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School Law Review

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New Guidance on Privacy for Student Education and Health Records

The U.S. Department of Education and the Office for Civil Rights at the U.S. Department of Health and Human Services recently released updated guidance regarding the application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) to a student's education and health records.

FERPA generally prohibits educational agencies that receive federal funds from disclosing a student's education records without the prior written consent of the parent or eligible student. On the other hand, HIPAA requires covered entities (health plans, health care clearinghouses, and health care providers) to protect an individual's health records and other personal health information these entities maintain or transmit.

Are Public Schools Subject to HIPAA's Privacy Requirements?

In a few very limited instances, an educational institution subject to FERPA may also be subject to the HIPAA privacy requirements. A school may be considered a "health care provider" if it provides health care to students in the normal course of business and the transactions are those for which the U.S. Department of Health and Human Services has adopted a standard form. Even though a school may employ nurses, physicians, or psychologists, schools generally do not bill health care plans for their services. Thus, most schools are not entities covered by HIPAA. Even if a school that is considered to be an entity covered by HIPAA (e.g., when a school hires a health care provider that bills Medicaid for services provided under the IDEA), it will not have to abide by the privacy requirements if the school maintains health information only in "educational records" under FERPA. This is due to HIPAA's Privacy Rule explicitly excluding FERPA "educational records" from the scope of the act. 45 CFR § 160.103.

Frequently Asked Questions

This new guidance includes a list of new frequently asked questions along with answers to when a student's health information can be shared without the consent of the parent or eligible student under FERPA and HIPAA. We will discuss some of these new clarifications below.

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1. **When can personal health information or personally identifiable information be shared about a student who presents a danger to themselves or to others?**

FERPA allows educational institutions to disclose personally identifiable information to certain appropriate parties if knowledge of this information would be necessary to protect the health or safety of a student or others. This disclosure may take place with or without the consent of the student. 20 U.S.C. § 1232 g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36. In order to use this exception, the educational institution must look to the totality of the circumstances and determine that there is an *articulable and significant threat* to the health or safety of the student or others. 34 CFR § 99.36(c). An articulable and significant threat means that if the educational institution can reasonably explain why it believes a student poses a significant threat, such as bodily harm to himself or others, the school may disclose educational records to any person who would be able to assist in protecting a person from that threat. If the educational institution is able to show that it had a rational basis for disclosing the information, the U.S. Department of Education will not substitute its judgment for that of the educational institution making its decision. 34 CFR § 99.36(c). The ability to share this information expires once the danger is no longer present.

The Joint Guidance provided the following example: A student states that he knows where his parents keep his guns and that he is going to come back and make sure that someone pays for what they have done. What is the district supposed to do? According to the U.S. Department of Education, FERPA permits the district to warn the appropriate parties that the student has made this statement and may be a threat to harm themselves or others. The district may inform the student's parents, the police, or other parties that would be in a position to help protect the health and safety of the student or others.

2. **Under FERPA, can an educational institution disclose, without prior written consent, personally identifiable information from a student's educational or health records to their security staff or law enforcement officials?**

The short answer is it depends. A district may be able to release records if certain conditions are met. If the person is an employee of the educational institution, meets the school's definition of a "school official" based on the school's annual FERPA notice, and has a legitimate educational interest in the information/records then the individual may be considered a school official to whom a student's personally identifiable information may be disclosed without prior written consent. 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A).

What about School Resource Officers and other law enforcement officials who are not employees of the educational institution? School resource officers are not employees of the educational institution, but may be considered a "school official" if they:

a. Perform an institutional service or function for which the school would otherwise use employees (e.g., ensure school safety or security);
b. Are under "direct control" of the educational institution with respect to the maintenance of the educational records. (e.g., done through a memorandum of understanding (MOU) to establish restrictions and protections);
c. Are subject to FERPA's use and re-disclosure requirements in 34 CFR § 99.33, which provides that the personally identifiable information may only be used for the purpose for which the disclosure was made (e.g., school safety and security) and limits re-disclosure of the student's educational records;
d. The SRO meets the school's definition of a "school official" provided in its annual notification of FERPA rights and has a "legitimate educational interest" in the records.

If the school resource officer or other law enforcement official is not a "school official" acting with a "legitimate educational interest" then the school may not disclose a student's educational and health records without the prior written consent of the parent unless an exception applies (i.e. health or safety emergency explained above, court-issued subpoena, etc.)

Special Education Spotlight
District Prevails in Plan to Reduce Unproductive Parental Communication

The Ninth Circuit Court of Appeals recently held that a district can impose a restrictive communication plan with a parent, based on the parent's prior actions and communications with the school district, without violating the parent's First Amendment Rights. L.F is the divorced parent of two girls who are students at Lake Washington School District in Washington State ("District"). He disagreed with how the District handled his students' alleged anxiety and other behavioral disorders which caused him to engage in a pattern of incessant communication with the District. The communications included him informing them of his frustrations, as well as making accusations of wrongdoing against the District's staff. The parent did so through emails, phone calls, text, and face-to-face conversations, ultimately leading to staff complaints of him making them feel threatened and intimidated.

His communication patterns became excessive and unproductive. District staff implemented a communication plan ("Plan") in November 2015, which restricted his communications with the District to bi-weekly meetings. However, it did not restrict communications during emergency situations regarding his children and did not affect his ability to attend campus activities. Initially, he followed the plan with no violations. However, in January 2016 he made direct contact with one of the children's teachers. As a result, the District amended the Plan and further limited his communication to once a month. L.F. made many requests for the District to modify the Plan but the District refused.

In March 2017, L.F. filed suit alleging that the Plan violated his First Amendment Rights. After working its way through the court system, a final decision was reached on this case by the Ninth Circuit Court of Appeals which found that the parent's First Amendment Rights were not violated because the Plan only limited his communication to specific channels (e.g. the bi-weekly meetings). The circuit court noted that the Plan addressed the *manner* in which he communicated with the District. It did not address the *content* of his speech. The court found the District was well within its rights to impose the limitation, arguing that members of the public do not have a constitutional right to force government entities to listen to what they have to say.

What this means for your District:

This case supports school districts' ability to reign in communications from parents/guardians when those communications are inappropriate, harassing in nature, and/or numerous. School district employees are not required to take harassment from parents/guardians simply by virtue of their relationship in educating a student. Instead, districts can require and expect the same professionalism and appropriateness in communications *from* parents as is provided *to* parents. If your district needs to consider putting a communication plan in place for a parent/guardian, please reach out to an Ennis Britton attorney for assistance in creating the plan and ensuring the plan is enforceable.

L.F. v. Lake Washington School District No. 414

School District, JVS, and ESC Opportunities with HB 2

One of the education-related bills that passed both houses at the close of the 2019 legislative session was HB 2. It deals primarily with higher education, but there are some provisions, including the creation of the TechCred and Individual Microcredential Assistance Programs, that could provide opportunities for school districts, especially joint vocational school districts, and educational service centers in Ohio. This new statewide TechCred (technical credential) Program will, according to the state give "businesses the chance to upskill current and future employees to help them qualify for a better job in today's tech-infused economy." The Governor's Office of Workforce Transformation, the Chancellor of Higher Education, and Ohio's Development Services Agency will develop the program.

Funding will be provided in two areas: (1) employers who seek reimbursement for training costs for current and prospective employees to earn a microcredential, and (2) training providers who seek reimbursement for the training

costs for an individual to earn a microcredential in the program. The amount of reimbursement shall not be more than $2,000 for each microcredential a prospective or current employee receives. A training provider may receive a total reimbursement of $250,000 in a fiscal year for providing training to individuals who earn microcredentials.

Microcredentials are statutorily defined to be industry-recognized credentials or certificates that can be completed by an individual in not more than one year. A list of approved microcredentials will be developed by the Chancellor of Higher Education. According to the TechCred Program, the microcredential must meet all three of the following criteria:

- Industry-recognized:
  - It is sought or accepted by employers within the industry, or sector involved, is a recognized, preferred, or required credential for recruitment, screening, hiring, retention, or advancement purposes; and
  - Where appropriate, is endorsed by a nationally recognized trade association or organization representing a significant part of the industry or sector.
- Technology-focused:
  - It demonstrates the competencies necessary to succeed in an occupation that utilizes technology to develop, build, and deliver products and services.
  - It relies on science, technology, engineering and/or math-related education, as well as technical skills to benefit an employer dependent on the development, deployment, and investment in new and emerging technology. This includes software development, advanced manufacturing, data analytics, cybersecurity, computer hardware and design, military applications, and other emerging fields.
- Short-term:
  - It can be completed in 12 months or is less than 30 credit hours or 900 clock hours.

Training providers may include state institutions of higher education, private businesses/institutions, or Ohio technical centers that provide adult technical education services that are recognized by the Chancellor of Higher Education. In order to be a training provider, entities must apply to the Director of Development Services. The statutory language indicates that there will need to be a focus for training providers to provide opportunities for individuals who are low income, partially unemployed, or totally unemployed. Training providers will appear on an annually-updated list of approved training provided by the Chancellor of Higher Education for the TechCred Program.

Employers would apply to participate in the program, including who or what entity would be providing the training, what positions or occupational skill the person would be eligible for after completing the training and earning the microcredential. The employer may apply for reimbursement for the training costs through the funded program. The maximum amount of reimbursement is $10,000.

The bill also provides funding to low-income, partially or totally unemployed individuals to participate in such programs, called the “individual microcredential assistance program.” The funding (up to $3,000 per microcredential with a maximum of $250,000 per training provider) goes to an approved training provider to pay for the cost of training an eligible person. It appears that reimbursement through this program is limited to a center that provides adult technical education recognized by the Chancellor of Higher Education.

The bill also creates some local and regional planning entities that, once formed, may apply for grants to assist with developing and offering opportunities through the TechCred program.

“Sector partnership networks” are workforce collaboratives that “organize multiple industry sectors into a working group” focused on meeting regional or statewide human resources needs. These industry sector partnerships and sector partnership networks may include school districts, local governments, and more.

The grant program will support these industry sector partnerships and sector partnership networks. The grant money may be used for a number of different things, including hiring employees to coordinate the partnership and its activities, developing educational materials, marketing the partnership, and any other activity approved in the

rulemaking process (which has not yet occurred.). The grant applications will be evaluated and scored. An appropriation of $2.5 million dollars in each fiscal year of this biennium has been made for the grants to Sector Partnership Networks. Appropriations for the TechCred program are $12.3 million in each fiscal year.

Once fully operational, with approved microcredentials, approved training providers, and grant systems in place, the new TechCred program may be a source of options for school districts and educational service centers alike, including options for funding through the grant and K-12 career and transition planning services for students.

Unemployment Claims and "Independent Contractors"

Generally, employees in Ohio are eligible to receive unemployment benefits if they are laid off from their place of employment. However, under Ohio law, if you are an "independent contractor," you are precluded from receiving those benefits. The Eleventh District Court of Appeals recently held that a truck driver was an independent contractor as opposed to an employee and therefore, was not entitled to unemployment compensation.

In *Marcus Roach Express, L.L.C. v. Dir., Ohio Dept. of Job & Family Serv.*, 2019-Ohio-5414, a truck driver claimed that he was an employee and entitled to receive unemployment benefits. The Ohio Department of Job & Family Services ("ODJFS") initially issued a determination allowing him to receive benefits, which the employer appealed to the court.

At issue in the appeal was whether the truck driver was really an independent contractor, rather than an "employee" separated from his job due to a lack of work. In making the determination of employee versus independent contractor, the Unemployment Review Commission will generally look to the list of twenty factors outlined in Ohio Adm. Code 4141-3-05(B). Though these factors may be used by the Commission, they are not necessarily determinative of whether the individual was or was not "subject to direction and control" over their services -- the primary metric in the analysis of deciding independent contractor status.

In this case, the truck driver's agreement actually stated that he was an independent contractor and not an employee of the company. Though this fact supports a finding that he was an independent contractor, the court looked to the totality of the circumstances in order to determine whether the employer actually had the right to control the driver's work.

ODJFS argued that "control" existed because the employer paid the driver weekly, approved his time-off requests, owned the delivery truck and paid for its repairs, required him to turn in logbooks, and continued a working relationship with the individual for eight years.

The court, however, noted that the driver was paid based on how many loads he accepted as opposed to the number of hours he worked. Additionally, the claimant was able to decide which routes he wanted and was able to set his own schedule, all of which led the court to conclude that the company did not exercise nor retain a right to control the individual's work. Therefore, the driver was considered to be an independent contractor and was not eligible to receive unemployment benefits.

What this means for you district:

This case should remind us that in the service-oriented nature of public education, there are limited opportunities to truly employ "independent contractors" for daily operations of districts. In teaching, feeding, counseling, transporting, and operating buildings, districts maintain control of personnel in the delivery of those services -- and for good reason. The factors for establishing a true independent contractor are important to know, particularly when attempting to defeat a claim for unemployment. While this case is instructive, should you want to question a request for unemployment compensation on this basis, it is advisable to contact an Ennis Britton attorney to review your realistic options.

New Program for 403(b) Plan Documents

In 2017, the IRS implemented a new program for pre-approved 403(b) plan documents, and the first IRS opinion letters approving 403(b) plan documents were issued in 2018. Under the new program, the only way for a tax-exempt employer to be sure that it's 403(b) plan continues to be a tax-qualified plan is to adopt a pre-approved plan document with a valid IRS opinion letter on or before **March 31, 2020**. Further, that document is required to reflect an effective date of January 1, 2010, to retroactively correct any defects that may have existed in any plan documents, in the view of the IRS, during the interim.

Many providers of investments and/or administrative services in the 403(b) plan business supply 403(b) plan documents, including documents that are the subject of a current IRS opinion letter. Therefore, some plans have already been brought into compliance with the 2020 deadline. It would be important, then, for you to communicate quickly and directly with your provider.

On the other hand, there are many 403(b) plan documents that have not been updated since the 2009 deadline, and many 403(b) account providers that do not consider plan document compliance to be their responsibility. Ultimately, in the IRS view, plan document compliance is the responsibility of the employer maintaining the plan. Once you have communicated with the provider, please feel free to contact any of our attorneys with questions and we will be happy to assist you to remain in compliance.

Upcoming Deadlines

As your school district prepares for the next couple of months, keep in mind the following upcoming deadlines.

- **February 1** – Deadline to submit May emergency, current operating expenses or conversion levy to county auditor for May election. (RC 5705.194, 5705.195, 5705.213, 5705.219)
- **February 6** – Deadline for school districts to file resolution of necessity, resolution to proceed and auditor's certification for bond levy with board of elections for May election (RC 133.18); Deadline for county auditor to certify school district bond levy terms for May election (RC 133.18); Deadline to submit continuing replacement, permanent improvement or operating levy for May election to board of elections (RC 5705.192, 5705.21, 5705.25); Deadline to certify resolution for school district income tax levy or conversion levy for May election to board of elections (RC 5748.02, 5705.219); Deadline to submit emergency levy for May election to board of elections (RC 5705.195); Deadline to submit phased-in levy or current operating expenses for May election to board of elections (RC 5705.251)
- **February 18** – Last day for voter registration for March election (RC 3503.01, 3503.19(A))
- **March 1** – Deadline to take action on and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01); Deadline to take action on and deliver written notice of nonrenewal of treasurer's contract (RC 3313.22); Deadline to publish joint statement describing how district's business advisory council has fulfilled its responsibilities (RC 3313.821)
- **March 17** – Primary Election Day (RC 3501.01)
- **March 31** – End of second ADM reporting period (RC 3317.03)
- **April 27** – Deadline to submit August emergency or current operating expenses levy to county auditor for August election (RC 574802(A))

Upcoming Presentations

2019–2020 Administrator's Academy Seminar Series

April 16, 2020: Student Discipline Primer

July 9, 2020: 2019–20120 Education Law Year in Review

Ennis Britton's Administrator's Academy Seminar Series is offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our website or contact Kayla via email or phone at 513-674-3451.

February 7: Ohio Association of School Personnel Administrators
Administrative Assistant Legal Update
Presented by Erin Wessendorf-Wortman

February 5: Southern Ohio & Brown County ESC
Special Education Legal Update
Presented by Hollie Reedy and Erin Wessendorf-Wortman

February 8: Ashland University Leadership Academy Series
Presented by Robert McBride and John Britton

February 11: Ennis Britton Nonrenewal Refresher Webinar
Presented by Gary Stedronsky and Pamela Leist

April 22: OASBO Annual Conference
Wait, What? FMLA Traps for the Unwary
Presented by Pamela Leist and Hollie Reedy

April 22: OASBO Annual Conference
Avoiding Legal Pitfalls of Online Fundraising
Presented by Pamela Leist and Hollie Reedy

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Want to stay up to date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

Webinar Archives

Did you miss a past webinar, or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Kayla via email or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline
- Student Privacy

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

Team Members:
Ryan LaFlamme
Robert J. McBride
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

Team Members:
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance
Taxes • School Levies • Bonds • Board of Revision

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