

Office of Open Records Holds That School Videos Depicting Student In An Altercation Is Not An Educational Record Of The Student Under FERPA

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Hawkins v. Central Dauphin School District, AP 2016-0583, 2016 PA O.O.R.D. LEXIS 760. The Office of Open Records reverses its earlier decision and holds that a video from a school bus video system showing an altercation between an adult and a 17-year-old student is not an educational record of the student under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g.

SUMMARY AND FACTUAL BACKGROUND

A request (“Request”) was submitted to the Central Dauphin School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a video from a District school bus. The requested video showed an adult grabbing a 17-year-old student by the wrist.

The District denied the Request, stating that disclosure of the video would violate FERPA and would result in the loss of federal funding. 65 P.S. § 67.708(b)(1)(i).

On appeal, the Office of Open Records (“OOR”) granted the appeal and held that the video was a public record. In the OOR’s view, only records relating to a student’s academics are “educational records” under FERPA. In making this determination, the OOR reversed its earlier decision in **Remling v. Bangor Area Sch. Dist.**, OOR Dkt. AP 2011-0021, 2011 PA O.O.R.D. LEXIS 74 which held that such videos are educational records under FERPA and exempt from disclosure under the RTKL.

DISCUSSION

FERPA protects personally identifiable information contained in education records from disclosure and financially penalizes school districts “which [have] a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1). FERPA and its implementing regulations define “education records” as those records that are “[d]irectly related to a student” and “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 20 U.S.C. §1232g(a)(4)(A); 34 C.F.R. 99.3.

The OOR acknowledged that the definition of educational records is broad and that, by its terms “appears to encompass all records held by an educational institution and which relate to a student.” Nevertheless, the OOR stated that “the courts interpreting FERPA have made clear that **only** those records relating to student academics” are education records protected by FERPA and held that the video was not an educational record.

Though the language used by the OOR in the **Hawkins** decision suggests that all courts agree with this narrow interpretation, the reality is that the OOR was relying on state and federal decisions from other jurisdictions that have been rejected by other courts for being inconsistent with the plain language of FERPA. Moreover, the OOR’s new position is inconsistent with guidance issued by the Federal Department of Education’s Family Compliance Office (“FCO”) which oversees compliance with FERPA.

Contrary to the OOR’s position on **Hawkins**, there is a significant body of case law holding that the term “educational records” must be interpreted broadly and include school surveillance videos. In **United States v. Miami University**, 91 F.

Supp. 2d 1132 (S.D. Ohio 2000), for example, the court reviewed and rejected many of the cases relied upon by the OOR in **Hawkins**:

With all due respect to these courts, this Court refuses to adopt such a narrow interpretation of FERPA's definition of "education records." None of the above-cited decisions provided any reasoning for their narrow interpretation of FERPA, and this Court fails to see how such a limited meaning of "education records" can be discerned from the plain language.

Id., at 1149 n. 17. **See also Bryner v. Canyons School District**, 351 P.3d 852, 858 (Utah Ct. App. 2015) (video from a school surveillance camera that showed an altercation between the requester's child and other students outside of a classroom is an educational record); **Medley v. Bd. of Educ.**, 168 S.W.3d 398, 404 (Ky. Ct. App. 2004) (videotapes of teacher's classroom were education records within meaning of FERPA).

Moreover, the OOR's holding in **Hawkins** is inconsistent with guidance issued by the Federal FCO. The FCO, which implements and oversees institutional compliance with FERPA, has issued guidance to school districts stating that school videos of students are educational records of the students. Initially, the FCO advised that "a parent may only inspect a school videotape showing his or her own child engaged in misbehavior if no other students are pictured": **Letter re: Berkeley County Sch. Dist.**, 7 FAB 40 (FCO 2004) (**quoted in Bryner**, 351 P.3d at 858). In other words, any school video depicting a student is an educational record of that student.

The FCO subsequently issued informal guidance that suggests that video recordings may constitute education records only for those students who are "directly related" to the focus or subject of the video. **See, e.g., Opinion of the Texas Attorney General**, OR2006-07701, 2006 Tex. AG Ltr. Rul. LEXIS 7439 (July 18, 2006) ("The [PCO] has, however, determined that the images of the students involved in the altercation do constitute the education records of those students. Thus, FERPA does apply to the students involved in the altercation.") (**quoted in Bryner.**, 351 P.3d at 858). At the very least, guidance issued by the FCO, which has been relied upon by courts, indicates that videos depicting altercations are educational records under FERPA of the students involved in the altercation.

Accordingly, contrary to the OOR's assertion in **Hawkins**, only a small line of cases has interpreted the term educational record narrowly. The stronger argument, based on the text of the statute and regulations and the guidance issued by the federal government, may be that the term should be interpreted broadly and include surveillance videos.

There are no Pennsylvania decisions directly on point, but Pennsylvania courts appear to have adopted the broad definition of educational records. In **Sherry v. Radnor Twp. Sch. Dist.**, 20 A.3d 515, 525 (Pa. Commw. Ct. 2011), the Commonwealth Court held that student disciplinary records are included under FERPA's definition of "education records." In doing so, the court relied on the Sixth Circuits decision which affirmed the above-quoted **Miami University** case, **United States v. Miami University**, 294 F.3d 797 (6th Cir. 2002). Accordingly, Pennsylvania courts may very well hold that school surveillance videos are educational records.

PRACTICAL ADVICE

The **Hawkins** decision was appealed to the Court of Common Pleas of Dauphin County where it is pending. In the meantime, the OOR continues to apply its narrow interpretation of educational records and order the release of videos featuring students. **See Adams v. Parkland School District**, AP 2016-1685.

Because there is uncertainty whether school surveillance videos are educational records under FERPA, school districts should work with their solicitor before relying on the recent OOR decisions and creating a policy or practice of granting RTKL request that seeks school videos depicting students.

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