

Images of Students must be Removed from School Bus Surveillance Video when Responding to a Request for Records Under the Right-To-Know Law

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Christopher L. Voltz, Esq., cvoltz@tuckerlaw.com, (412) 594-5580

Easton Area Sch. Dist. v. Miller, 232 A.3d 716 (Pa. 2020). Pennsylvania Supreme Court holds that images of students in a school bus surveillance video are “educational records” under FERPA and must be redacted before releasing the video in respond to a request for records under the RTKL.

BACKGROUND

Requester submitted a request for records under the Pennsylvania Right-to-Know Law (“RTKL”) seeking a school bus surveillance video involving an elementary school teacher who, according to Requester, had roughly physically disciplined a child on a school bus outside of the school.

The school district denied the request on the basis that the recording was an educational record of the disciplined child under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and that if a record is exempt from public disclosure pursuant to FERPA it is also exempt from public disclosure under the RTKL. 65 P.S. §§ 102, 305(a)(3).

The Commonwealth Court, however, concluded that the video was not an “education record” of the student within the meaning of FERPA, because, even though it captured individually identifiable images of students, it was not “directly related” to the students who were portrayed. Instead, the Commonwealth Court found that the footage was “directly related” to the teacher whose behavior was at issue. In the words of the Commonwealth Court: “[A] video ... is only an educational record with respect to a student in the video for whom the video may have consequences.” *Id.*

DISCUSSION

The Supreme Court reversed the Commonwealth Court and held that while the video itself is a public record subject to disclosure, the images the video contains depicting the personally identifiable information of students – i.e., the students’ images on the video – are exempt from public disclosure pursuant to FERPA, and, therefore, also exempt from public disclosure under the RTKL. 65 P.S. §§ 102, 305(a)(3).

In reaching this decision, the Court cited to, and relied upon, the United States Department of Education’s online FAQs on Photos and Videos under FERPA (“Guidance”) which sets forth factors that should be considered in determining whether a photo or video is “directly related” to a student:

- The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);
- The photo or video contains a depiction of an activity:
 - that resulted in an educational agency or institution’s use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student); ...
 - that shows a student getting injured, attacked, victimized, ill, or having a health emergency; ... or
- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a

student's education record.

The Guidance further provides that “[a] photo or video should not be considered directly related to a student in the absence of these factors and if the student’s image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual.”

The Guidance also provides a list of examples of videos considered education records, specifically stating that a: “school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting.” The Court noted that the Department has also advised, in separate guidance, that a school surveillance video depicting a hazing incident is an education record directly related to both the perpetrators and the victims.

In light of the Guidance, the Court rejected the Commonwealth Court’s conclusion that the recorded interaction involving a teacher’s conduct directly relates solely to the teacher and was only “tangentially related” to the student. To the contrary, the Court found that because the student is the subject of some interaction with a teacher that warranted preservation of the video for an official purpose (whether the student is being disciplined or is the victim of misconduct or is in an innocuous interaction that was nevertheless part of an official inquiry), the video was as “directly related” to the student as much as it was related to the teacher.

Accordingly, the Court concluded that a school district must not release the students’ personally identifiable information — that is, the students’ images on the video to the extent the students are reasonably identifiable — to anyone other than the parent or eligible student, absent one of the conditions listed under FERPA § 1232g(b)(1) (which do not include release of information to the press or to a public records requester), without proper consent, or a judicial order or subpoena.

While the Court held that the images of the students must be redacted, it held that the redacted video had to be provided. Under the RTKL, where a record contains information which is subject to access along with information which is not subject to access and the two cannot be physically separated, “the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access.” 65 P.S. § 67.706. Accordingly, the Court concluded that the video itself was not exempt from disclosure and, to the extent the students’ images can be redacted to remove their personally identifiable information, the video must be disclosed. See 65 P.S. §§ 67.102, 67.305(a)(3).

PRACTICAL ADVICE

With the Miller decision, the Pennsylvania Supreme Court has established that school surveillance videos, whether recording the interior of a school bus or school grounds, are public records, but that images of students are not subject to disclosure under FERPA (and, potentially, the constitutional right to informational privacy). Accordingly, when receiving a request, the Court has instructed school districts to redact students’ images by, for example, blurring or darkening portions of the video revealing the students’ identities, and to subsequently provide access to the redacted video.

While this decision provides some clarity for school districts when dealing with requests for videos depicting students, school districts should consult with their solicitor prior to responding to such a request.

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