

To: Board of Education  
From: David Cunningham, executive director, human resources/chief legal counsel, x 4937  
Re: Report on Student Confidentiality and the Family Education Rights and Privacy Act and Staff Confidentiality  
Date: November 22, 2017

## **Student Confidentiality**

### **General FERPA Protections**

FERPA is the federal law which limits disclosure of personally identifiable information contained in student records to third parties and guarantees that parents of students under the age of 18 and students over the age of 18 (“eligible student”) have access to and the ability to challenge the accuracy of their educational records. FERPA protects information which is contained in “education records,” which is defined as those records that are both directly related to a student and maintained by the district or a third party acting on behalf of the district. The term “record” refers to any information recorded in any way including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 C.F.R. § 99.3. There are a limited number of exceptions to the types of information that are considered education records under FERPA; however, discipline records are not an exception and would be considered an education record protected by FERPA.

The parent or eligible student must provide a signed and dated written consent before a school discloses personally identifiable information contained in student records unless an exception is provided for the release of the record. The written consent must: (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. Furthermore, the parent or eligible student must be provided with a copy of the record if they request it. 34 C.F.R. § 99.30.

Personally identifiable information includes information such as: (1) the student’s name; (2) the name of the student’s parent or other family member; (3) the address of the student or student’s family; (4) other indirect identifiers, such as the student’s date of birth, place of birth and mother’s maiden name; (5) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances to identify the student with reasonable certainty; or (6) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the record relates. 34 C.F.R. § 99.3.

FERPA allows appropriate information concerning disciplinary action taken against a 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 to be included in a student’s educational records. While FERPA allows this information to be released to appropriate teachers and school district officials who have a legitimate educational interest in the information, this information cannot be released to outside third parties without consent unless the totality of the circumstances show there is an articulable and significant threat to the health and safety of the student or other individuals and the disclosure is to a person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. § 99.36(b). For example, this health and safety exception would allow disclosure of

information to police or EMS in appropriate emergency situations, but not to other parents following an incident between two students.

### **What, if any, information can be shared with the public?**

Under FERPA, no specifics regarding either student involved in an incident can be shared with the public. It is likely that the public may know that an incident occurred between two students, but neither student can be identified by the school and neither student's disciplinary history nor any action taken against the student(s) can be discussed. The district can acknowledge that an incident occurred and can simply state that appropriate action has been taken. The following are examples of how we typically acknowledge an incident:

- In the case of a bomb threat, we would say something like: "The district is aware that a threat was made on social media regarding the safety of the school. The matter has been turned over to police for investigation, and we have increased security at the school for next day [or next several days] to ensure the safety of our students."
- In the case of a student assaulting another student at school, we would say something like: "We are aware of an incident that occurred involving two students at the high school. Due to confidentiality, we are not at liberty to discuss any of the details. However, we have taken appropriate action to address the incident and to ensure the safety of our students."

### **What can board members share and what parameters should guide public comment around these student discipline issues?**

Board members are not allowed to comment on student discipline issues as there is very little information that can be shared publicly due to confidentiality rights under FERPA. Providing a statement similar to the examples is permissible.

### **What guidance can be used to explain the "why" if the recommendation is that we cannot or should not comment?**

Neither the board as an entity, individual board members, or district administrators are allowed to provide any specific information regarding disciplinary action against a student, even when the student has done something truly egregious. FERPA has no exception which would allow the school district to share such information publicly or even with the parent of another student who may be involved.

The most important thing to communicate in the response to a question is that the district continues to be focused upon the safety and security of its students, even if information cannot be shared regarding disciplinary action. When it is a situation involving two students, it sometimes helps to share with the victim's parents that we have to protect the confidentiality of the accused, just as we have to protect the confidentiality of the victim. While it may not make the victim's parent any happier, it may help them to understand that the same rule applies equally to everyone.

## **Staff Confidentiality**

### **General Employee Protections**

Generally, personnel records are confidential. Since a unified school district is a public entity, certain records are statutorily declared to be open. The Kansas Open Records Act (KORA) states a unified school district is not required to disclose personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment; however, an employee's name, salary, length of service, and position are considered an open record. (K.S.A. 45-220.) In order to protect the privacy of district employees, those records are not released without the written authorization of the employee.

The law is specific about who may have access to an employee's evaluation. K.S.A. 72-9005 states: "Except by order of a court of competent jurisdiction, evaluation documents and responses thereto shall be available only to the evaluated employee, the board, the appropriate administrative staff members designated by the board, the school board attorney upon request of the board, the state board of education as provided in K.S.A. 72-7515, the board and the administrative staff of any school to which such employee applies for employment, and other persons specified by the employee in writing to his or her board." Thus, neither individual board members, members of the public, nor unauthorized administrators have access to this information.

As mentioned in the student confidentiality portion of this report, neither the board as an entity, individual board members, or district administrators are allowed to provide specific information regarding disciplinary action against an employee, even when the employee has done something truly egregious. The employee may authorize the school district to share such information publicly, but even then, the district must consider what is in the best interest of all parties before addressing the request.

The most important thing to communicate in the response to a question regarding a personnel matter is that the district continues to be focused upon the privacy interests of its employees. While the public may want to be better informed, it helps to understand the importance of protecting confidential information since an unauthorized release may result in legal liability for the district and/or the individual sharing inappropriately.