

CLASS IS IN SESSION: A Brief Lesson on FERPA and Custody Issues in Public Schools

BY PATRICK MURCH, ESQ.

Each school year, attorneys for school districts in Nevada handle hundreds of subpoenas and requests for education records from parents, attorneys and governmental agencies. In addition, they are tasked with interpreting divorce decrees, parenting agreements and custody orders for purposes of advising school employees on issues such as custody/visitation rights, enrollment and other custody-related matters that regularly arise in the educational context. This article provides an overview of a few of the most common legal issues that school districts encounter pertaining to education records and custody.

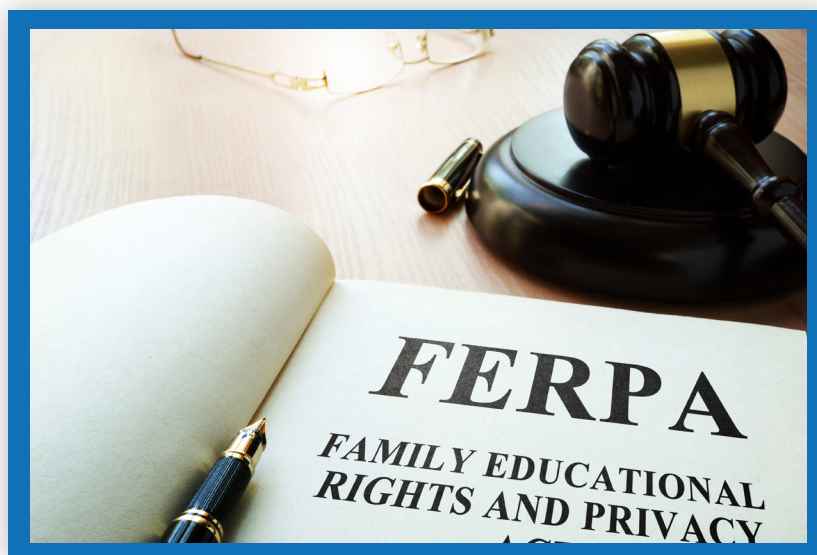
EDUCATION RECORDS

The Family Educational Rights and Privacy Act (FERPA)¹ governs the confidentiality and disclosure of education records. “Education records” include files, documents, records and other materials that:

- a. Are maintained by an educational agency or institution, and
- b. Contain information that is directly related to a student. 20 U.S.C. 1232g(a)(4)(A).

They do not include records made by school personnel for their own purposes that are not accessible by or revealed to any person other than a substitute teacher or administrator, records created and maintained solely for law enforcement purposes, personnel files or records created by certain medical professionals in relation to the provision of treatment to students who are over the age of 18 or attending a program of post-secondary education. 20 U.S.C. 1232g(a)(4)(B).

Thus, files, documents, records and other materials pertaining to attendance, individual class grades, report cards, transcripts, discipline and special education are typical education records that are subject to FERPA’s confidentiality and disclosure requirements. Conversely, employment records of school district



the types of records that the attorney is seeking, states the purpose of the disclosure and identifies the party or class of parties to whom the disclosure is made. 34 C.F.R. 99.30. Under FERPA, the right to authorize the disclosure of education records belongs to the parent(s) or legal guardian(s) until a child turns 18. *Id.* Thereafter, that right transfers to the individual to whom the records pertain. *Id.*

All school districts in Nevada

employees, school police department reports and personal notes made by teachers, administrators or other education professionals that pertain to particular students, but are not included in cumulative records files or folders, are not.

Attorneys who seek to obtain education records in connection with their representation of clients have two primary means of doing so:

- a. By written authorization of a person who has an express right under FERPA to provide consent to the disclosure; or
- b. By subpoena or court order.

Authorization to Disclose Records

The most efficient and cost-effective method by which an attorney can obtain education records is to obtain a signed and dated written authorization that specifies

should have authorization forms available online or upon request, or an online portal through which to submit records requests.² If an attorney elects to use a different request form to obtain records from a school district that accepts non-electronic requests, the form must comply with the requirements set forth above. Thus, a standard Health Insurance Portability and Accountability Act (HIPAA) release that is typically utilized in personal injury cases is insufficient for purposes of obtaining education records, and cannot be complied with unless it clearly specifies that it authorizes the disclosure of education records and it complies with the other requirements of 34 C.F.R. § 99.30.³

Finally, if an attorney is seeking education records for use in legal proceedings, he or she can request that the school district include a business records

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affidavit or declaration with the records production. While school districts are not legally obligated to comply with such a request, they are not prohibited from doing so. By making the request at the time that the authorization is submitted, attorneys and their clients may save time and costs.

Subpoena or Court Order

If an attorney is unable to obtain written authorization for the disclosure of education records, he or she can usually obtain such records via a subpoena or court order, subject to some additional requirements. 34 C.F.R. § 99.31(a)(9). Upon receipt of a valid subpoena or court order, a school district must make a reasonable effort to provide the parent(s), legal guardian(s), or the person to whom the records pertain, if over the age of 18, with written notice of the subpoena or order and allow a reasonable period of time⁴ to seek protective action. *Id.* If a school district does not receive notice that protective action is being sought before the expiration of the specified time period, the district can produce the records.⁵

There are only a few limited exceptions to the notice requirement, including when a subpoena is issued by a federal grand jury or for a “law enforcement purpose” in which “the court or other issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed.” 34 C.F.R. § 99.31(a)(9)(ii)(A) and (B).

In sum, education records are subject to certain protections under FERPA. Nevertheless, in most circumstances, attorneys who seek to obtain such records for use in legal proceedings can usually obtain them by complying with the foregoing requirements.

CUSTODY

School districts commonly face two issues pertaining to custody — visitation at school and school enrollment rights. These issues are briefly discussed below.

Visitation at School

As family law attorneys are aware, Nevada law requires that custody and

visitation orders “include all specific times and other terms” of the custody or visitation, stated in “absolute terms,” rather than terms that are susceptible to different interpretations. NRS 125C.0045(5); NRS 125C.010(1). To satisfy these requirements, custody orders typically contain detailed schedules specifying the days of the week that each parent has custody or visitation, the times and places that child exchanges must occur, and holiday and vacation schedules.

While some orders clearly specify that both parents can attend and/or participate in special school events (e.g., school plays and performances, field days, graduation ceremonies and parent-child breakfasts), regardless of which parent has custody on a particular day, other orders make no mention of such events. Because of the specificity requirements discussed above, school district attorneys can (and do) advise schools that if the parties to a custody order intended to permit both parents to attend special events, they would have included language to that effect in the order. Thus, if such language is absent, the logical conclusion is that they did not have such an intention. Family law practitioners can better serve their clients if they specifically address the issue of school events in custody orders.

Enrollment

Finally, boards of school trustees have the right to make school zoning determinations and determine which students must attend which schools. NRS 388.040(1). Thus, while courts can order that a child attend a school for which one of the parents is zoned, they cannot order school districts to enroll a child in a school that is outside one of the parents’ attendance zones. *Cf. id.*

If an order does not specify that a child be enrolled in a school for which a particular parent is zoned, school districts have the right to direct that a child be enrolled in a school in the attendance zone in which the parent with the most custodial time during a school week resides. If one of the parties to a custody dispute wishes to obtain a different result, he or she must get an order to that effect. **NL**

1. 20 U.S.C. § 1232g; 34 C.F.R. Part 99; see also NRS 392.029 (requiring Nevada public schools to comply with FERPA).
2. For example, the Clark County School District has established an online portal (transcripts.ccsd.net or <https://clarknv.scribborder.com>) through which authorized individuals must request education records for former students. Requests for records for current and former Washoe County School District students must be submitted via <https://washoeschoolsnv.scribborder.com/>.
3. Health and medical records are not always maintained in a student’s cumulative folder and are not always subject to disclosure pursuant to an authorization to disclose education records. An attorney seeking both education records and health/medical records should obtain an appropriate written authorization to that effect.
4. The Clark County School District has historically interpreted the “reasonable period of time” requirement to mean 10 calendar days.
5. In limited instances, such as when a defendant in a criminal case issues a subpoena for the victim’s education records, a prosecutor or parent/legal guardian might request that a school district deliver the records to the court for in camera inspection before disclosing them to the defendant. FERPA does not directly address this situation. Nevertheless, in such circumstances, a school district can request that the defendant stipulate to such a requirement. If the defendant does not agree, the school district can request that the court enter a protective order to that effect.



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