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SUBJECT: The Family Educational Rights and Privacy Act and Information Sharing in the Context of School Safety

REQUESTED BY: Matthew L. Blomstedt, Ph.D.
Commissioner of Education

WRITTEN BY: Douglas J. Peterson, Attorney General
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You have requested an opinion from this office with respect to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99 ("FERPA"), in the context of school safety and information sharing. You indicate in your opinion request letter that you are a member of Governor Ricketts' task force convened for the purpose of improving school safety. Members of the task force have raised questions about the barriers FERPA places on information sharing, and you seek general guidance from this office as to what information may be shared under FERPA, and under what conditions. You have also asked that we address any liability issues which may exist relating to the disclosure of student information, as well as the interplay between the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and FERPA. Finally, you have requested that we address FERPA in the context of Nebraska's public records law.

BACKGROUND

In January 2018, the Colorado Attorney General issued an opinion which addressed the "misconceptions about FERPA's scope" and which sought to assure educators and other school personnel that they may proactively respond to school safety concerns without violating federal privacy law or incurring liability for disclosing

information. Formal Opinion of Cynthia H. Coffman, Attorney General, No. 18-01, January 11, 2018 at 1 ("Colorado Op.").¹ The opinion noted that reports analyzing recent campus shootings indicate that educators "often misunderstand the scope and meaning of FERPA." *Id.* For example, in a 2007 report commissioned to study the mass shooting at Virginia Tech University, two of the review panel's key findings were the "widespread confusion about what federal and state privacy laws allow" and that, "[i]n reality, federal laws and their state counterparts afford ample leeway to share information in potentially dangerous situations."² *Id.* at 4. A report issued in 2016 pertaining to a shooting at Arapahoe High School in Centennial, Colorado, states that "evidence indicates that FERPA was misinterpreted, leading the school staff to believe that they would be more liable if they had shared information about [the shooter's] concerning behaviors, than if they had not."³ *Id.* The Colorado opinion also pointed to a May 2001 report analyzing the April 20, 1999 Columbine High School tragedy. Among the key factors identified by the Columbine Review Commission was the necessity for law enforcement and school officials to "work cooperatively in assessing actual or potential threats to the safety of students and school personnel."⁴ *Id.* at 3 n.2.

Like the Colorado opinion, this opinion will attempt to dispel any misunderstandings regarding the disclosure of information under FERPA—misunderstandings that could adversely impact school safety and violence prevention measures.

OVERVIEW OF FERPA

FERPA "is a Federal law that protects the privacy of student education records."⁵ Generally, FERPA prohibits the unauthorized disclosure of personally identifiable information (PII)⁶ in students' education records unless there is written parental consent.

¹ Accessible at <https://coag.gov/sites/default/files/contentuploads/ago/agopinions/cynthia-h-coffman/2018/no-18-01.pdf>.

² *Mass Shootings at Virginia Tech*—April 16, 2007, Report of the Review Panel, Presented to Governor Kaine, Commonwealth of Virginia, at 2, accessible at <https://rems.ed.gov/docs/MassShootingsatVirginiaTech.pdf>.

³ Sarah Goodrum and William Woodward, *Report on the Arapahoe High School Shooting: Lessons Learned on Information Sharing, Threat Assessment, and Systems Integrity* (Jan. 18, 2016) at 8-9.

⁴ *The Report of Governor Bill Owens' Columbine Review Commission*, May 2001, at 88 n.202, accessible at <https://schoolshooters.info/sites/default/files/Columbine%20-%20Governor's%20Commission%20Report.pdf>.

⁵ *Family Educational Rights and Privacy Act (FERPA) and the Disclosure of Student Information Related to Emergencies and Disasters*—June 2010, accessible at <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf>.

⁶ "Personally identifiable information" includes, but is not limited to, the following: The student's name; the name of the student's parent or other family members; the address of the student or student's

§ 1232g(b)(1). The law applies to all educational agencies and institutions that receive funds for any program administered by the U.S. Department of Education.

Under FERPA, a “record” is defined as “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” 34 C.F.R. § 99.3. “Education records” are defined 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.

§ 1232g(a)(4)(A); *see also* 34 C.F.R. § 99.3. There are four statutory exceptions to the definition of education records, including records of a law enforcement unit of an educational agency or institution. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.3.

FERPA provides a list of exceptions to the general consent rule, allowing an educational agency or institution to disclose PII from a student’s education record under one or more conditions. § 1232g(b)(1)(A)-(L); 34 C.F.R. § 99.31(a)(1)-(16). Except for the parties enumerated in § 99.31(12) (“the parent of a student who is not an eligible student⁷ or . . . the student”), disclosure under the exceptions in § 99.31 is permissive, not required. 34 C.F.R. § 99.31(d).

FERPA is a “Spending Clause” statute, enacted under art. I, § 8 of the United States Constitution, which authorizes Congress to spend funds to provide for the general welfare.⁸ “Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.” *Gonzaga University v. Doe*, 536 U.S. 273, 278 (2002). FERPA is administered by the Family Policy Compliance Office (“FPCO”) within the U.S. Department of Education, and is responsible for “investigating, processing, reviewing, and adjudicating violations of [§ 1232g] and complaints which may be filed concerning alleged violations of this section.” § 1232g(g).

family; a personal identifier, e.g., the student’s social security number, student number, or biometric record; and other indirect identifiers, e.g., student’s date of birth, place of birth, and mother’s maiden name. 34 C.F.R. § 99.3.

⁷ “Eligible student” refers to “a student who has reached 18 years of age or is attending an institution of postsecondary education.” 34 C.F.R. § 99.3.

⁸ U.S. Department of Education guidance, *Legislative History of Major FERPA Provisions* (last modified Feb. 11, 2004), accessible at <https://www2.ed.gov/policy/gen/guid/fpc/ferpa/leg-history.html>.

ANALYSIS

I. FERPA Privacy Provisions Only Pertain to “Education Records.”

“Education records” are broadly defined in FERPA. As noted by Justice Breyer in his concurrence in *Gonzaga*:

Much of the statute's key language is broad and nonspecific. The statute, for example, defines its key term, “education records,” as (with certain enumerated exceptions) “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational . . . institution.” 20 U.S.C. § 1232g(a)(4)(A). This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information.

536 U.S. at 292 (Breyer, J., concurring). However, despite the broad statutory definition, not every record or piece of information about a student is subject to FERPA. In *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002), the United States Supreme Court considered whether peer-graded assignments fell under the definition of “education records.” While the Court noted that the graded papers “directly related to a student” [§ 1232g(a)(4)(A)(i)], it concluded the student papers are not education records because they are not “maintained” by the school (“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. The Court also found that a student grader is not “a person acting for” the school within the meaning of § 1232g(a)(4)(A)(ii) (“The phrase ‘acting for’ connotes agents of the school, such as teachers, administrators, and other school employees.”). *Id.*

As further support, the Court noted that § 1232g(b)(4)(A) required the educational agency or institution to keep a separate “record of access” together with the education records, which lists all entities which have requested or obtained access to a student’s education records, and the specific legitimate interest an entity had for obtaining the information. This record is only available to parents, the school official and assistants who are the custodians of the records, and officials pursuant to § 1232g(b)(1)(A) & (C). In this regard, the Court stated:

. . . FERPA requires “a record” of access for each pupil. This single record must be kept “with the education records.” This suggests Congress contemplated that education records would be kept in one place with a single record of access. By describing a “school official” and “his assistants” as the personnel responsible for the custody of the records, *FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms.*

Id. at 434-435 (emphasis added). The holding in *Owasso* continues to be the standard for educational agencies and institutions to apply when considering whether certain information relating to a student is an “education record” subject to FERPA.

A. Certain Types of Student Information Do Not Implicate FERPA’s Privacy Provisions.

FERPA applies to tangible records and the information in those records. See Letter to Montgomery County Public Schools (MD) re: Law Enforcement Unit Records, February 15, 2006, at 2. It does not protect the confidentiality of records in general. Consequently, information from sources other than education records falls outside FERPA’s nondisclosure provisions. *Id.*

1. *Personal Observations*

According to guidance promulgated by the U.S. Department of Education—*Addressing Emergencies on Campus*—June 2011—“FERPA does not prohibit a school official from disclosing information about a student that is obtained through the school official’s personal knowledge or observation and not from the student’s education records.” *Id.* at 4. For example, if a teacher overhears a student making threatening remarks to other students, he or she may disclose that information to appropriate authorities, including disclosing the information to local law enforcement officials, school officials, and parents. *Id.* The general rule regarding personal observations will apply so long as the information disclosed by the school official did not come from information contained in an education record. *Id.*⁹

2. *Social Media*

As noted in the Colorado opinion, “[s]ocial media posts are not restricted from disclosure under FERPA.” Colorado Op. 7. According to *The National Center for Campus Public Safety Guide to Social Media in Educational Environments* (2016) at 2, “[t]he use of social media by teenagers is no longer widespread—it is pervasive. Almost every middle school, high school and college-age student in the United States engages in some form of social media.” Research indicates that “92% of teens report going online daily and 24% of teens are online ‘almost constantly.’” *Id.* Teens use a variety of online platforms, including Facebook, Instagram, Snapchat, and Twitter. Video-based platforms include YouTube, Vine, and Vimeo. *Id.* at 3. “Some teens spend vast amounts of time online where they read the feeds of their peers’ activities and post things they’d never say in person.” *Id.* at 2.

⁹ See also *The Family Educational Rights and Privacy Act, Guidance for Eligible Students*, February 2011 at 1, accessible at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf>.

Students' social media posts, photos and videos, etc. are not maintained by the educational agency or institution. The students creating and posting this content are not persons acting for the agency or institution. Accordingly, this content is not considered an "education record" and may be disclosed at the discretion of school officials.

B. Law Enforcement Unit Records Are Expressly Excluded from the Definition of "Education Records."

Records of a law enforcement unit of an educational agency or institution which are created by the unit for law enforcement purposes, and maintained by the unit, are expressly excluded from the definition of education record. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1). A law enforcement unit is defined as

any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

34 C.F.R. § 99.8(a)(1). The records of a law enforcement unit do not include records that are created by the unit for law enforcement purposes, but are maintained by a different component of the educational agency or institution, or "[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). Education records and PII in the possession of a law enforcement unit remain subject to FERPA, and may only be disclosed under an exception in 34 C.F.R. § 99.31. "Because the . . . unit may not redisclose [PII] from students' education records that it receives, except in compliance with FERPA, it is advisable for law enforcement units to maintain law enforcement unit records separately from education records." *Addressing Emergencies on Campus* at 6-7. FERPA "neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records." 34 C.F.R. § 99.8(d).¹⁰

¹⁰ U.S. Department of Education guidance *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools* indicates that security videos maintained by the law enforcement unit which contain images of students are not considered education records subject to FERPA. The guidance further suggests that schools which do not have a designated law enforcement unit assign an employee to fulfill this role, which would allow the individual to maintain the security video. In addition, because the video is excluded as an education record,

II. Exceptions to the General Consent Rule Relevant to School Safety Allow Disclosure of Education Records Without Parental Consent.

FERPA contains several exceptions to the general consent rule that allow educational agencies and institutions to share information in education records without parental consent. Two of those exceptions are critical for purposes of information sharing and school safety.

A. School Officials.

This exception applies to other school officials within the educational agency or institution, whom the agency or institution has determined have “legitimate educational interests” in the information. 34 C.F.R. § 99.31(a)(1)(i)(A). An educational agency or institution must use “reasonable methods” to ensure that school officials’ access is limited to only that information in which they have legitimate educational interests. 34 C.F.R. § 99.31(a)(1)(ii). “School officials” are not limited to agency and institutional staff, but may also extend to outside parties (e.g., contractor, consultant, volunteer, threat assessment teams). These parties may be designated as school officials, and obtain access to education records without consent, if the information is necessary “to perform the required institutional services and functions for the school.” Family Educational Rights and Privacy, 73 Fed. Reg. 74,814 (Dec. 9, 2008). Certain conditions enumerated in 34 C.F.R. § 99.31(a)(1)(i)(B) must also be met (e.g., the party is under the direct control of the agency regarding the use and maintenance of the records).

Members of a law enforcement unit “employed by the agency or institution qualify as school officials under § 99.31(a)(1)(i)(A) if the school has complied with the notification requirements in § 99.7(a)(3)(iii).” 73 Fed. Reg. 74,815. The notice must contain specific criteria “for determining who constitutes a school official and what constitutes a legitimate educational interest.” If qualified, members of a law enforcement unit may receive PII from education records if they are determined to have legitimate educational interests with respect to the information. However, any education records received may only be disclosed with consent or pursuant to an exception in § 99.31.

B. Health or Safety Emergency.

Section 1232g(b)(1)(I) authorizes school officials to disclose education records without consent “in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.” See *also* 34 C.F.R. § 99.31(a)(10). As provided in § 99.36 [What conditions apply to disclosure of information in health and safety emergencies?]

it may be shared with outside authorities, i.e., local law enforcement, as deemed necessary and appropriate. Guidance accessible at <https://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf>.

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In 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 Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

34 C.F.R. § 99.36 (emphasis added). Appropriate parties to whom the disclosure may be directed include law enforcement officials, public health officials, trained medical personnel, and parents. *Addressing Emergencies on Campus* at 3. Disclosure under this exception must “relate[] to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.” *Id.* It could also relate to “a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment.” 73 Fed. Reg. 74,838. The

language in § 1232g(b)(1)(I), particularly the word protect, “underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury.” *Id.* Under § 99.32(a)(5), the 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 who received the information. *Addressing Emergencies on Campus* at 4.

III. The Interplay Between HIPAA and FERPA.

According to joint guidance issued by the U.S. Departments of Health and Human Services and Education,¹¹ HIPAA generally does not apply to schools, even when those schools may be HIPAA covered entities. The HIPAA Privacy Rule expressly excludes “individually identifiable health information” in FERPA “education records” or “treatment records” [§ 1232g(a)(4)(B)(iv)] from the definition of “protected health information.” See 45 C.F.R. § 160.103. This exclusion applies to both the HIPAA Privacy Rule and the HIPAA Security Rule. As a result, FERPA, not HIPAA, dictates the disclosure of students’ health records. With respect to an eligible student’s treatment records, those records may be disclosed to any party without consent so long as one of the exceptions in § 99.31 applies. See *Addressing Emergencies on Campus* at 10.

IV. There Is No Private Cause of Action Under FERPA.

In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court considered whether a student could sue for damages under 42 U.S.C. § 1983 to enforce provisions of FERPA. In *Gonzaga*, a student planned to teach in a public elementary school following graduation. State certification requirements for new teachers included obtaining an affidavit of good moral character from their graduating colleges. Gonzaga’s teacher certification specialist overheard one student tell another that the student had engaged in sexual misconduct with a female undergraduate. The specialist discussed the allegations, including identifying the student by name, with the state agency responsible for teacher certification. Ultimately, the student was told that he would not receive the affidavit necessary for certification. *Id.* at 277. The student sued Gonzaga in state court alleging, among other things, a FERPA violation. A jury awarded the student compensatory and punitive damages. The Washington Court of Appeals reversed, concluding that FERPA created no individual rights, and could not be enforced under § 1983. *Id.* at 278. The Washington Supreme Court reversed that decision, finding that while FERPA “does not give rise to a private cause of action,” the “nondisclosure provision ‘gives rise to a federal right enforceable under section 1983.’” *Id.*

¹¹ Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* And the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* To Student Health Records, November 2008, at 3, accessible at <https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.

The U.S. Supreme Court stated that it had never held that spending legislation, drafted in terms like FERPA's, could confer enforceable rights, and declined to do so in the present case. *Id.* at 279. The Court focused on the statutory framework of FERPA, which only required the Secretary of Education to withhold federal funds "to any 'educational agency or institution' which has a prohibited 'policy or practice.'" *Id.* at 287. The Court concluded that "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." *Id.* at 290.

Prior to 2008, provisions in the emergency exception [§ 99.36] were required to be "strictly construed." 73 Fed. Reg. 74,837. However, those regulations were amended in the wake of the Virginia Tech shooting to "provide[] greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals." *Id.* Express language in the emergency exception indicates the department will not "substitute its judgment" for decisions made by educational agencies and institutions in emergency situations so long as there is a "rational basis" for the decisions and the disclosures were made to the appropriate parties. Moreover, language in the "Dear Colleague" letter issued by the U.S. Department of Education at the time the emergency exception regulations were amended reflects the department's desire to balance privacy with safety. Under the heading "School Safety," the letter provides, in pertinent part, that "[a]s Secretary Spellings has noted, 'Nothing is more important to Americans than the safety of their children. FERPA is not intended to be an obstacle in achieving that goal.'" *Dear Colleague Letter about Family Educational Rights and Privacy Act (FERPA) Final Regulations*, December 17, 2008. In light of the foregoing, "[w]hen faced with potential safety risks, schools may, consistent with FERPA, err on the side of proactive disclosure." *Colorado Op.* at 11. It is also worth noting that in the forty-four years since FERPA's enactment, the FPCO has never withheld federal funding in an enforcement action.¹²

V. Law Enforcement Unit Records Are Excluded from State Law Provisions Governing Access to Student Records.

You have also asked whether "law enforcement unit records," which are expressly excluded from the definition of "education records" under FERPA, *see supra* at 6, are similarly excluded from state law provisions governing access to student records. In that regard, Neb. Rev. Stat. § 79-2,104 (2014) generally allows any public school student, his or her parents, and school officials to access "the school's files or records maintained concerning such student" This access "includ[es] the right to inspect, review, and obtain copies of such files or records." However, "[n]o other person shall have access to such files or records except (a) when a parent, guardian, or student of majority age provides written consent or (b) as provided in subsection (3) of this section [relating to

¹² Sarah Pierce West, Comment, *They[ve] Got Eyes in the Sky: How the Family Educational Rights and Privacy Act Governs Body Camera Use in Public Schools*, 65 Am. U. L. Rev. 1541 n.47 (2016).

audits of federally- or state-supported education programs]. *The contents of such files or records shall not be divulged in any manner to any unauthorized person.*" Neb. Rev. Stat. § 79-2,104(1) (emphasis added).

Section 79-2,104 was initially enacted in 1973, one year prior to the enactment of FERPA. However, subsequent amendments to § 79-2,104 demonstrate the Legislature's intention to align it with FERPA. For example, in 2009 Neb. Laws LB 549, § 10 (codified at Neb. Rev. Stat. § 79-2,104(3)(b)), the Legislature clarified that § 79-2,104

does not preclude or prohibit the disclosure of student records to any other person or entity which may be allowed to have access pursuant to the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g, as such act existed on February 1, 2009, and regulations adopted thereunder.

In 2013, the Legislature further amended § 79-2,104, finding "that the sharing of student data, records, and information among school districts, educational service units, learning communities, and the State Department of Education, to the fullest extent practicable and permitted by law, is vital to advancing education in this state." 2013 Neb. Laws LB 262, § 1 (codified at Neb. Rev. Stat. § 79-2,104(4)). It mandated that state and local educational entities share student data, records, and information, when permitted, unless otherwise prohibited by law. The Legislature further required the State Board of Education ("State Board") to adopt and promulgate rules and regulations governing "the uniform sharing of student data, records, and information" among these educational entities.

"The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment." *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 445, 771 N.W.2d 103, 118 (2009). "[T]o ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). Testimony offered at the committee hearing on LB 262 noted the lack of a "statewide standard for interpretation of FERPA" and that, as a result, "Nebraska is missing out on an opportunity to have workable data as allowed under federal law."¹³ In her introduction on LB 262 on general file, Senator Cook stated that "LB 262 will . . . bring our state statute in line with [the] federal Family Educational Rights and Privacy Act."¹⁴

In response to the requirements in § 79-2,104(4), the State Board subsequently adopted Title 92, *Nebraska Administrative Code*, Chapter 6 (eff. Nov. 4, 2014) ("Rule 6"). Rule 6 noted that "[s]everal provisions of both state and federal law and regulations relate to matters concerning the disclosure and confidentiality of student records and

¹³ See Hearing of the Education Committee on LB 262, 103rd Neb. Leg., 1st Sess. 51 (Feb. 5, 2013) (Statement of Sen. Cook).

¹⁴ See Floor Debate on LB 262, 103rd Neb. Leg., 1st Sess. 33 (Feb. 27, 2013).

information,” citing to, among others, § 79-2,104 and FERPA. § 001.03. The State Board employed the term “education records” to encompass the “student data, records, and information” required to be shared among educational agencies and institutions. Relying on the definition from FERPA, the State Board defined “education records” as “those records that are directly related to the student and maintained by an educational agency or institution. Specific examples of what this term does not include are described in FERPA at 34 CFR 99.3 where this term is further defined.” § 002.04 (emphasis added). “Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.” *Swift & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 767, 773 N.W.2d 381, 385 (2009). As prescribed in § 79-2,104(4), Rule 6 provides uniform and consistent standards relating to the statewide sharing of data, records and information. Since the State Board chose to use the overarching term “education records” in Rule 6, and define it in a manner nearly identical to the definition of education records in FERPA, *including* its exclusions, we believe that law enforcement unit records may be similarly excluded from state law provisions dealing with student records.

VI. FERPA and the Nebraska Public Records Statutes.

The Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2014, Cum. Supp. 2016¹⁵) (“NPRS”), generally allow Nebraska citizens and other interested persons the right to examine public records in the possession of public agencies, make abstracts of those records, or obtain copies in certain circumstances. “Public records” include “all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.” Neb. Rev. Stat. § 84-712.01(1) (2014). Records that are not “of or belonging to” an educational agency or institution are not subject to disclosure under § 84-712. Like FERPA, the NPRS do not apply to the disclosure of information, e.g., personal knowledge or observations, which does not already exist in a tangible form.

Access to records is not absolute, however. Section 84-712 expressly provides that the right to examine or obtain copies of public records exists “[e]xcept as otherwise provided by statute.” Neb. Rev. Stat. § 84-712.01(1) provides an exception from that definition “when any other statute expressly provides that particular information or records shall not be made public” Thus, in those instances where records requested under the NPRS are excepted from disclosure by statute, there is no right of access.

¹⁵ See also 2018 Neb. Laws LB 193; 2018 Neb. Laws LB 859; and 2018 Neb. Laws LB 902.

There are no Nebraska cases which discuss the interplay between FERPA and the NPRS. However, it seems to us that FERPA falls within the "other statute" exception¹⁶ contemplated in §§ 84-712 and 84-712.01(1). We find support for this conclusion in *United States v. Miami University*, 294 F.3d 797 (2002). In *Miami University*, the court considered the release of student disciplinary records in the context of both FERPA and the Ohio Public Records Act. The court pointed to an exception in the Ohio act that excludes from the definition of public records those "[r]ecords the release of which is prohibited by state or federal law." *Id.* at 810 (citing Ohio Rev. Code, § 149.43(A)(1)(v)). The court found that because of this exception, "the Ohio Public Records Act does not conflict with the FERPA and the state and federal statutes can coexist." *Id.* at 811. Section 84-712 provides access to public records in Nebraska, unless otherwise provided by statute. FERPA generally provides that the disclosure of a student's education records is prohibited without parental consent. Based on the decision in *Miami University*, a Nebraska court could well conclude that FERPA and the NPRS can coexist, with FERPA controlling access to students' education records.¹⁷

CONCLUSION

In view of the federal and state statutory and regulatory provisions discussed above, we make the following conclusions with respect to information sharing for school safety purposes:

- Not all records relating to students are subject to the FERPA disclosure provisions, e.g., a teacher's personal observations.
- Law enforcement unit records created and maintained by the unit are expressly excluded under FERPA.
- There are provisions in FERPA that allow the disclosure of students' education records without parental consent when designated school officials or outside parties have a *legitimate educational interest* in the information or when the disclosure is in response to *health or safety emergencies*.

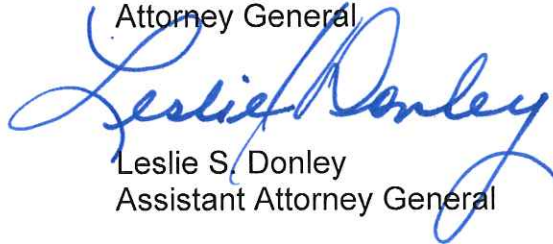
¹⁶ See *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 127, 907 N.W.2d 301, 310 (2018) (Concluding that the district's competitive information could not be withheld under the exception in § 84-712.05(3) of the NPRS, but noting that it would not hesitate to apply the "other statute" exception in § 84-712.01(1), "and the general principle favoring a specific over a general statute," to exclude the information from disclosure.).

¹⁷ In addition, Neb. Rev. Stat. § 84-712.05(1) of the NPRS allows a public body to withhold personal information in student records so long as those records have not been "publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties" This exception to disclosure is superfluous in light of the language in § 79-2,104(1), which makes student records confidential unless there is written consent or when necessary for purposes of an authorized audit or evaluation.

- Under the holding in *Gonzaga*, no educational agency or institution official or employee can be sued for an alleged FERPA violation.
- FERPA controls disclosure of student health records, not HIPAA.
- Law enforcement unit records are excluded from provisions in state law pertaining to student records.
- The "other statute" provisions in the NPRS would likely allow custodians of public records to defer to the federal law when responding to requests for students' education records made pursuant to Neb. Rev. Stat. § 84-712.
- Finally, officials and employees in educational agencies and institutions should keep in mind that real time decisions made under the emergency exception will not be scrutinized so long as there is a rational basis for those decisions based on the information available at that time.

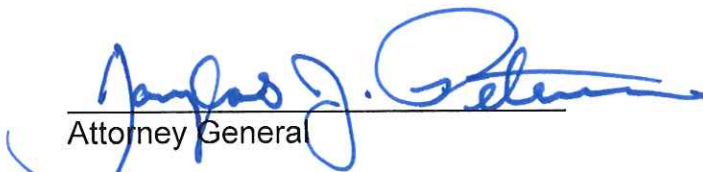
Sincerely,

DOUGLAS J. PETERSON
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Attorney General

49-2082-29