹⁰¹ See e.g. Massachusetts (603 MASS. CODE REGS. 23.00); New Jersey (N.J. ADMIN. CODE § 6:3-6.1); Pennsylvania (22 PA. CODE § § 12.31-.33); and West Virginia (W. VA. CODE R. § § 126-94-1 to 30).

districts. In these states, school administrators thus must be aware of both state administrative regulations and local district policy related to the privacy of student records.

III. RECOMMENDATIONS

As is typical for many legal issues, there is a veritable polyglot of laws and regulations regarding the privacy of public educational records in our country. As technological advancements and policy trends result in the generation of vast amounts of data and information, education agencies are faced with a complicated set of competing legal demands. On the one hand, public education is a unique, publicly-supported, democratic endeavor, thereby engendering a strong sense of openness and governmental accountability. On the other hand, the vast majority of those served by public schools are legal minors and much of the data and information generated and maintained by public education agencies are therefore extremely sensitive and arguably private. In public education, educators must strike a balance between public access to information and information privacy (rather than secrecy) for public school children.

School administrators who wish to maintain that balance must be aware of and knowledgeable about the various federal and state laws and regulations that govern the privacy of students' publicly-held, personally-identifiable information. Most administrators must thus extend beyond a basic understanding of the public nature of the work that they do, and the related condition of openness of what they do, and recognize the delicate nature of collecting and maintaining reams of

information about young people. Administrators' strong familiarity with federal and state information privacy laws and regulations is absolutely imperative.

As much as federal, state, and local education officials have attempted to codify information privacy in education through the laws and regulations discussed in this article, many issues are far from settled. As technological development advances at a pace far greater than that of the law or policy-making, information privacy is likely to be a burgeoning intersection of law and education. For instance, lawmakers will have to consider adding clarity to the definition of education records "in the age of computer logging."¹⁰² Educators integrating collaborative, communicative technologies into the teaching and learning process will need to take into account the legal prescriptions around student "publishing" on the Internet. For example, Maine has begun to recognize potential technological impacts upon the privacy of student records by stating that "[a] public school may not publish on the Internet or provide for publication on the Internet any personal information about its students without first obtaining the written approval of those students' parents."¹⁰³

As legislative and administrative rules struggle to keep up with digital technologies, students also may be able to seek protection for information privacy rights from federal and state constitutions.¹⁰⁴ However, given recent

¹⁰² Jennifer C. Wasson, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy*, 81 N.C.L.Rev. 1348, 1352 (2001). (Logging is defined by Wasson as "the process by which a systems administrator collects data about a computer network and the individuals using it.")

¹⁰³ 20-A M.R.S. § 6001(2) (2005).

¹⁰⁴ For a more complete discussion on state constitutional rights and information privacy in education, see Stuart, *supra* n. 29 at 377. ("School administrators...must be aware of the growth in state constitutional litigation and give due consideration as to whether compliance with

judicial trends in other areas of the law, particularly related to the application of the Fourth Amendment to school officials, that prospect seems unlikely. For example, in a series of search and seizure cases over the last couple of decades, the United States Supreme Court and other federal courts have continually chipped away at student privacy rights in schools.¹⁰⁵ In the 2002 case of *Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Earls et al.*, the Court upheld a school district policy of drug testing of all students who participate in competitive extracurricular activities. Part of the rationale for that decision was that the Court declared that students have a limited expectation of privacy in schools.¹⁰⁶

Because these cases pertain to personal and bodily privacy, whether the same line of reasoning would apply to controversies regarding public education students' information privacy is an open question. One argument against students' information privacy expectations that we can expect will be raised will be students' widespread use of the very technologies that make information privacy jurisprudence so wide open. That is, given the ways that students readily publicize themselves and offer personally identifiable information in public or quasi-public cyberdomains such as blogs, wikis, and social networking sites such as MySpace¹⁰⁷ and Facebook,¹⁰⁸ local education agencies may have more

disclosure requests - even under FERPA or state open records acts - is a wise idea in light of the fundamental protections offered to informational privacy under their state constitutions.")

¹⁰⁵ See e.g. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646; *Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Earls et al.*, 536 U.S. 822, 829 (2002).

¹⁰⁶ 536 U.S. 822, 829 (2002). ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.")

¹⁰⁷ <http://www.myspace.com>

¹⁰⁸ <http://www.facebook.com>

leeway when it comes to disclosing personal information about students. While this argument may be a bit convoluted, it does suggest the complexity of the issues that lawmakers in all branches and at all levels of government must face in the not-so-distant future.

Staying abreast of technological and legal developments regarding information privacy will necessarily require educators to engage in continuing professional development and training. We offer several recommendations to enhance public school educators' ability to avoid liability and protect the information privacy of children and adolescents.

First, we recommend that local education agencies develop, with the assistance of counsel, a comprehensive and forward-looking student records policy. There are many good resources available for guidance in such an endeavor. For example, Stuart offers cogent guidance on developing a local policy that incorporates "fair information practices into the framework ... and thereby set out a more coherent praxis for school administrators to follow."¹⁰⁹ Concurrent with the development and implementation of local policy, local education agencies must be sure to make all of the proper notifications about student records, particularly those set out in FERPA and PPRA, to students and their parents. The United States Department of Education, and many state departments of education, produce model notices, for example, related to the release of directory information.¹¹⁰ Similarly, the National School Boards

¹⁰⁹ Stuart, *supra* n. 9, at 1162.

¹¹⁰ <http://www.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html>

Association provides a model notice and consent/opt-out form consistent with the requirements of PPRA.¹¹¹

Second, we recommend that school organizations appoint a data steward, often called a chief information officer (CIO). This individual serves as the point person for all data management, storage, and confidentiality issues and works closely with the superintendent, district technology coordinator, academic officers, and other central office administrators to design policies, procedures, technology systems, and training for educators in the organization. Many large school districts and state agencies already have CIOs, as do many corporations. Sometimes those individuals simultaneously serve in other administrative roles, with perhaps the most common being the chief technology officer in charge of all digital technologies within a school district.

A CIO can serve several important functions for a school district or state agency, including being responsible for vision, strategy, direction, and oversight related to the various information sources and technologies that reside within the organization¹¹². A CIO also can ensure that all employees understand their legal and professional responsibilities for appropriate data use and can design and help deliver training opportunities to facilitate employees' knowledge retention and application. Designation of a single individual to be in charge of data management and security is a widely-accepted practice in corporate and governmental sectors.

¹¹¹ <http://www.nsba.org/site/docs/11100/11061.pdf>

¹¹² State of New Mexico Chief Information Officer (2006), available at <http://www.cio.state.nm.us>; CIO - Technology, Anchorage School District (2006), available at <http://www.asd.k12.ak.us/CIO/cio.asp>.

Finally, we recommend that school organizations conduct regular and thorough data audits to monitor compliance with federal and state laws as well as district policies. School leaders must take active steps to ensure that valuable and confidential information is being adequately protected; they cannot simply assume that proper procedures and safeguards are being followed by local staff. As this article notes, if an educational organization fails to exercise reasonable safeguards and protect its confidential information in a manner that satisfies standards of due care, it opens itself to a host of potential problems ranging from loss of federal funding, to allegations of negligence and incompetence, to lawsuits charging computer malpractice, to forfeiture of insurance claims due to preventable losses.

Complicating matters further is the fact that public schools serve as stewards of public data and thus have different legal, political, and ethical responsibilities (compared to private schools or corporations) for protecting information that belongs to the general public. In addition to whatever legal ramifications there are for privacy violations, the potentially priceless asset of public confidence also is at risk. Appropriate risk assessment, data security procedures, and employee training can mitigate unnecessary financial expenses and damages to organizational goodwill. The institution of public schooling is already under intense attack on many fronts. Public confidence in public schools is an endangered species that needs protection, much in the same way that school-age children need protections for whatever private information is collected and maintained on them by the schools.

IV. CONCLUSION

It is unclear just how far we are into the 'Information Age.' However, it is quite clear that there is increasing demand, both nationally and worldwide, for access to information, including government records. Increasingly-powerful Internet search engines, the ever-growing capacity of computer hard drives, and expanding Internet, network, and peer-to-peer connectivity all are fueling humans' seemingly-insatiable desire for more information.

In the United States, we are seeing an interesting paradox at play. Because of policy choices and military needs, the number of government documents classified as 'secret' has dramatically increased. For example, "3,579,505 new documents were classified in 1995. In 2003, the government classified 14,228,020 new documents"¹¹³ At the same time, however, the number of requests under the federal Freedom of Information Act for disclosure of records has also dramatically increased. While there were less than one million FOIA requests in 1998, by 2003 there were some three million requests.¹¹⁴ As the government seeks to make more documents secret, the American public increasingly holds the government accountable by seeking disclosure of public records.

This ongoing tension will continue to play out in the public schools as well. School districts already are seeing requests by the media, parents, community members, researchers, and other educational stakeholders for access to the data in their increasingly-connected, technologically-driven databases. As schools

¹¹³ Nikki Swartz, *The World Moves Toward Freedom of Information*, *The Information Management Journal* 20 (November/December 2004).

¹¹⁴ *Id.*

navigate the inexorable and rapid pace of societal and technological change, administrators must be firmly knowledgeable about their legal and professional obligations to balance the needs of their organization with the rights of students and must take active steps to stay up-to-date on recent technological and legal trends.