



**September 2021**

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## Are Teachers Breaking the Rules Recording Students on Their Personal Cell Phones in Class?

A complaint was recently filed with the Student Privacy Policy Office (SPPO) alleging a Family Educational Rights and Privacy Act (FERPA) violation when two teachers recorded students in the classroom on their personal cell phones.

Students’ education records are protected under FERPA. The term “education records” is defined, with certain exclusions, as those records that are directly related to a student and which are maintained by an educational agency or institution, or by a party acting for the agency or institution, to which funds have been made available under and program administered by the Secretary of Education.

Under FERPA, a school is prohibited from disclosing personally identifiable information from a child’s education records, without consent, unless the disclosure meets an exception to FERPA’s general consent requirement. Any complaint must:

- be filed by a parent who maintains FERPA rights over the education records which are the subject of the complaint;
- be submitted to the SPPO within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation; and
- contain specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred.

Ultimately, the parents failed to establish that the teacher’s recording qualified as part of the student’s education record and SPPO ruled that the videos did not violate FERPA. The SPPO maintained that the recordings did not focus on a specific student, but instead showed students participating in school activities without highlighting a particular student. They further noted that the SPPO has not issued formal guidance on the use of personal devices by school officials and the FERPA regulations do not specifically address this issue.

### What Does this Mean for Your District?

While the SPPO determined that the recordings in this case were not prohibited under FERPA, SPPO did indicate that other laws protecting the confidentiality of information in general or personally identifiable student information could come into play. Great caution and care should be exercised by school officials when making recordings or taking photographs in a classroom to ensure that prior consent is obtained to ensure that no federal or state laws are violated.

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## Special Education Spotlight: Guidance of IDEA Amidst COVID-19 Pandemic

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The U.S. Department of Education's (DoE) Office of Special Education and Rehabilitative Services (OSERS) issued a dear colleague letter on August 24 reiterating its commitment that children with disabilities and their families have successful early intervention and educational experiences for the 2021-22 school year.

As it did last year in a Q&A document released on September 28, 2020, OSERS asserts that "with few exceptions" there is no authority vested in DoE to waive IDEA requirements. The only "notable" exception identified by OSERS relates to waiving maintenance of effort funding requirements. The lack of requirement waivers applies regardless of the primary instructional delivery approach – both virtual and in-person learning are held to the same standard.

The letter reports that "the Department expects that all [school districts] will provide every student with the opportunity for full-time, in-person learning for the 2021-2022 school year." Both the letter and accompanying Q&A document indicate a focus on the transition from remote to in-person learning. While the vast majority of Ohio students made this transition at some point during the 2020-2021 school year as vaccines became available, in some other states it is happening for the first time this fall. A successful transition includes ensuring that IEPs are in effect for children with disabilities at the start of the school year, and all other rights of children with disabilities under IDEA are protected.

The guidance reaffirms the importance of appropriate implementation of IDEAS's child find obligations, which requires the identification, location and evaluation, of all children with disabilities in the states, including those enrolled in homeschool. An effective child find system is an ongoing part of each state's responsibility to ensure that FAPE is made available to all eligible children with disabilities. The Q&A document provides some specific ideas related to child-find during the pandemic, including a warning to "not rely solely on referrals by parents" as the primary child find tool, and the precaution that traditional child find strategies may not be adequate during remote learning. Increased community outreach and education is strongly encouraged by OSERS.

A theme underlying much of the guidance, and one emphasized by recent Department of Education actions, is that COVID precautions are "of utmost importance." Not only does COVID pose a direct threat to individual students – especially disabled students with medical fragility – but the fear of COVID may result in parents turning to private schooling and home schooling for perceived safety. This can make IDEA compliance more challenging. As a result, OSERS looks to COVID precautions as key element of IDEA compliance. The letter points to the CDC recommendation that everyone in K-12 schools wear a mask indoors, including teachers, staff, students, and visitors, regardless of vaccination status. The guidance encourages schools to put in place layered prevention strategies including promoting vaccination and proper universal mask-wearing.

### **What does this mean for your district?**

Adjustments to "normal" IDEA compliance, such as child find procedures, will be essential during this school year as OSERS increases its expectations while continuing to assert that no waivers will be issued. While the initial Q&A focuses on child find, OSERS has indicated that additional guidance will be forthcoming. As was the case last school year, the new guidance is expected weeks or months after school resumes. Unfortunately, schools cannot point to this delay by OSERS as a defense against any alleged IDEA violations. As a result, careful planning and informed, proactive legal guidance are key.

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## Anonymous Reporting Systems Required for 2021-22 School Year in All Districts

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Starting this year, school districts must either register with the Department of Public Safety's free *Safer Ohio School Tip Line* or enter into an agreement with another anonymous reporting program selected by the district that allows individuals to report threats to student safety.

The selected reporting system must meet all of the following requirements:

- Operate twenty-four hours a day, seven days a week
- Share any reported information with law enforcement, public safety agencies, and school threat assessment teams as required under your emergency management plan
- Comply with FERPA and state law governing student confidentiality

Schools are expected to promote and inform students about the tip line and the reporting methods. Through the tip line, students are encouraged to report:

- Bullying incidents
- Withdrawn student behaviors
- Verbal or written threats observed toward students, faculty, or schools
- Weapon/suspicious devices on or near school grounds
- Gang related activities
- Unusual/suspicious behavior of students or staff
- Self-harm or suicidal sentiments
- Any other school safety related concerns

Although school safety analysts may ask for additional information, it is important to note that any tips may remain anonymous.

School districts are also required to submit annual reports to the Ohio School Safety Center (OSSC) and the Ohio Department of Education through forms prescribed by each agency. The data reported will include:

- The number of reports made through the reporting system disaggregated by school
- The number and type of disciplinary actions taken in the previous school year as a result of anonymous complaints
- The number and type of mental wellness referrals as a result of anonymous complaints
- The race and gender of students subject to the disciplinary actions and wellness referrals
- Any other information the ODE or OSSC deems necessary

Districts should ensure that contracts with reporting program providers includes language addressing the reporting requirement to ensure the proper data is collected. This data is considered a security record that is not subject to release under the state's public records law.

The OSSC has created a handful of downloadable print and digital images of the reporting program that may be posted in your schools and on social media. Visit the [OSSC's website](#) for additional details and register for the *Safer Ohio School Tip Line* program [here](#).

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## Mask Mandate Updates

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### **U.S. DOE's Office for Civil Rights Enters the Fray by Initiating Discrimination Investigations Against States with Mask Prohibitions**

On Monday, August 30, the U.S. Department of Education's Office for Civil Rights (OCR) opened investigations into five states that prohibit schools from setting universal mask mandates. Letters were sent to the chief state school officers of Iowa, Oklahoma, South Carolina, Tennessee, and Utah. Several state school chiefs who received the letter said they agreed that their school districts should have the flexibility to set mask requirements if they deem them necessary.

OCR will specifically investigate whether statewide prohibitions on universal indoor masking discriminate against students with disabilities who are at heightened risk for infection of COVID-19 by preventing them from safely attending in-person education. Specifically, they will determine whether these prohibitions are a violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act which collectively mandate that schools are required to provide a free and adequate public education (FAPE) to students with disabilities and also provide programs and facilities that are accessible to individuals with disabilities.

Education Secretary Miguel Cardona had previously sent letters to each of the states who will be subject to the OCR's investigations. In it, he noted that "the safe return to in-person instruction requires that school districts be able to protect the health and safety of students and educators, and that families have confidence that their schools are doing everything possible to keep students healthy."

The Department will continue to monitor, but did not launch an official investigation into, Florida, Texas, Arizona, or Arkansas as they have voluntarily suspended enforcement of their policies while litigation is ongoing as described below.

### **Florida Judge Invalidates Governor's Executive Order**

On Friday, August 27, a Florida judge ruled that school districts can legally require their students to wear masks to prevent the spread of COVID-19. He stated Governor Ron DeSantis overstepped his executive order by banning school districts from requiring students to wear masks.

The governor has argued that a new Florida law gives parents the ultimate authority to oversee health issues for their children. However, the judge noted, it exempts government actions that are needed to protect public health and are reasonable and limited in scope. A school district's decision to require student masking to prevent the spread of the virus falls within that exception.

Through his opinion, the judge cited Florida Supreme Court decisions which found that individual rights are limited by their impact on the rights of others. For example, adults have the right to drink alcohol but not drive drunk, and that there is a right to free speech, but not to harass or threaten others. As a result, he said that school boards could reasonably argue that mask-less students endanger the health of other students and their teachers, and mask policies should be up to them to determine.

Despite the ruling, the Florida Department of Education on August 30 began withholding school board member salaries from two school districts that require masks in classrooms. Florida Education Commissioner, Richard Corcoran, said he is following through on the orders of the State Board of Education and stated funds would continue to be withheld monthly until each school board complied with state law and rule.

## **Lawsuit in Texas Filed**

On Tuesday, August 17, a lawsuit was filed in Texas claiming that the state is discriminating against medically vulnerable students by failing to accommodate their disabilities. The parents filed suit on behalf of their disabled children, all of who are under age 12 and ineligible to receive a COVID-19 vaccine.

The parents claim that the ban violates Section 504 and Title II of the ADA by excluding students with underlying medical conditions from district programs and failing to make reasonable accommodations that would allow those students to attend school. In addition, they are asking a judge to issue a temporary restraining order that would allow districts to implement mask mandates and prohibit the state from withholding funds from districts that choose to make them mandatory.

The lawsuit challenges an executive order by Governor Greg Abbott that declares school systems cannot require students or staff to wear a mask. It also noted that districts must allow individuals to wear a mask if they choose to do so. As a result of ongoing litigation, the Texas Education Agency issued an updated public health guidance that stated it would not be enforcing the mask provisions in the interim, but would make additional guidance once the court issues are resolved.

## **Other Actions Afoot**

In Arkansas, a judge pressed pause on the state law that prohibits local officials from setting mask mandates, meaning school districts can – at least for now – set their own local mask requirements. Tennessee’s governor has signed an executive order requiring schools to allow families to opt out of mask mandates. In Utah, local health departments can issue 30-day school mask mandates with approval from the state or county government.

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## Upcoming Presentations

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We are currently scheduling administrator retreats for the 2021-2022 school year (in person or via videoconference). Contact us soon if you would like to schedule a retreat for your administrators, as calendars book up quickly.

**September 10: BASA Communications Conference**  
***Effectively Managing Contentious Board Meetings***  
Presented by Pamela Leist and Hollie Reedy

**September 10: OASBO Ohio Valley Chapter – *Legal Update***  
Presented by Erin Wessendorf-Wortman

**September 14: Southern Ohio ESC – *Legal Update***  
Presented by Bronston McCord & Erin Wessendorf-Wortman

**September 16: OASPA – *Legal Update***  
Presented by Jeremy Neff & Giselle Spencer

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# 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 may have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly, 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  
Kyle Wheeler

## **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  
Kyle Wheeler

## **School Finance**

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

### **Team Members:**

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