

# Ohio Association for Pupil Transportation



## Bus Camera Data: How Long to Save it & Who Should See it?

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### David Lampe

Cincinnati: 513.870.6561

Dayton: 937.535.3914

[dlampe@bricker.com](mailto:dlampe@bricker.com)

# Regulation of Student Records

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State Law

Federal Law

# Ohio Revised Code 3319.321



- Strictly limits the disclosure of personally identifiable information (“PII”) about pupils in the public schools.
- Prohibits the disclosure of student names or other PII about students to any person or group for use in a profit-making activity.

# Ohio Revised Code 3319.321 (cont.)



- Exceptions to nondisclosure are permitted in the case of “directory information.”
- Directory information may be released without prior written consent unless the recipient is engaged in a profit-making activity or unless the parent (or pupil, if over 18) has informed the school that such information may be released only with their prior written consent.

# Directory Information Under ORC 3319.321



- Name
- Address
- Telephone listing
- Date and place of birth
- Major field of study
- Participation in officially recognized activities and sports
- Weight and height of members of athletic teams
- Dates of attendance
- Dates of graduation
- Awards received

# Federal Law - FERPA

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- Family Educational Rights and Privacy Act
- 20 U.S.C. §1232g
- 34 CFR Pt. 99
- Applies all to school districts receiving federal funds.

# FERPA



- Prohibits the unauthorized disclosure of current and former student's records.
- Gives rights to students and parents to inspect and review records and to challenge the accuracy of the information contained in those records.

# FERPA

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- Directory information may be disclosed, unless parent/eligible student opts-out of release without their consent.
- School districts may define “directory information” in annual FERPA notices sent to parents/eligible students each year.



# Annual FERPA Notice



- Are student images/video identified in the school district's annual FERPA notice as "directory information"?
- Video of school sporting events, choir/band performance, etc. could fall under the definition of directory information, if properly identified in the district's annual FERPA notice.

# Definition of “Record”

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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 §99.3.

# Education Record

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As long as the records are “directly related to a student and . . . are maintained by an educational agency or institution or party acting for the agency or institution,” the document is likely covered by FERPA.

# Release of Personally Identifiable Student Information



- Requires consent of the parent or pupil (if age 18 years or older).
- Information released with consent may be transferred only on the condition that it will not be given or disclosed to another without the further written consent of the pupil or his/her parent(s).

# Parental Access

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The non-residential parent is entitled to access the student records of his/her child to the same extent that such access is provided to the residential parent, unless otherwise provided in a separation agreement, divorce decree or other court order.

# Access to Educational Records

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Burden is on the residential parent to inform the school of any limitations prohibiting or restricting access to student records for the non-residential parent.

# Access to Student Records



Although a non-residential parent may have the same rights as the residential parent to his/her child's records (unless otherwise limited by court order or separation agreement, etc.), such non-residential parents generally do not have the right to participate in educational decisions related to the child, unless such rights are already provided in a court order, decree or approved separation agreement.

# Access to Student Records by School Employee



- Access to student records is limited to those employees acting exclusively in their capacity as an employee servicing the student.
- Employees who do not have a legitimate, school-related need to access the student's records are not permitted access.



# Subpoena or Court Order



- FERPA permits the disclosure of education records without consent of the parent/eligible student in compliance with a lawfully-issued subpoena or judicial court order.
- Prior to production, the educational institution must send notice to the parent/eligible student and allow them a reasonable time to file a motion to quash seeking a court order preventing the production of the records.

What about school video that shows multiple students?

# 20 U.S.C. §1232g(a)(1)(A)

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If any material or document in the education record of a student includes information on more than one student, the parents of each student shall have the right to inspect and review only such part of the materials/document as relates to his/her own student.

# 34 CFR §99.12(a)

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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.

# Family Policy Compliance Office (FPCO)



- Division of the U.S. Department of Education that administers FERPA.
- Has opined that, where a video (or other picture image) of one or more students is taken, the video is “directly related” to and thus “the education record” of the student or students who are the focus of the video.

# FPCO Guidance (cont.)



- Students (or their parents) who are the focus of video may view the video since it is their “education record.”
- If multiple students are the “focus” of the video, all such students and their parents may view the video.

# FPCO Guidance (cont.)

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School may not give copies of the video to any of the parents (or students) who are the focus of the video without the consent of the other students who are also the focus of the video.

# FPCO Guidance (cont.)

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Video would not be a FERPA -protected education record for those students who are in the background (i.e., sitting on the bus, walking down the hall, etc.), and who are not the focus of the video.



# FPCO Guidance (cont.)

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If the school uses the video to find witnesses to an altercation, and such students are named or used as witnesses, then the video becomes an education record of the student-witnesses.

# Who “Maintains” the Video?

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FERPA’s definition of “education records” applies to those records that are “maintained by an educational agency or institution or by a party acting for the agency or institution.” 34 CFR §99.3.

# Maintained by the School?

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- Are the cameras which captured the video image of the students the property of the school?
- Are such cameras the property of a party acting on behalf of the school (i.e., private bus company that has contracted with school to transport students)?
- If yes to either of the above questions, FERPA applies to video that is considered an education record of the student(s).

# Maintained by the School (cont.)

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- FERPA would not apply if the video cameras and footage are operated or maintained by the school's law enforcement unit.
  - Cruiser dash cameras
  - Police body cameras

# Whose Record is it?

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O.R.C. 149.011(G) defines what constitutes a record, and states in relevant part:

"Records" include any document, device, or item, regardless of physical form or characteristic ... created or received by or coming under the jurisdiction of any public office ... which serves to document the organization, function, policies, decisions, procedures, operations, or other activities of the office. (Emphasis added.)

# Whose Record is it?

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- Are SRO body camera video kept by the police department or the school district?
- Video documents the operations and functions of the police department or the school district?
- If video is not deemed school district records, then no duty upon the district to provide video to anyone pursuant to a public records request.

# Couple Caveats...

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- Does contract between district and police provide the district with access to the body cam videos?
- If yes, then video given to district would be either a public record or student record (as applicable).
- If district needs a video for a particular school purpose, it should make a public records request for the police to produce the record.

# Body Camera Protocols



- Negotiate protocols with law enforcement addressing when body cameras will be used and when they should be turned off?
- Use of body cameras to preserve evidence and provide transparency –vs- creating hundreds of hours of body cam video created for no discernable purpose?
- Privacy concerns (restrooms, locker rooms, etc.)?



# Law Enforcement Records



- Records created by law enforcement, for purposes of law enforcement, and maintained by law enforcement, are not “education records” subject to the privacy protections of FERPA. Such records may be subject to disclosure to third parties without the consent of the parent or eligible student.
- However, education records, or personally identifiable student information contained with such records, which the school shares with law enforcement, do not lose their protected status as education records just because they are shared with law enforcement.

# Police & Student Records



- Generally law enforcement agencies unconnected to the school have no authority under FERPA to receive student records.
- FERPA provides no automatic exception to law enforcement agencies.
- Several exceptions apply (to be discussed later).

# Law Enforcement Access



- Law enforcement officers who are investigating missing child cases must be given access to student records. R.C. 3319.321(E).
- However, parental permission must still be obtained before the officer is given copies of student records in conjunction with missing child investigations.

# Law Enforcement Access

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The Ohio Attorney General has opined that student records relating to illegal drug or alcohol use may not be released to law enforcement officers without consent. 1990 OAG No. 099.

# Police & Student Records



- Schools can provide student directory information to police, assuming parents/eligible student have not opted-out of the disclosure of such directory information.
- Schools can provide non-directory student information to police with consent.
- Student information can be given to law enforcement in the event of a health or safety emergency, even without consent.

# Police/SROs and Student Records (cont.)

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School officials may be well served to meet with police to discuss FERPA's restrictions – to allow the police to understand the school's desire to cooperate with law enforcement, yet remain in compliance with federal law.

# **FPCO Guidance: *Letter to Dr. Jene Watkins, Indian Creek Local School District (Feb. 21, 2008 )***



- Complaint concerning an alleged FERPA violation for school's delivery of student information to law enforcement officers/SRO.
- SRO then disclosed student information to the student's parents and county prosecuting attorney.
- FPCO found that even if SRO qualified as a "school official" or "law enforcement unit," he/she cannot disclose the educational records he/she had received from the school to the prosecutor.

# **FPCO Guidance: *Letter to Dr. Jene Watkins, Indian Creek Local School District (Feb. 21, 2008 – Ohio) (cont.)***



FPCO ordered the district to provide documentation that it established procedures to ensure that SROs and other non-employees of the district did not obtain access to educational records without parent/eligible student consent, unless they qualified as “school officials,” and unless the district could show that it had direct control over these contractors in accordance with FERPA’s requirements.



# SRO as School Official



- Under FERPA, a SRO may be considered a school official with a legitimate educational interest if certain conditions are met:
  1. The SRO performs an institutional service or function for the school that would otherwise be performed by school employees;
  2. The SRO is under the direction and control of the agency or institution with respect to use and maintenance of educational records; and
  3. The SRO is subject to the requirements in 34 CFR §99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

# SRO As School Official

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- The SRO must be designated as a “school official” in the school’s annual FERPA notification so the parents know the SRO has access to their children’s educational records.
- If the SRO is deemed a “school official,” their ability to review student records is limited to whether or not they have a legitimate educational interest in the records.
- If the SRO wishes to review student records merely for external law enforcement purposes, the SRO will be prevented by FERPA from reviewing the records.

# SRO As School Official

- Student discipline is a legitimate educational interest.
- If SRO is designated as school's law enforcement official, as well as a school official with legitimate educational interests requiring them to review student statements and to maintain those educational records for law enforcement purposes (i.e., determining whether a student committed a crime while on campus), the SRO could be provided access to school records.
- SRO is not authorized to re-disclose personally identifiable student information from records unless the disclosure meets an exception under FERPA's general consent requirements.

# Status of Records Created by SROs



- SROs are generally called upon to perform law enforcement duties which arise on school campus.
- If SROs are performing a law enforcement purpose, their records are law enforcement records, which are not covered by FERPA.
- This means SRO records may be disclosed under other laws, such as the Public Records Act.
- If a copy of the SRO records are provided to the school, the school's copy of the SRO's records becomes an "education record" subject to FERPA.

# SRO Access to Video Recordings



- Surveillance video is not an education record unless the activity becomes the subject of a school discipline and/or student-specific issue.
- In such instance, the video is an education record of the students shown in the video committing the misconduct or other behavior under investigation.
- If that video is an education record, FERPA generally prohibits the release of the video to law enforcement agencies without consent of the parent/eligible student.

# Disclosure to Police/SROs



FERPA permits schools to outsource services or functions that involve the disclosure of education records to contractors, consultants, volunteers or third parties provided the outside party:

1. Performs an institutional service or function for the agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
3. Subject to the requirements in Section 99.33(a) that personally identifiable information from education records may be used only for the purposes for which the disclosure was made (i.e., to promote school safety and the physical security of students, and governing the re-disclosure of PII from education records); and

# Disclosure to Police/SROs



4. Meets the criteria specified in the school or local education agency's annual notification of FERPA rights for being a school official with a legitimate educational interest in education records.
- SROs may only be considered school officials with legitimate educational interests if they meet these four criteria.
  - SROs who serve as a school official under FERPA may not disclose PII from education records to others, including other employees of his/her local police department who are not acting as school officials, without consent unless the re-disclosure fits one of the exceptions to FERPA's consent requirements.

# Health & Safety Exception



- Under certain emergency situations, it may become necessary for an education institution to release PII to protect the health and safety of the student or other students. (34 CFR §99.31(a)(10) and 34 CFR §99.36).
- In making a determination of a health and/or safety emergency, an education agency may take into account the totality of circumstances pertaining to a threat to the health or safety of a student or other individuals.



# Health & Safety Exception

- The FPCO has consistently interpreted the health or safety exception narrowly by limiting its application to a specific situation that presents imminent danger to students or other members of the community, or that requires an immediate need for information to avert or diffuse serious threats to the safety or health of a student or other individuals.
- Within a reasonable period of time after disclosure is made under this exception, an educational agency or institution must record, in the student's education records, the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. 34 CFR §99.32(A)(5).

# Health & Safety Exception

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If the agency determines there is an “articulable and significant threat” to health or safety, it may disclose information from a student’s education records to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”

# Child Protective Services Agencies



- Potential conflict between FERPA and the Child Abuse Prevention and Treatment Act (“CAPTA”) regarding release of educational records or personally-identifiable information without the consent of the parent.
- CAPTA and state law require a school employee to immediately report to Children’s Services or law enforcement when they know or have reasonable cause to suspect that a child has been or is likely to be abused or neglected.
- FERPA generally prohibits a school from releasing education records or personally identifiable information from these records.

# FPCO Resolution to Conflict

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FPCO has determined that CAPTA and relevant state statutes prevail over FERPA to the extent they require reporting by school authorities of known or suspected abuse, even if such reporting requires a disclosure of confidential education records.

# Student Statements Concerning Employee Misconduct



- Courts in Ohio have found that student statements taken for purposes of investigating employee misconduct are not covered by FERPA.
- This would allow such statements to be provided in response to a public records request.
- We recommend student names and other personally-identifiable student information still be redacted from these statements.

# Penalty for FERPA Violations



- No funds shall be made available to educational agencies that have “a policy of denying, or which effectively prevents” parents from exercising their right to inspect or review educational records of their children, given an opportunity to challenge the content of the records or to correct errors in the records, or for permitting the release of education records (unless specifically allowed by statute or by written consent of the parents), or failing to inform the parents of their rights under the statute.
- Enforcement actions include the U.S. Department of Education withholding funds, issuing a complaint to compel compliance through a cease and desist order, or terminating eligibility to receive funding.

# Recent Developments

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# *Patton v. Solon City School District (2017)*



- Parent of student (Patton) made a public records request to the school district seeking school bus surveillance video for an approximate three-month period. School district had already disposed of much of the requested video under its records retention schedule. The remaining video was withheld as excepted under FERPA and R.C. 3319.321.
- Patton filed suit alleging a denial of timely access to public records.



# *Patton v. Solon City School District (cont.)*



- Video at issue was retained as part of the school's discipline investigation. The video showed multiple students involved in physical and verbal altercations.
- The Special Master indicated that only the images of the children involved in the altercation on the bus (except for Patton's son) are subject to the withholding requirements under FERPA. Incidental footage of students in the background were not educational records for those children.
- The Special Master concluded the images of the children involved in the altercation on the bus (except for Patton's son) were subject to withholding pursuant to FERPA, and such images may be redacted.

# *Patton v. Solon City School District (cont.)*



- School district provided evidence that Patton became aware of the identity of all the students involved in the incident prior to making his public records request.
- Under R.C. 3319.321(B), the Special Master held the district was required to withhold all personally identifiable information of all students in the bus video. The un-redacted video captured student faces, hair, backpacks, clothing, phones, voices and actions during the altercation that may serve to identify a student to a parent who is already familiar with that information and those characteristics.
- The Special Master held such items may be obscured where protected information is intertwined. No other images or audio may be redacted unless intertwined with student personally-identifiable information.

# Wachter Letter



- On December 7, 2017, the U.S. Department of Education Office of the Chief Privacy Officer issued guidance concerning FERPA and student surveillance video. In that case, the District was in possession of witness statements and video of a student hazing incident.
- The Chief Privacy Officer opined that:
  1. The video and witness statements are education records of all the students who were disciplined as a result of the incident;
  2. The video and witness statements are education records of the victims of the hazing incident;
  3. The parents of these students (or the students themselves, if eligible) have the right to view these education records;

# Wachter Letter



4. If the videos and witness statements contain PII about other students, that information must be redacted before the viewing if that can be accomplished “without destroying its meaning”;
5. If the PII about other students cannot be redacted without destroying its meaning, then the parents/eligible students must be allowed to access and review the un-redacted record;
6. FERPA does not require the District provide copies to the parents/eligible students unless failing to do so would effectively deny them the right to inspect and review the records; and
7. However, if state records law would require the district to provide a copy of the record to the parent/eligible students, FERPA does not prevent this.

# Retention of Video



- Destruction of records is governed by the district's records retention schedule.
- The district's records retention schedule sets forth how long different types of records must be maintained.
- In setting retention periods, the district should consider any relevant statutes, as well as the nature of the record itself; the purposes served by the record; any continuing need for the record by the District or the student; and any chance for future litigation and any applicable statute of limitations.

# Suggested Retention Periods

The State Auditor and Ohio History Connection's Local Government Records Program recommend keeping the following records for the indicated lengths of time:

- Enrollment, withdrawal, grades, transcripts, activities, attendance, standardized test results, intervention records, foreign exchange records, suspensions/expulsions, and home schooled student records – Permanent retention
- Discipline records – 1 year after student leaves school
- Psychological Records – Permanent retention
- IEPs – Permanent retention
- Special education tutoring reports – 10 years

# Destruction of Records



- You should check the District's records retention schedule before destroying any records, including the education records of your students.
- FERPA regulations make clear that the District cannot destroy any education records while a parent's or eligible student's inspection request is still outstanding. 34 C.F.R. § 99.10(e).

# Retention & Destruction



- There is no legal requirement to permanently keep most education records.
- Such records, however, should only be destroyed in accordance with the District's records retention schedule.
- The records retention schedule should reflect how long each class of education records will be kept, and should indicate which records will be retained permanently.
- You may destroy education records by following the same procedure you would with other records once they reach the end of the retention period contained in your schedule.



# Retention & Destruction of Bus Surveillance Video?



- Know or reasonably suspect that video will show an incident?
- If no incident, the law does not require districts to maintain video for any minimum period.
- What are your recording and technology capabilities?
- Records retention and disposal schedule should align with recording and technology capabilities.

# Differing Storage Capabilities?



- It is feasible individual school buildings may have different technology and video storage capabilities.
- *Possible records retention language:*

*Technology and video storage capabilities in each school building or other recording site will affect the retention period of surveillance video. To best assure that video is able to be viewed and/or preserved, any request to view a video recording should be made to the building principal within \_\_\_\_\_ days of the event/incident at issue.*

# Retention & Destruction of Bus Surveillance Video?



- Retain through statute of limitations period for potential litigation?
- Litigation holds?
- If part of discipline records, retain for period designated for the retention of such records?
- Pending records inspection requests by parents/student?
- Any pending investigations – internally or externally?

# Questions?



**David Lampe**

*Partner, Bricker & Eckler LLP*



201 East Fifth Street, Suite 1110  
Cincinnati, Ohio 45202  
513.870.6561

312 North Patterson Blvd., Suite 200  
Dayton, Ohio 45402  
937.535.3914

[dlampe@bricker.com](mailto:dlampe@bricker.com)