



COMMONWEALTH of VIRGINIA

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The Honorable Kenneth L. Alger, II
Commonwealth's Attorney for Page County
116 South Court Street - Suite D
Luray, Virginia 22835

Dear Mr. Alger:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire, with regard to law enforcement access to pupils' school records, whether § 22.1-287 of the *Code of Virginia* may be reconciled with the federal Family Educational Rights and Privacy Act (FERPA). You further ask, based upon a specific factual scenario, whether a school superintendent possessed authority to rely upon FERPA provisions to deny a request for access to a pupil's records by a law enforcement officer seeking information in the course of his duties.

Response

It is my opinion that the provisions of § 22.1-287 of the *Code of Virginia* may be reconciled with those of the Family Educational Rights and Privacy Act. It is my further opinion, based upon the factual scenario you describe, that the school superintendent possessed authority to rely upon FERPA provisions to deny access to a pupil's records to a law enforcement officer seeking information in the course of his duties.

Background

You relate an incident in which several parents of high school students contacted law enforcement to advise that a local student had posted on Facebook a message that troubled them. According to the reports, the message read, "I hate all tenth graders. Remember Columbine." Law enforcement officers identified the author of the post, referred to hereinafter as "Juvenile," and met with him at his residence, where he admitted to making the post. The officers made a lawful search of the residence and found no weapons. They subsequently attempted to obtain "a juvenile petition for a threat and a CHINS petition"¹ and were denied both prior to Juvenile returning to school. When Juvenile arrived at school the next day, he was met by law enforcement personnel who searched him for weapons and found none. Juvenile was placed in in-school suspension.

¹ See VA. CODE ANN. § 22.1-258 (2011); VA. CODE ANN. §§ 16.1-228 (Supp. 2012); 16.1-260 (Supp. 2012).

Administrative staff at the school met with the police Captain that morning and related their concerns over safety at the school due to Juvenile's prior disciplinary record, threats made towards other students and faculty, and violent outbursts he had made in the school setting. The Captain was informed that Juvenile had been involved in an altercation the previous Friday, where Juvenile reportedly had been the aggressor. On behalf of the victim, several students threatened Juvenile, to which Juvenile responded by stating, "That's fine. I will bring my gun to school." One of the other students replied, "Bring your gun to school. I dare you." The confrontation continued into the weekend, leading to text message correspondence and the aforementioned Facebook post.

After receiving this new information, law enforcement personnel became increasingly concerned about students' safety at the school. The Captain began receiving information from the Superintendent's staff, school personnel, students and parents regarding their concern over the return of Juvenile to school. The captain was then informed that the Superintendent would not authorize the release of any information on Juvenile to law enforcement.

You indicate that the Captain advised the Superintendent that Juvenile's records were essential to establish the level of threat Juvenile posed to the school system "in the past" and to determine whether Juvenile had access to weapons or had made similar threats to others. The Superintendent stated that she was not required to provide such information to law enforcement. She stated that FERPA included an emergency provision, but that she had determined that there was no emergency. The Captain maintained that this was a potential emergency. The records were obtained by a search warrant several days later.

Applicable Law and Discussion

FERPA, in relevant part, establishes as a condition of receiving federal funding, that the education records of students not be released without the prior written consent of a student's parents.² FERPA nonetheless also provides several exceptions to the parental consent requirement. Relative to your inquiry, education records may be released to appropriate persons in connection with an emergency, in certain limited circumstances.³ The release of such information is made subject to the regulations of the Secretary of Education.⁴

The regulations promulgated by the Secretary of Education pursuant to FERPA reiterate this health and safety exception by stating, "[a]n 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."⁵ The regulation further provides that in making such a determination regarding health and safety,

² 20 U.S.C.A. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization" The "prohibition" is one only tied to the federal government's spending power; and FERPA does not create an individual right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (U.S. 2002); *see also Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (U.S. 2002) (explaining that "The Act states that federal funds are to be withheld from school districts that have 'a policy or practice of permitting the release of education records . . . of students without the written consent of their parents.' § 1232g(b)(1)").

³ 20 U.S.C.A. § 1232g(b)(1)(I).

⁴ *Id.* *See* 34 C.F.R. § 99.36.

⁵ 34 C.F.R. § 99.36(a).

an educational agency or institution may take into account the totality of 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.^[6]

Section 22.1-287 of the *Code of Virginia* establishes the strictures for the release of pupil records in the Commonwealth. In relevant part, it expressly provides that

[n]o teacher, principal or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person is . . . [s]tate or local law-enforcement or correctional personnel...seeking information in the course of his duties^[7]

Section 22.1-287 further provides, notwithstanding the restrictions it imposes, that

...[t]he principal or his designee may disclose identifying information from a pupil's scholastic record for the purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication. In addition to those agencies or personnel identified in [specific sections of the statute], the principal or his designee may disclose identifying information from a pupil's scholastic record to attorneys for the Commonwealth, court services units, juvenile detention centers or group homes, mental and medical health agencies, state and local children and family service agencies, and the Department of Juvenile Justice and to the staff of such agencies.^[8]

Statutes are to be interpreted according to their plain language.⁹ Both the federal and state provisions establish a default rule of non-disclosure. Federal law authorizes release "in connection with an emergency," but critical to your inquiry, permits disclosure only "[i]f the educational agency or institution determines that there is an articulable and significant threat" to the safety of others.¹⁰ Indeed, absent a court order, the assessment of whether disclosure is warranted rests with the local educational agency, and not law enforcement. The decision to release records is further vested in the educational

⁶ 34 C.F.R. § 99.36(c). Although not directly related to your inquiry, a somewhat similar exception within FERPA authorizes disclosure to "State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted

after November 19, 1974, if...the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and...the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

20 U.S.C.A. § 1232g(b)(1)(E)(ii).

⁷ VA. CODE. ANN. § 22.1-287(A)(5) (2011).

⁸ Section 22.1-287(D)(4).

⁹ See *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹⁰ See 34 C.F.R. § 99.36(c).

agency's discretion, in that the law provides only that the agency "may disclose information from education records" to appropriate persons; it does not require such disclosure.¹¹

Similarly, although § 22.1-287 provides for law enforcement a limited exception to the prohibition against the release of records,¹² it nowhere imposes a clear, affirmative duty or requirement on school officials to release such records upon request. While the statute prohibits disclosure with several listed exceptions, it does not conversely mandate disclosure in the case of those listed exceptions. Rather, the statute permits disclosure in those instances, including when access to records is afforded "law enforcement . . . in the course of his duties," or, for the "purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication."^{13,14}

In comparing these statutory provisions, I do not find an inherent conflict between FERPA and § 22.1-287. Critically, neither mandates disclosure where the other proscribes it; rather, where the release of student records is permitted, such release is discretionary on the part of the educational agency.¹⁵

Moreover, I conclude that the specific disclosure-related exception at issue in your inquiry is consistent with FERPA. The disclosure permitted under § 22.1-287(A)(5) falls within the scope of FERPA's parallel emergency-related exception to nondisclosure.¹⁶ As noted, the exception at subsection (A)(5) permits disclosure to State or local law-enforcement or correctional personnel seeking information in the course of his duties. An educational agency could comply with both FERPA and this state law provision if it were to disclose information to law enforcement personnel in connection with an

¹¹ *Id.* Moreover, FERPA states that federal officials will not substitute their judgment for the judgment of local officials if there is a rational basis for the local officials' determinations concerning the health and safety exception. *See* 34 C.F.R. 99.36(c). Weighing the risks and determining the proper actions fall within the purview of officials in the local educational agency absent a law or court order mandating disclosure. Nonetheless, any disclosure must meet the requirements set forth in FERPA's implementing regulations. *See* 34 C.F.R. § 99.36(c).

¹² Section 22.1-287 generally prohibits disclosure of student records to law enforcement officers unless pursuant to judicial process or under one of the listed exceptions. 1978-79 Op. Va. Att'y Gen. 232.

¹³ According to the facts you relate, the superintendent was not asked to disclose the identifying information of Juvenile for the "purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication," pursuant to § 22.1-287(D)(4). You state that law enforcement officers had attempted to obtain a juvenile petition for a threat and a CHINS petition and were denied both. You also state that the records were "essential" to the investigation and "to establish the degree of a threat this individual had posed in the school system in the past and to develop other lead information to determine if Juvenile had other access to a weapon or made similar threats to others." Thus, it appears the purpose underlying the request for disclosure was to evaluate a past and perhaps ongoing threat to ensure safety rather than to further the ability of the juvenile justice system to effectively serve the pupil.

¹⁴ "Unless it is manifest that the purpose of the legislature was to use the word 'may' in the sense of 'shall' or 'must,' then 'may' should be given its ordinary meaning - permission, importing discretion." *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949).

¹⁵ For example, § 22.1-287(D)(4) tracks the language of the FERPA exception related to assisting the juvenile justice system, including the required condition that,

[p]rior to disclosure of any such scholastic records, the persons to whom the records are to be disclosed shall certify in writing to the principal or his designee that the information will not be disclosed to any other party, except as provided under state law, without the prior written consent of the parent of the pupil or by such pupil if the pupil is eighteen years of age or older[.]

20 U.S.C.A. § 1232g(b)(1)(E)(ii).

¹⁶ 20 U.S.C.A. § 1232g(b)(1)(I); *and see* 34 C.F.R. § 99.3(a) and (c).

emergency, when the knowledge of such information is necessary to protect the health or safety of the student or other persons.¹⁷ If, however, upon taking into account the totality of existent circumstances, the educational agency does not conclude that the facts meet the criteria for the FERPA exception, information about the pupil may not be released.

In the specific factual scenario you describe, the superintendent concluded, under required FERPA analysis, "that there was no emergency."¹⁸ Thus, the terms of § 22.1-287(A)(5) did not apply so as to enable the superintendent to provide a law enforcement officer access to the pupil's records.

Conclusion

It is my opinion that the provisions of § 22.1-287 of the *Code of Virginia* may be reconciled with those of the Family Educational Rights and Privacy Act. It is my further opinion, based upon the factual scenario you describe, that the school superintendent possessed authority to rely upon FERPA provisions to deny access to a pupil's records to a law enforcement officer seeking information in the course of his duties.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹⁷ *Id.*

¹⁸ Whether the superintendent correctly assessed the totality of circumstances in this instance is beyond the scope of this opinion.