

**FERPA: ITS PROVISIONS AND ITS EXCEPTIONS
FOR THE SPECIAL EDUCATION STUDENT**

By

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I. Background

- A. In general, FERPA (the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g) and its regulations grant parents the right to inspect their child's education records; prohibit the disclosure of a student's education records without parental consent (subject to some exceptions); and allow parents the right to ask the school district to amend their child's records and have a hearing if the request is denied.
- B. One significant point of recent focus has been the issue of electronic records and, especially, e-mail. It is important to understand that included within the scope of electronic information is information stored on cell phones, PDAs, databases, instant messages and voice-mail recordings.

II. Laws that Come Into Play

- A. FERPA, 20 U.S.C. § 1232g.
- B. Virginia Freedom of Information Act, Va. Code § 2.2-3700, *et seq.*
- C. Va. Code § 22.1-289(A).
- D. Library of Virginia Guidelines on Records Management, Schedule 21.
- E. *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, DOE 2010.

III. Applicable Federal Provisions

34 CFR Section 99.3 *What definitions apply to these regulations?*

The following definitions apply to this part:

...

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written or electronic means, to any party except the party identified as the party that provided or created the record.

...

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

...

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

...

Personally Identifiable Information

The term includes, but is not limited to —

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) *Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;*

(f) *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;*

...

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche.

34 CFR Section 99.10 *What rights exist for a parent or eligible student to inspect and review education records?*

(a) *Except as limited under Sec. 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's educational records.*

...

(b) *The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.*

(c) *The educational agency or institution, or SEA or its component, shall respond to reasonable requests for explanations and interpretations of the records.*

(d) *If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall –*

(1) *Provide the parent or eligible student with a copy of the records requested; or*

(2) *Make other arrangements for the parent or eligible student to inspect and review the requested records.*

(e) *The educational agency or institution, or SEA or its component, shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.*

...

34 CFR Section 99.11 *May an educational agency or institution charge a fee for copies of education records?*

(a) *Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.*

(b) *An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.*

34 CFR Section 99.12 *What limitations exist on the right to inspect and review records?*

(a) *If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.*

34 CFR Section 300.623 *Safeguards.*

(a) *Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages.*

(b) *One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.*

(c) *All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.123 and 34 CFR part 99.*

(d) *Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.*

IV. Virginia-Specific Provisions

- A. “‘Scholastic record’ means those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. These include, but are not limited to, documentation pertinent to the educational growth and development of students as they progress through school, student disciplinary records, achievement and test data, cumulative health records, reports of assessments for eligibility for special education services, and Individualized Education Programs. Such records may be

recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” Va. Code Ann. § 22.1-289(A).

1. Under Va. Code Ann. § 22.1-289(A), “‘scholastic record’... shall not include records of instructional, supervisory, administrative, and ancillary educational personnel that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”
- B. Virginia Special Education Regulations, at 8 VAC 20-81-10, define “education record” as “those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as ‘scholastic record.’ In addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child’s educational program (e.g., scheduling of meetings or notices). This term also includes the type of records covered under the definition of ‘education record’ in the regulations implementing the Family Education Rights and Privacy Act.” *See also* 8 VAC 20-81-170(G)(11).

V. Significant Cases of Interest Interpreting FERPA

- A. *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 36 IDELR 62 (2002). It does not violate FERPA for one student to grade another student’s paper. Student classwork does contain information specifically related to a student; however, in order to be considered an education record, the record would have to be officially maintained. “The word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled.” *Id.* at 433. To hold otherwise, “... every teacher would have an obligation to keep a separate record of access for each student’s assignments.” *Id.* at 434. “For these reasons, even assuming a teacher’s grade book is an education record, the Court of Appeals erred, for in all events the grades on students’ papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act.” *Id.* at 436.
- B. *Gonzaga University v. Doe*, 536 U.S. 273, 37 IDELR 32(2002). Information about a student, who was seeking to become a teacher, was released without the student’s consent to the state agency overseeing teacher certification. The U.S. Supreme Court held that no enforceable cause of action arose under FERPA in the situation where there was a violation of FERPA’s nondisclosure requirements. “In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms — no less and no more than what is required for Congress to create new rights enforceable under an implied private

right of action. ... FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983." *Id.* at 290.

VI. Responding to Requests for Records

- A. *Letter to Anonymous*, 114 LRP 28828 (FPCO February 25, 2014). Parents requested "[a]ll documents and records created or maintained by, or at the request of, [School] (whether or not held by [School] District Administration or residing on the K-12 server, or elsewhere), its employees, agents, administrators, contractors, and/or representatives, reflection communications, facts, observations or impressions, concerning or relating to [your son] and [you and your husband], regardless of physical form or characteristics, including without limitation, any writing, picture, recording, sound or symbol, whether on paper, magnetic or other media."

The school district provided "some" records after conducting a reasonable search for records. The parents suggested that not all records were produced. According to FPCO, "...it's the responsibility of the parent or eligible student to clearly specify the records to which he or she is seeking access. If a parent or eligible student makes a 'blanket' request for a large portion of education records and the parent or eligible student believes that he or she was not provided certain records which were encompassed by that request, he or she should submit a follow-up request clarifying the additional records he or she believes exist." *Id.*

- B. Records cannot be disclosed without written parent consent even if the parent orally requests the disclosure. *Letter to Wall*, 115 LRP 4922 (FPCO November 18, 2014).
- C. FERPA does not require disclosure of records to an attorney for the parents as the right of access under FERPA is personal to the parents or eligible student. As a result, the 45-day period for disclosure does not apply to requests from attorneys for records, even if accompanied by a written consent of the parents for the disclosure. *See Letter to Segura*, 113 LRP 7194 (FPCO October 2, 2012). There may be, however, a right of access under the IDEA.
- D. FERPA does not prohibit disclosure of student records to a school for which an application is being made by the school division in considering a change in placement. *Letter to Anonymous*, 113 LRP 35724 (FPCO June 19, 2013). "Under FERPA, a school may not generally disclose personally identifiable information from a student's education records to a third party unless the student's parent has provided written consent. 34 CFR § 99.30. However, there are some exceptions to FERPA's general written consent requirement. One such exception permits a school to nonconsensually disclose information from a student's education records to another school where the student seeks or intends to enroll. 34 CFR

§ 99.31(a)(2). The sending school may make the disclosure if it includes a statement in its annual notification of rights that it discloses education records for this purpose, or if it makes a reasonable attempt to notify the parent in advance of the disclosure.”

- E. When dealing with disclosures, it is important to have a comprehensive annual FERPA disclosure notice that covers such items as disclosure to attorneys, schools, private providers, etc. There is a model notice on the FPCO website (<http://www2.ed.gov/policy/gen/guid/fpc/index.html>)
- F. Information that is not an educational record may still be subject to being produced through a subpoena or FOIA. *Sass v. Woodward Mental Health Center, Inc.*, 114 LRP 12305 (NY Sup. Ct. #602712/12 March 12, 2014).
- G. Do not assume there is no disclosure of a student name if an identification number is used instead. A student number can be considered as a personal identifier.
- H. It is very expensive to locate, review, classify, redact and produce electronic information.
- I. Test protocols may be education records and, if so, may be reviewed by parents.
- J. Consider a policy that prohibits maintaining student records or conducting business on an employee’s personal electronic devices.
- K. There is an obligation to preserve electronic information in the event of litigation or threatened litigation. This requirement does not arise out of FERPA.
- L. It is not required that a request for records be in writing. *Letter to Chief State Sch. Officers*, 108 LRP 47461 (FPCO Sept. 1, 2008).
- M. There is no obligation to supply records on an ongoing basis. Records are supplied only following a request. *Letter to Anonymous*, 107 LRP 64188 (FPCO Sept. 28, 2007).
- N. It is reasonable to request that parental review of records occur during the school day and during school hours, provided that the practice will not prevent the parents’ right of access to records. *Letter to LEA Superintendents*, 108 LRP 47595 (FPCO Sept. 1, 2008).
- O. A right of access to records is not the same as a right to obtain copies of records. *Letter to Shuster*, 108 LRP 2302 (OSEP 2007).
- P. Consideration must be given, however, to whether the failure to supply copies effectively prevents the parents from having access to the records. *Letter to Kincaid*, 213 IDELR 271 (OSEP 1989).

VII. Emergency and Safety Exceptions

- A. Disclosure to parents of information regarding an eligible student may be made in a health and safety situation. *Letter to Anonymous*, 53 IDELR 235 (US DOE Dec. 17, 2008).
- B. Use caution in disclosure, but FPCO will perhaps not second-guess the disclosure.

VIII. Allegations of Impermissible Disclosure, Destruction of Records and FERPA Investigations

- A. *Letter to Anonymous*, 114 LRP 37975 (FPCO May 1, 2014). “FERPA does not require districts to provide parents with district policies, or to provide parents a list of the types and locations of education records. FERPA does not require schools to create or maintain education records, or to re-create lost or destroyed education records. Additionally, FERPA does not require a school to keep education records in any particular file or location, and a school official would not be prohibited by FERPA from taking education records home, so long as the records are treated consistent with FERPA. FERPA would not require a school district to honor a request that education records not be destroyed. However, a school may not destroy education records if there is an outstanding request to inspect and review the records.”
- B. FERPA complaints must be filed by parents or an eligible student; must be filed within 150 days of the alleged violation or within 180 days of when the complainant knew or reasonably should have known of the violation; and must contain specific allegations that show a FERPA violation. *Id.*
- C. Parents may not file claims about impermissible disclosure if they received records of another student. *Letter to Nettles*, 113 LRP 7190 (FPCO October 2, 2012).
- D. *Letter to Anonymous*, 114 LRP 37978 (FPCO May 1, 2014). Parent stated to FPCO that a student came up to her and remarked “she was sorry [your] daughter has autism.” The parent viewed this knowledge as an indication that there had been a disclosure of confidential information. The special education coordinator said that she would speak to the teachers of the student. The parent did not identify the teacher and FPCO refused to open a complaint. It was further noted that, in the event of a FERPA violation, corrective action can be determined. Corrective action can include “...training of school officials or a memorandum advising school officials of the specific requirements at issue in the complaint.” *Id.* FPCO cannot under FERPA require a school district to take punitive action against an employee.
- E. Disclosure of information based on personal knowledge or observation does not violate FERPA as it is not a disclosure from records. *See Letter to Ramirez*, 113 LRP 7165 (FPCO October 2, 2012).

- F. A record does not have to be amended if the challenge the record is based on a difference of opinions. *Letter to Anonymous*, 113 LRP 28736 (April 16, 2013); *Letter to Moody*, 113 LRP 9505 (FPCO January 9, 2013) (dispute over tardies and absences).
- G. Records do not have to be destroyed at the request of a parent, if the education agency determines that the records are still relevant.
- H. Improper disclosure of electronic information can result in costly data recovery provisions.

IX. Electronic Record Issues

- A. *ESPN v. Ohio State Univ.*, 970 N.E.2d 939 (Ohio 2012). ESPN sought to obtain, among other records, e-mails relating to the football team's alleged involvement in the tattoo scandal. Some related to individual students. The Ohio Supreme Court held that e-mails that the university has purposefully "maintained" for purposes of FERPA are education records and are exempt from disclosure under Ohio's open records law. The Court concluded: "Ohio State submitted sufficient evidence to establish that the responsive records are 'maintained' for purposes of FERPA. Ohio State's Department of Athletics retains copies of all e-mails and attachments sent to or by any person in the department; the e-mails cannot be deleted. ... These records are not similar to the transient records involved in *Falvo*...." *Id.* at 947.
- B. *Phoenix Newspapers Inc. v. Pima Community College*, Case No. 20111954 (Ariz. Superior Ct., Pima Cnty. May 17, 2011). Documents are not "maintained" simply because they are on a server or in an individual employee's mailbox. "Documents are not 'maintained' by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records. *Id.* If emails can be removed from the database in question simply by the account holder deleting the email from their inbox then emails that happen to remain on the server by no action of the educational institution are not maintained by the school. *Id.*; *See Owasso*, 534 U.S. at 433. 'FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar,' not individual assignments or emails. *Owasso*, 534 U.S. at 435."
- C. *S.A. v. Tulare County Office of Education*, 53 IDELR 111 (E.D. Cal. 2009) (Related cases at 51 IDELR 244, 52 IDELR 10, 53 IDELR 143 and 53 IDELR 218). Parents requested a copy "of any and all electronic mail" that personally identified their child. The school district produced all e-mails that had been printed and placed in the student's file. All other e-mails had been purged. The parents filed a state complaint under the IDEA's state complaint procedure alleging that they were denied access to their child's educational records and that some educational records were destroyed without notice to them. The state held

that e-mail is not an educational record unless it is officially maintained in the student's file and that because the e-mails were not officially maintained, there was no obligation to give notice prior to their destruction. The parents argued on appeal to the federal District Court that the school district was required to "maintain all e-mails that identify him." Citing *Owasso*, the Court rejected this position and concluded that there is no requirement "to maintain a record that identifies Student." The e-mails would only be education records if they specifically identify the student and were officially maintained. As a result, e-mails that are not kept in the student's permanent record were found not to be education records and the purging of the e-mail was not an improper destruction of education records. *See also, Washoe Co. Sch. Dist.*, 114 LRP 25728 (Nev. DOE May 23, 2014).

- D. *K.C. v. Fulton County Sch. Dist.*, 46 IDELR 39 (N.D. Ga. 2006). Parents did not prevail in their allegations that they were denied access to student records "...including writing samples, evaluations, written assignments and worksheets. ..." "The Supreme Court has thus made clear that parental access to 'education records' does not extend so far as to allow access to each individual piece of student work. The Plaintiffs were provided with the material when they subpoenaed it for the due process hearing. There was no IDEA violation by the school district in not providing the material earlier."
- E. *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, 789 N.W.2d 495 (Mich. Ct. App. 2010). The mere possession of a record by a public agency does not make it subject to FOIA. The document must be related to an official function. Personal emails are not subject to FOIA.
- F. *Ky. Op. Att'y. Gen. 10-ORD-069*, 2010 WL 1437143 (Ky. A. G. April 8, 2010). Communications among school staff about a student are educational records which must be made available to the parents for their review and inspection.
- G. *Washoe Cnty. Sch. Dist.*, 109 LRP 78026 (SEA Nev. 2009). Parents alleged that they were not provided all educational records regarding their child, specifically all e-mail records. The parents were advised that all e-mails were routinely purged after 60 days unless archived. The parents filed a state complaint. The Nevada State Department of Education investigated and noted that the IDEA incorporates the FERPA definition of records at 34 CFR § 300.611(b). The state concluded that because e-mail records were purged, the school district "... did not comply with federal and state requirements to permit the parents to inspect and review the student's education records, including e-mails, prior to the 4/6/09 IEP meeting." Because the e-mails were found to be education records and no notice of their destruction was provided to the parents, this failure provided an additional violation of the IDEA.
- H. *School District U-46*, 45 IDELR 74 (SEA Ill. 2005). School district represented to hearing officer that all e-mails had been produced to parents following their request. This request was made in connection with a due process hearing. The

hearing officer commented without analysis that, “There is certainly no reason why these records would not be ‘education records’ relating to the Student and thus available to the parents and their attorney under 34 CFR § 300.562.”

- I. It is far from clear whether e-mail is an education record and when an electronic record might become an educational record.
- J. A House of Representatives panel heard testimony regarding FERPA and electronic issues. *See How Data Mining Threatens Student Privacy, J. Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Educ. of the H. Comm. on Educ. and the Workforce & the Subcomm. on Cybersecurity, Infrastructure Protection, and Security Technologies of the H. Comm. on Homeland Sec., 113th Cong. (2014).* Testimony before the panel suggested that FERPA may not be current regarding the collection of electronic information. Concerns were expressed about third-party contracts, cloud computing services and data security and privacy. The issue of data-mining of student records is an issue that should be addressed. Of interest, testimony revealed that there had never been a penalty assessed for a FERPA violation.
- K. The installation of apps and software by teachers and staff can be an issue regarding student records.
- L. *See Transparency Best Practices for Schools and Districts (July 2014).* <http://www.ed.gov/blog/2014/07/privacy-transparency-new-resources-for-schools-and-districts/>
- X. Inadvertent Disclosure of Electronic Records
 - A. *Letter to Lacey, 114 LRP 30849 (FPCO March 12, 2014).* Student records were disclosed to other parents via email. “The FERPA Safeguarding Recommendations recognize that no system for maintaining and transmitting education records, whether in paper or electronic form, can be guaranteed safe from every hacker and thief, technological failure, violation of administrative rules, and other causes of unauthorized access and disclosure.” FERPA does not address requirements for safeguarding documents or for actions to take in the event of a disclosure.
 - B. No system for maintaining records will be perfect and it is possible that there will be inadvertent disclosures as a result of hacking and similar occurrences. The LEA should focus on follow up efforts in the event of an impermissible disclosure. *Letter to Schulte, 113 LRP 35693 (June 18, 2013); Letter to Fagan, 113 LRP 7161 (FPCO October 9, 2012).*
 - C. The follow-up procedures can include the following steps:
 - 1. Involving law enforcement;
 - 2. Determine the scope of the breach and type of information disclosed;

3. Take steps to retrieve the data and to prevent further disclosure;
4. Identify affected records and affected students;
5. Determine the source of the breach and which officials had the responsibility for the oversight of the systems;
6. Determine whether policies and procedures were breached;
7. Determine whether the source of the breach was a lack of oversight;
8. Conduct a risk assessment and figure out strategies to prevent a recurrence; and
9. Refer the victims to the website for the Office of Inspector General that describes the steps to take if there has been identity theft.

XI. FERPA Complaints and Hearing Procedures

- A. The Family Policy Compliance Office is the arm of the U.S. Department of Education that is primarily responsible for enforcing FERPA. Under the FERPA regulations, FPCO's jurisdiction is not limited to "policies and practices" that violate FERPA. *See also Letter to Anderson, 50 IDELR 167 (U.S. Dep't of Educ. 2008).*
- B. The scope of a FERPA hearing is limited. The FERPA regulations afford an opportunity for parents to challenge alleged inaccuracies or misleading information in the student's educational records. *See 34 CFR 99.21(a).*
- C. The hearings are to be conducted in accordance with the procedures specified in 34 CFR 99.22. Those procedures provide as follows:
 1. The hearing required by § 99.21 must meet, at a minimum, the following requirements:
 - (a) *The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.*
 - (b) *The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.*
 - (c) *The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.*

- (d) *The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.*
- (e) *The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.*
- (f) *The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision. 34 CFR § 99.22.*

- D. The FERPA hearing process is nothing like those hearings initiated under the IDEA. “A hearing on the amendment of records under 34 CFR §300.568 is a separate hearing procedure from the impartial due process hearing under Part B of the IDEA. Part B provides that a parent or public agency may initiate a due process hearing on matters relating to identification, evaluation, or educational placement, and provision of a free appropriate public education. 34 CFR §300.507(a). As such, if a parent requests that information in a student's records be amended and the public agency refuses to amend the information in accordance with the request, a public agency may not bypass a parent's right to a hearing under 34 CFR §300.568, which is governed by FERPA, and require the parent to request an impartial due process hearing under 34 CFR §300.507(a). Questions involving a violation of FERPA requirements regarding education records are not within the jurisdiction of a hearing officer in a due process hearing convened pursuant to 34 CFR §300.507(a) of the IDEA.” *See Letter to Parent re: Amendment of Special Education Records* (August 13, 2004), <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/parent.html>.
- E. The State Regulations also address the procedures to be used in FERPA hearings and provide that the hearings “...shall be conducted in accordance with the procedures under 34 CFR § 99.22 of the Family Educational Rights and Privacy Act...” 8 VAC 20-81-170(G)(9) (Emphasis added).

XII. Other FERPA Issues

- A. Have a policy on charging for copies of records. Fees may not be charged for searching for records or for retrieval of records. 34 CFR § 99.11(b) and 34 CFR § 300.617(b).
- B. Fees may be charged for copies of records unless the fee would prevent right of access to records. 34 CFR § 99.10(d)(1) and 99.11(a).

- C. If a record contains information about more than one student, the information about one student may not be disclosed to another student and redaction would be required. 34 CFR § 99.12(a). This redaction can be time-consuming.
- D. Records must be produced within a period of time not to exceed 45 days. 34 CFR § 99.10(b). State laws may impose shorter periods of time. Also, there may be a need to produce records before an IEP meeting.
- E. Failure to comply with FERPA's provisions regarding the protection of records could result in a cut off of federal funds. 20 USC § 1232g(b)(1).
- F. State requirements regarding disclosure of records must be consistent with FERPA's provisions. *Rim of the World Unified Sch. Dist. v. The Superior Court of the Cnty. of San Bernardino*, 103 LRP 6168 (Cal. Ct. App. 2002).
- G. Consider naming a custodian of records to whom requests for records must be directed in order to protect against requests for records during the summer months and requests directed to multiple personnel. *B.F., a minor by and through P.F. and R.F. v. Fulton Cnty. Sch. Dist.*, 51 IDELR 76 (N.D. Ga. 2008).
- H. Schools must use "reasonable methods" to identify and authenticate the identity of parents, student, school officials, and any other parties to whom the school discloses education records.

XIII. Additional Guidance from VDOE and Elsewhere

- A. Do schools have discretion to determine whether e-mails are "maintained" as education records for purposes of FERPA and IDEA? The Virginia Department of Education's FAQ, 001-10 recognizes the school division's authority under special education regulations to determine which records are officially maintained by the division and therefore which records constitute education records.
- B. "It is up to each locality to determine which electronic data and communication (including communication between and among school personnel), if any, constitute an education record and how the school division will maintain electronic education records in ways that will allow parent(s) access to those records if they request a copy or want to inspect or review the student's entire record. In addition, a division must be mindful that certain electronic data and communication must be retained to enable it to demonstrate compliance with various state and federal special education regulations regarding whether in the context of a state complaint, due process proceeding, or federal monitoring and data collection. Recall that the definition of electronic record includes matters associated with the child's educational program; e.g., scheduling of meetings or notices." See Virginia Department of Education, *Frequently Asked Questions, 001-10 Education Records*, http://www.doe.virginia.gov/special_ed/regulations/state/faq_implementing_regulations/2010/001_education_records.shtml.

- C. See Library of Virginia, Records Retention and Disposition Schedule, General Schedule No. GS-21. (2012),
http://www.lva.virginia.gov/agencies/records/sched_local/GS-21.pdf.
- D. The Library of Virginia procedures dictate how long information must be kept if it is required to be maintained.
1. See Library of Virginia, *E-Mail Management Guidelines*, (May 2009),
<http://www.lva.virginia.gov/agencies/records/electronic/email-management-guidelines.pdf>.
 2. See Library of Virginia, *Virginia Public Records Management Manual*, (October 2014),
<http://www.lva.virginia.gov/agencies/records/manuals/vprmm.pdf>.
 3. See Library of Virginia, *Electronic Records Guidelines*, (December 2009),
<http://www.lva.virginia.gov/agencies/records/electronic/electronic-records-guidelines.pdf>.