ALAN WILSON
ATTORNEY GENERAL

February 6, 2012

The Honorable Leon Lott
Sheriff, Richland County
5623 Two Notch Road
Columbia, SC 29223

Dear Sheriff Lott:

We received your letter requesting an opinion of this office. You state that the Richland County Sheriff's Department (the "Department") has encountered problems with a school district (the "District") regarding the sharing of information on crimes committed in the schools. You inform us the District asserts it will not provide the requested information to the Department, pursuant to the Family Educational Rights and Privacy Act ("FERPA"). You ask whether or not FERPA prohibits the District from providing the requested information to the Department in the performance of its law enforcement duties.

Law/Analysis

FERPA, 20 U.S.C. §1232g *et seq.*, was enacted by Congress to protect the privacy rights of students and their parents regarding education records. FERPA conditions federal funding through programs administered by the federal Department of Education (the "DOE") to educational institutions on the requirement that such institutions not have a "policy or practice of permitting the release of education records (or personally identifiable information contained therein) of students without the written consent of [the students or] their parents." 20 U.S.C. §1232g(b)(1); see Owasso Independent School District No. I-011 v. Falvo, 534 U.S. 426, 428-29 (2002). The United States Supreme Court has recognized that FERPA does not create an individual enforceable right under 42 U.S.C. §1983. Gonzaga University v. Doe, 536 U.S. 273, 289 (2002). In fact, FERPA does not prohibit the release of educational records. Rather, FERPA's sole enforcement mechanism is the DOE's power to withhold federal funds from educational institutions which either receive funds directly from the DOE or which have students in attendance who receive funds through programs administered by the DOE. See Op. S.C. Atty. Gen., March 30, 2007. Thus, every public school in South Carolina would be required by federal law to comply with the disclosure requirements of FERPA.

FERPA, on its face, appears to limit its provisions to those situations where an educational agency "has a policy or practice of permitting the release of education records." See 20 U.S.C. §1232g(b)(1) and (2). FERPA was clearly designed to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records. See Jensen v. Reeves, 45 F.Supp.2d 1265, 1276 (D. Utah 1999). This focus on policies which systematically

invade a student's privacy is consistent with FERPA's allowances for the disclosure of such information in particular circumstances on a case-by-case basis.

FERPA's restrictions on disclosure apply to personally identifiable information contained in educational records maintained by an educational institution. We note that FERPA broadly defines an "educational record" as "those records, files, documents, and other materials which - (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A). The term "personally identifiable information" includes, but is not limited to, the student's name, the name of the student's parents or other family members, the student's address, any personal identifiers, including the student's social security number, any list of personal characteristics that would make the student's identity easily traceable, or any other information that would make the student's identity easily traceable. 20 U.S.C. §1232g(a)(5)(A).

Addressing your question, we note that FERPA recognizes the important public policy of protecting student safety by providing an explicit exemption for the disclosure of personally identifiable information from an educational record to appropriate parties for an emergency when it is necessary to protect the health or safety of the student or others. 20 U.S.C. §1232g(b)(1)(I); 34 C.F.R. §99.36(a); see Ellis v. Cleveland Municipal School District, 309 F.Supp.2d 1019, 1024 (N.D. Ohio 2004) [citing Doe v. Woodford County Bd. of Education, 213 F.3d 921, 926 (6th Cir. 2000)]. The exception is discretionary in nature. DOE regulations provide in 34 C.F.R. §99.36(c) that:

> [i]n making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the [DOE] will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

See Jain v. State, 617 N.W.2d 293 (Iowa 2000) [discussing the health or safety exception]. FERPA thus does not prevent a school from disclosing information to a law enforcement agency when an emergency makes it necessary to protect the health and safety of a student or other persons. As previously stated, this determination must be made on a case-by-case basis. This Office is not a fact-finding entity and any determination, therefore is beyond the scope of an opinion of this office. See Op. S.C. Atty. Gen., April 6, 2006 ("[T]he investigation and determination of facts are matters beyond the scope of an opinion of this office").

Additionally, a school may disclose personally identifiable information to a law enforcement agency pursuant to a judicial order or lawfully issued subpoena. 20 U.S.C. §1232g(b)(2)(B). FERPA and

DOE regulations provide that if served with such a subpoena, the school must make a reasonable effort to notify the parent or student (if over 18) in advance of compliance with such subpoena, so that the parent or student may seek protective action. A school may disclose personally identifiable information from an education record of a student in compliance with a judicial order or lawfully issued subpoena without the required consent if the court or other issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 C.F.R. §99.31(a)(9)(ii); see Defeo v. McAboy, 260 F.Supp.2d 790, 794 (E.D. Mo. 2003); Van Brunt v. Van Brunt, 419 N.J. Super. 327, 16 A.3d 1127, 1130-31 (2010).

Significantly, we note that Congress has provided an exception to the definition of "education records" regarding permissible reporting by schools to law enforcement agencies. Specifically, the term "education records" under FERPA expressly does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." 20 U.S.C. §1232g(a)(4)(B)(ii). DOE regulations provide that "[a] law enforcement unit means any . . . component of an educational agency or institution . . . that is officially authorized or designated by that agency or institution to [e]nforce any local, State, or Federal law . . . or [m]aintain the physical security and safety of the agency or institution." 34 C.F.R. §99.8(a)(1)(i) and (ii). Further, "[a] component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student." Id. at §99.8(a)(2).

In our opinion, this type of information, although student-sensitive and certainly personal, neither concerns distinctively educational matters nor has some tie to some aspect of the educational process. One court has noted:

> [i]t is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects; *i.e.*, records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files. These records are quite appropriately required to be kept confidential.

Bauer v. Kincaid, 759 F.Supp. 575, 591 (W.D. Mo. 1991). In Bauer, the court concluded that FERPA was not a justification for university officials' refusal to release incident reports maintained by campus police to the plaintiff, who was the editor-in-chief of a student newspaper. The court elaborated on the type of information expressly protected under FERPA:

> FERPA protects as confidential, information which a student is required to produce or divulge in conjunction with application and attendance at an educational institution. FERPA also protects academic data generated while an individual is a student at an educational institution. Criminal investigation and

> incident reports are not the same type of records which [FERPA] expressly protects.

Id. at 590.

Other courts have concluded that criminal incident reports are not protected from disclosure by schools under FERPA. See, *e.g.*, Ellis, 309 F. Supp.2d at 1022-23 [incident reports related to substitute teachers' alleged corporal punishment of students, student and employee witness statements, and information related to subsequent discipline of substitute teachers do not contain information directly related to a student and are therefore not protected by FERPA]; Young v. City of Omaha, 2009 WL 4726949, at *8 (D. Neb. 2009) [FERPA's provisions do not prohibit law enforcement officers from obtaining a student's education records from an educational institution]; Hampton Bays Union Free School District, 62 A.D.3d 1066, 878 N.Y.S.2d 485, 488-89 (2009) [written accounts of probationary teacher's allegedly inappropriate social interaction with a student is not exempt from disclosure]; Staub v. East Greenbush School District No. 1, 128 Misc.2d 935, 491 N.Y.S.2d 87, 88 (1985) [names and addresses of student witnesses to an accident are not protected from disclosure by FERPA]; Brouillet v. Cowles Publishing Co., 114 Wash.2d 788, 791 P.2d 526, 533 (1990) [records specifying the reasons for teacher certificate revocations, including allegations of sexual misconduct with students, are not protected from disclosure as student educational records].

We also note an opinion of the Tennessee Attorney General dated May 21, 2010, which concluded that, because "education records" do not include records maintained by a law enforcement unit of the school, FERPA does not prohibit schools from sharing criminal incident report data with law enforcement.

The reasoning expressed by the above authority is persuasive. FERPA's exemption for law enforcement records demonstrates these records are not considered in the same category as educational records. Criminal investigation and incident reports do not contain the same type of information which a student is required to submit as a precondition to enrollment or attendance, and is not the type of information created in the natural course of an individual's status as a student. The underlying purpose of FERPA was to stem the policy of many institutions to carelessly release educational information and to deter schools from indiscriminately releasing student educational records. Nothing in FERPA refers to a policy or intent to protect campus law enforcement unit records which happen to contain student names or other personally identifiable information. It is therefore the opinion of this office that a school would not be prohibited by FERPA from sharing information related to crimes committed in the schools to law enforcement.

In this regard we note DOE regulations which provide that law enforcement records do not include "[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution." 34 C.F.R. §99.8(b)(2)(ii). The DOE defines disciplinary action or proceeding as "the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution." Id. at §99.3. The DOE thus draws a distinction between student disciplinary records and law

enforcement unit records. The former would likely be protected as "education records" under FERPA (subject to the exceptions previously discussed), while the latter are excluded from the definition of "education records" and receive no protection by FERPA. See United States v. Miami University, 294 F.3d 797, 814 (6th Cir. 2002) [holding that although FERPA protects student disciplinary records from disclosure, it does not protect law enforcement records or place restrictions on their disclosure]. However, this particular determination must again be made on a case-by-case basis, which is outside the scope of an opinion of this office.

Lastly, this office has previously advised that a school district is required to report all suspected crimes to law enforcement. See Ops. S.C. Atty. Gen., June 28, 2010; December 5, 2005; April 11, 1994. As set forth in §59-24-60:

> [i]n addition to other provisions required by law or by regulation of the State Board of Education, school administrators must contact law enforcement authorities immediately upon notice that a person is engaging or has engaged in activities on school property or at a school sanctioned or sponsored activity which may result or results in injury or serious threat of injury to the person or to another person. . .

Attendant with the affirmative duty to report criminal conduct,[1] this office has also addressed whether a school district has authority to limit law enforcement in the investigation of crimes on school grounds. In an opinion dated October 11, 2011, we stated that a sheriff's jurisdiction encompasses the entire county. Sheriffs are required to "patrol the entire county" where they serve, pursuant to §23-13-70. This provision obligates a sheriff's department "to prevent or detect crime or to make an arrest . . . for the violation of every law which is detrimental to the peace, good order and morals of the community." As stated in a prior opinion of this office dated April 17, 2008, "[p]olice officers have the right, indeed the duty, to

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[1]It is also provided in §59-63-335 that:

> [f]ailure of a school administrator to report criminal conduct as set forth in Section 59-24-60 or failure to report information concerning school-related crime pursuant to Section 59-63-330 shall subject the administrator and the school district to liability for payment of a party's attorney's fees and the costs associated with an action to seek a writ of mandamus to compel the administrator and school district to comply with Section 59-24-60 . . .

We further note that §59-63-350 provides that:

> [l]ocal law enforcement officials are required to contact the Attorney General's "school safety phone line" when any felony, assault and battery of a high and aggravated nature, crime involving a weapon, or drug offense is committed on school property or at a school-sanctioned or school-sponsored activity or any crime reported pursuant to Section 59-24-60.

investigate seemingly criminal behavior or activity. . . ." Therefore, we conclude that "a school district is without authority to limit law enforcement in the investigation of crimes on school grounds." Op. S.C. Atty. Gen., June 29, 2010.

Conclusion

FERPA penalizes educational institutions only for disclosing personally identifiable information contained in education records. The principal purpose of FERPA is the deterrence of indiscriminate releasing of student educational records. Student education records other than directory information may not be disclosed under FERPA, without consent of a parent or student (if over 18). We note, however, that FERPA recognizes an important public policy of protecting student safety by providing an express exemption for the disclosure of personally identifiable information from an educational record to appropriate parties when there are genuine health or safety concerns for students or others. Moreover, not all information reflected in school records is an "educational record" under FERPA. Criminal investigation and incident reports, including witness statements, surveillance video, etc., which is maintained by a law enforcement unit of a school, would be specifically exempted by FERPA from the definition of "education records." Although these records may contain names and other personally identifiable information, such are "records . . . created by [a] law enforcement unit for the purpose of law enforcement" and relate in no way whatsoever to the type of records which FERPA expressly intended to protect from disclosure, *i.e.*, educationally-related information kept in individual student files. It is our opinion that FERPA would not preclude a school from sharing information regarding crimes committed in schools to the law enforcement agencies in the performance of their law enforcement duties. In fact, schools are required to report criminal incidents under State law and they are without authority to limit law enforcement in the investigation of crimes committed on school grounds. However, we are unable to reach a conclusion as to the disclosure of any particular information by the District to the Department. Any release of such information must be determined on a case-by-case basis.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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