

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

LETTER OF FINDINGS

<p>School Division Dr. Michelle Boyd, Assistant Superintendent, Special Services Ms. Dawn Schaefer, Acting Director, Special Education Procedural Support 8270 Willow Oaks Corporate Drive—Second Floor Fairfax, Virginia 22031 mboyd@fcps.edu DMSchaefer@fcps.edu</p>	<p>Parent(s) INDIVIDUAL PARENTS AND SYSTEMIC COMPLAINT See Appendix A</p>
<p>Date Complaint Received September 27, 2021</p>	<p>Student(s) INDIVIDUAL STUDENTS AND SYSTEMIC COMPLAINT See Appendix A</p>
<p>Notice of Complaint Date October 6, 2021</p>	<p>Complainant (if other than parent) NA</p>
<p>Complaint Appeal Date¹ December 27, 2021</p>	<p>Findings Date November 26, 2021</p>
<p>Complaints Department Phone # (804) 225-2013</p>	

This complaint involves a number of students receiving special education and related services within Fairfax County Public Schools (LEA (local education agency)) in the fall of 2021.²

A. Applicable Regulations

On May 28, 2009, the Virginia Board of Education adopted revised regulations to reflect IDEA '04 and its 2006 implementing regulations. The Board's revised regulations became effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, at 8 VAC 20-81-10 *et seq.* (the "Virginia Regulations"). Accordingly, this office based its investigation and findings on the Virginia Regulations, which are applicable to the allegations forming the basis of the complaint. The Virginia Regulations are available online at http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf.

B. Sufficiency of Complaint (See 34 C.F.R. § 300.153)

Prior to the issuance of the *Notice of Complaint* in this case, this office reviewed the complaint documentation and determined that it met the filing requirements of the regulations.

¹ The thirty (30) day period for filing an appeal under the Virginia Regulations, at 8 VAC 20-81-200.E, expires on December 26, 2021, which is a weekend. Accordingly, the appeal will be due on the next business day, Monday, December 27, 2021.

² For ease of reading throughout this Notice of Complaint, quotations may be designated by the following typeface/colors: *Purple italics* = Complainant; *blue italics* = LEA; *black italics*: US ED; VDOE/ODRAS; other.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 2

C. On-Site Visit

Based on Complainant's supporting materials, the school division's response documentation, and other information, this office determined that conducting an on-site visit would not have produced any more determinative facts than were presented in the written correspondence, and therefore, we had sufficient information to bring our investigation to closure without an on-site visit.

ISSUES AND REGULATIONS:

1. Procedural Safeguards—Confidentiality of Records.

Complainant has alleged that LEA has violated special education laws and regulations governing confidentiality of education records with regard to **Students identified on Exhibit A and on a systemic basis.**

More specifically, Complainant has alleged that:

- *In response to a FOIA [Freedom of Information Act] request, [LEA] provided [Other Individual] almost 1500 pages of documents that breach the privacy of students, their parents, and staff. Before [Other Individual] knew the request included a breach, [Other Individual] shared the document with me;*
- *My own information was breached, as was information related to numerous students in special education and their parents (in addition to info about other students, parents, and staff);³ and*
- *More specifically information was released regarding Other Individual, Parent C and her son, Parent D and her son, Parent E and her kids, and Parent F are just a few of the parents and students with special needs whose privacy was breached.*

Applicable Regulations and Other Relevant Authority:

- 34 C.F.R. § 300.613; 8 VAC 20-81-170.G; 8 VAC 20-81-10;
- 34 C.F.R. § 300.623; 8 VAC 20-81-G.11;
- 34 C.F.R. § 300.32; 8 VAC 20-81-10;
- 34 C.F.R. § 93.3;
- 34 C.F.R. §§ 300.32 and 300.62; 8 VAC 20-81-170.G.10;
- 8 VAC 20-150-20

³ To the extent the materials Complainant provided address an alleged unauthorized release of personally identifiable information regarding students who are not eligible for special education and related services under IDEA '04, our office has no jurisdiction to address this concern. In addition, our office has no authority to address releases of personally identifiable information of staff.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 3

Findings:

The Office of Dispute Resolution and Administration finds the school division to be in compliance with regard to Students A, B, F1, F2, I and K, and in noncompliance with regard to Students C, D, E1, E2, G, H, J, L, M, N, O and P. The Office of Dispute Resolution and Administrative Services also finds that the disclosure in question does not, in and of itself, constitute a systemic violation, but notes certain concerns generally with the LEA's FERPA compliance program that will be addressed through our general supervision authority.

Analysis:

The basic facts in this case are not in material dispute. Complainant alleges, and the LEA admits that, in response to a request for information under the Virginia Freedom of Information Act (FOIA), the LEA released records to the Other Individual that contained un-redacted names of LEA students, parents and staff members, including students and parents of students with disabilities. The Other Individual then shared that information with Complainant. The records consisted of billing records from law firms representing the LEA in a variety of legal matters.

Complainant has alleged that the violation is systemic in nature, and identified eight students with disabilities whose names were included in the released materials. In addition, the LEA, in its response, self-identified eleven additional students with disabilities whose names appeared in the disclosures.

Preliminary Discussion – Legal Principles

To resolve the issue before us, therefore, we are called to interpret and apply a limited number of laws and regulations to the undisputed facts. While there are a number of statutes, regulations and common law principles that may broadly come into play under these facts, our jurisdiction – our legal authority - is restricted to a subset of the foregoing. More specifically, we, as the Office of Dispute Resolution for Special Education and Student Services in Virginia, have no jurisdiction over matters related to FOIA, to common law rights of property and privacy, to the First Amendment of the United States Constitution, or even to legal obligations of a school division to maintain student records generally. We may not address matters relating to the rights of adults alone, or to the rights of any student other than a student who is eligible for special education and related services under IDEA and its implementing federal and state regulations. Furthermore, while the laws and regulations applicable to our investigation may incorporate provisions of the Family Education Rights and Privacy Act (FERPA) and of state law, they are, at most, a subset of those authorities.

We are aware that legal claims beyond our jurisdiction have been asserted and are being litigated regarding the instant record disclosure. We must, therefore, carefully sort through the facts and assertions floating in and around this case, and focus solely on the questions that are ours to answer.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 4

Those questions arise from the following legal framework:

- The 2006 implementing regulations, at 34 C.F.R. § 300.613, and the Virginia Regulations, at 8 VAC 20-81-170.G, set forth generally provisions governing confidentiality of information. These provisions address, among other things, parental rights to inspect and review education records relating to the student.
- Federal and state regulations (8 VAC 20-81-10) define “education records” as those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as “scholastic record.” In addition to written records, education records include electronic exchanges between school personnel and parent(s) regarding matters associated with the student’s educational program, such as scheduling of meetings or notices.
- Additionally, the 2006 implementing regulations, at 34 C.F.R. § 300.623, and the Virginia Regulations, at 8 VAC 20-81-170.G.11, direct school divisions to protect the confidentiality of **personally identifiable information** (PII) at collection, storage, disclosure, and destruction stages.
- Special education regulations (34 C.F.R. § 32; 8 VAC 29-81-10) define the term “personally identifiable” as information that contains (I) the name of the child, the child's parent, or other family member; (ii) the child’s address; (iii) a personal identifier, such as the child's social security number or student number; or (iv) a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.
- The FERPA regulations (34 CFR § 99.3) state that the term “PII” includes, but is not limited to (a) the student's name; (b) the name of the student's parent or other family members; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number, or biometric record; (e) other indirect identifiers (e.g., the student's date of birth, place of birth, and mother's maiden name); (f) *other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty*”[emphasis added]; or (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.⁴

⁴ The Privacy Technical Assistance Center within the U.S. Department of Education (US ED) has stated that PII “includes information that can be used to distinguish or trace an individual’s identity either directly or indirectly through linkages with other information.” U.S. Department of Education, Privacy Technical Assistance Center, *Data Governance Checklist*, PTAC-CL-1, December 2011 (revised June 2015) <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Data%20Governance%20Checklist_0.pdf >

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 5

- The 2006 implementing regulations, at 34 C.F.R. §§ 300.32 and 300.623, and the Virginia Regulations, at 8 VAC 20-81-170.G.10, specify that parental consent must be obtained before PII is disclosed to anyone other than school division officials, **unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act (20 USC § 1232g).**
- Parental consent is not required before personally identifiable information is disclosed to school division officials collecting, maintaining, or using personally identifiable information as required by special education regulations, with limited exceptions (34 C.F.R. § 99.3; 8 VAC 20-81-170.G.10.b).
- The US ED Student Privacy Policy Office has stated that an “unauthorized disclosure” *occurs when personally identifiable information from a student’s education record is made available to a third party who does not have legal authority to access the information. Such an unauthorized disclosure can happen inadvertently, as occurs when information about an individual is unintentionally revealed through, for example, a security breach of the electronic system that is used to maintain and access the education records, or when a teacher or administrator accidentally leaves paper reports that include personally identifiable information in an unsecured location.*⁵
- One exception to the parental consent requirement is material constituting “directory information”—defined by FERPA regulations as “*information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.*” This information may include, inter alia, “*the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.*”⁶
- The Virginia Regulations governing the Management of the Student's Scholastic Record in the Public Schools of Virginia, at 8 VAC 20-150-20, direct school divisions to manage the scholastic records of all students in compliance with applicable law, including FERPA, IDEA 2004, and various provisions of the Code of Virginia, including, but not limited to, §§ 16.1-260, 16.1-305.1, 16.1-305.2, 22.1-287, 22.1-287.1, 22.1-288.2, and 22.1-289.

Application of Legal Authority:

⁵ U.S. Department of Education, Student Privacy Policy Office, Privacy Technical Assistance Center, <https://studentprivacy.ed.gov/glossary#glossary-node-252>

⁶ 34 C.F.R. § 99.3.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 6

Based upon the foregoing, we must determine, as a jurisdictional matter, whether the disclosed records generally constituted education records within the meaning of FERPA. If we do not have jurisdiction, this is not to suggest that the parents have no recourse in the matter, but rather, that relief cannot be obtained through our office. If we do have jurisdiction, we must determine whether each individual disclosure violates FERPA, i.e., that an education record not subject to an exemption has been disclosed and whether the violation is systemic in nature.

Education Records

- In its complaint response, the LEA argues, first, that the records released, as a whole, were not “education records:”

Pursuant to the Virginia Administrative Code, education records “means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as ‘scholastic record.’ In addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the student’s: educational program (e.g., scheduling of meetings or notices). 8 Va. Admin. Code § 20-81-10 (2010).

The FOIA request submitted by Parent B was not a request for information that could be easily identified as part of an education record, (i.e. grades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files.) U.S. Dept. of Education, What is an Education Record (last visited Oct. 14, 2021), <https://studentprivacy.ed.gov/faq/what-education-record>.

The request included: “All outsourced counsel legal services invoices and paid legal services invoices from June 1, 2020 to August 12, 2021.” These legal invoices were provided to FCPS but are not maintained as education records under applicable law and regulations. Thus, to the extent PII was disclosed, this is not the type of disclosure from educational records that falls within the purview of the special education regulations cited in the complaint.

- In the past twenty years, much litigation in this area has focused on defining the scope of records covered by the statute. The upshot of these cases is that not every document that

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 7

contains PII is “maintained” within the meaning of the statute, and accordingly, not every document containing PII is an education record subject to its protections.⁷

- FERPA clearly does not require that any particular documents be maintained in a student’s education record. Specifically, the Family Policy Compliance Office (FPCO), U.S. Department of Education, has advised:
 - “Under FERPA, a school is not generally required to maintain particular education records or education records that contain specific information [emphasis added]. Rather, a school is required to provide certain privacy protections for those education records that it does maintain.”
 - “Under FERPA, a school is not required to provide information that is not maintained or to create education records in response to a parent's request.”
- Litigation in this area has further focused on whether documents directly related to a student that exist incidentally are “maintained” by the school division. In 2002, the U.S. Supreme Court specifically examined whether student-specific information had been “maintained”—thus constituting an “education record”—in *Owasso Public Schools v. Falvo*. In this case, the Court ruled that peer-graded papers had yet to be “maintained” by the school, and, accordingly, did not constitute education records. The Court opined:

*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.*⁸

⁷ Contrast this with FOIA, which assumes that every document that exists is subject to disclosure unless a specific exemption applies. Under FERPA, a document is not protected from disclosure unless it is an education record, and even in that case, it may be required to be disclosed under FOIA with PII redacted.

⁸ *Owasso Public Schools v. Falvo*, 534 U.S. 426 122, S.Ct. 934 (2002). The Court further stated, *The student graders only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student's folder in a permanent file.* The Owasso decision has been cited in numerous rulings (see, e.g., *K.C. v. Fulton Co. Sch. Dist.*, 46 IDELR 39, 4 GASLD 242, 10 FAB 8, 106 LRP 42172 (N.D. Ga. 2006); *Moghadam v. Regents of Univ. of Calif.*, 169 Cal. App. 4th 466; 86 Cal. Rptr. 3d 739 (2008 Cap. App.); distinguished in *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212; 970 N.E.2d 939 (2012), in which university athletic department retained “copies of all emails....and ...copies of all documents scanned into electronic records, which are organized by student-athlete”).

But see, *Bryner v. Canyons Sch. Dist.*, 351 P.3d 852 (2015); *writ of certiorari denied*, 366 P.3d 1213 (2016); *cert. denied* (U.S. 2016), in which a school security video documenting a student fight constituted an “education record” as it included information directly related to students and was “maintained” by the school division; the Utah Court of Appeals declined to read *Owasso* to impose a strict requirement that records must be kept in a central location such as a filing cabinet.

In contrast, the Commonwealth Court of Pennsylvania, in *Cent. Dauphin Sch. Dist. V. Hawkins* (No. 1154 C.D.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 8

- Subsequent judicial rulings further refine the issue of “maintaining” records—specifically, email correspondence. Citing *Owasso*, a California federal district court focused on the two-pronged definition of “education record” in *S.A. v. Tulare Co. Office of Educ. and Calif. Dept. of Educ.* The court found that:

an email is an education record only if it both contains information related to the student and is maintained by the educational agency. Conversely, an email that is not maintained by the educational agency is not an education record [emphasis added].

The court specifically rejected the student’s argument that the school division “maintained” emails electronically “in inboxes and [its] server...” The court stated:

Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion—that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained “in the same way the registrar maintains a student's folder in a permanent file”—is “fanciful.” Owasso, 534 U.S. at 433. Like individual assignments that are handled by many student graders, emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places.⁹

2017)(2018), declined to find a school bus surveillance video constituted an “education record” under FERPA, as the school division did not have a “maintenance protocol” for the video and, thus, the video was not “maintained in the manner contemplated by FERPA, as definitively construed in *Owasso*.”

⁹ *S.A. v. Tulare Co. Office of Educ. and Calif. Dept. of Educ.*, 12 FAB 37, 53 IDELR 143, 109 LRP 63200 (E.D. Cal. 2009). The court further stated that *Pursuant to the applicable statute and regulation, [LEA] was required to provide for inspection only those emails that personally identify Student and are maintained by [LEA]. Student offers no evidence that [LEA] failed to provide for inspection emails that were maintained in Student's file. Student admits that [LEA] provided a "stack" of emails from 2006 and 2007 that were printed out and kept in Student's file. Moreover, the evidence that [LEA] maintains Student's records in hard copy in Student's permanent file is not controverted. Student provides no evidence that [LEA] maintains records electronically. Because [LEA] was obligated to provide for inspection education records, see, 34 C.F.R. § 300.613, and the evidence supports California DOE's position that [LEA] provided Student with the emails that [LEA] maintained, this Court upholds California DOE's conclusion that [LEA] was compliant with the applicable state and federal education laws.*

Relying on *Tulare* in 2015, the Wisconsin state education agency found that a school division responded properly to parents’ request for “all of the student’s education records,” when it omitted emails not included in the student’s personal file. The SEA stated: *Emails not included in the student's file are not considered education records because they are not “maintained” as contemplated by Congress. Emails may appear in multiple in-boxes of many individuals within the school and the school district.* Wisconsin SEA, *Middleton-Cross Plains Area School District*, 18 FAB 38, 15 LRP 31928 (June 15, 2015).

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 9

- In 2017, a federal district court in Pennsylvania relied on *Owasso* and *Tulare* in addressing *whether e-mails [discussing a student’s potential retention in first grade], in fact, are “education records” as envisioned by the interlocking statutory schemes at issue here... Unless [LEA] kept copies of e-mails related to [student] as part of its record filing system with the intention of maintaining them, we cannot reach the conclusion that every e-mail which mentions [student] is a bona fide education record within the statutory definition. These e-mails appear to be casual discussions, not records maintained by [LEA]. Since these e-mails do not qualify as education records to which Plaintiffs are guaranteed a right of access, there was no violation of their procedural rights....*¹⁰
- While these cases stand for the proposition that not every document that contains a student’s name constitutes an education record, the question presented in the instant case is different. Here, the documents disclosed clearly contained some PII, and the LEA does not directly argue that they were not “maintained”. In fact, the documents have presumably been maintained by the LEA as financial or accounting records. Rather, the LEA urges that the records are not of the type that could be “easily identified as part of an education record” and thus are not subject to FERPA. Because the question is fundamentally different, the case law cited above sheds some light on the issue, but is not dispositive. Logically, persuasive arguments can be made for and against the school division’s position.
- While we do not believe, in light of applicable case law, that a document must be kept in a physical or electronic file labeled with the student’s name to be an electronic record, we do agree that there is some logic to categorizing financial records separately from student records. In fact, the sole reference to financial records contained in FERPA is limited to “student financial records (at the post-secondary level),” a logical inclusion in that post-secondary education, unlike public elementary and secondary education, generally requires the payment of tuition. The limitation, however, is telling, in that it does not suggest that other financial records such as a student’s cafeteria account would be a typical education record.
- On the other hand, we note that billing records such as these are related to event(s) that occurred in connection with the student’s educational services. We would expect to see substantive information related to a due process hearing, a disciplinary appeal or a suit otherwise arising from the relationship between the student and the school division in the student’s educational record. Should the school division’s decision about whether to put a copy of the bill in the file as well as in the accounting office drive whether the document, clearly containing PII and clearly maintained by the school division, is subject to FERPA protections?

¹⁰ *E.D. v. Colonial Sch. Dist.*, Civil Action No. 09-4837 (E.D. Pa. Mar. 31, 2017).

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 10

- The LEA has not cited any legal authority to support its position, nor have we identified any authority shedding further light on this matter. As a result, we have no supporting authority to cause us to depart from the tried and true construct. Thus, we must conclude that the documents contain PII and are maintained by the school division, therefore they are education records under FERPA and this matter is within our jurisdiction.

Individual Disclosures

The LEA also argues, in the alternative, that, if the records can broadly be classified as education records, some specific individual disclosures nonetheless still do not constitute disclosures covered by FERPA, while other individual disclosures are permitted by exceptions contained within the statute. Importantly, it admits that, if the records are education records subject to our jurisdiction, it has impermissibly disclosed personally identifiable information of certain students. It, however, goes on to deny that the disclosure is systemic in nature.

- Pursuant to special education regulations (34 C.F.R. §§ 300.32 and 300.623; 8 VAC 20-81-170.G.10), school divisions must obtain parental consent before disclosing PII to anyone other than school division officials, unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act (“FERPA”)(20 USC § 1232g). Parental consent is not required before PII is disclosed to school division officials collecting, maintaining, or using PII as required by special education regulations, with limited exceptions.¹¹

Personally Identifiable Information Generally

- The FERPA regulations (34 C.F.R. § 99.3) state that the term PII includes, but is not limited to (a) the student's name; (b) the name of the student's parent or other family members; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number, or biometric record; (e) other indirect identifiers (e.g., the student's date of birth, place of birth, and mother's maiden name); (f) “other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty” [emphasis added]; or (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
- The Privacy Technical Assistance Center within the U.S. Department of Education (US ED) has further stated that PII “includes information that can be used to distinguish or trace an individual’s identity either directly or indirectly through linkages with other information.”¹²

¹¹ See 34 C.F.R. § 99.31. As a preliminary matter, we note that none of the 16 regulatory exceptions to the parental consent requirement is applicable to the case before us.

¹² U.S. Department of Education, Privacy Technical Assistance Center, *Data Governance Checklist*, PTAC-CL-1,

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 11

- The LEA has admitted that the document disclosed PII of the following students:

Student C

Student D

Student H

Student L

Student M

Student N

Student O

Student Q

In each case, the disclosure consisted of the student's name (last, or first and last) and a description of the type of legal matter in which the law firm was representing the student. The school division concedes that the name, together with the additional information disclosed could be used to distinguish or trace an individual student's identity. We accept the admission and find the LEA to be in noncompliance with regard to these individual students.

- The LEA has asserted that disclosures related to the following students did not constitute disclosure of an education record.
 - Student A - The LEA argues, and the record reflects that the disclosed information does not name Student A. It names Parent A (Complainant) but does not connect her with the student or any action involving the student. Rather, the legal matter referenced concerned a FOIA request. Such a request could involve any individual, not just a parent, and could touch on any matter of any sort, student-related or not, involving the school division. Because the document release did not contain the student's name or other information that could be reasonably linked to the student, we find the LEA to be in compliance with regard to Student A.
 - Student B – The LEA argues, and the record reflects that the disclosure does not contain any PII of Student B. Even if the documents did contain the student's name, the LEA notes, and we agree, that Parent B was the person making the FOIA request, and thus, the

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 12

school division was permitted to disclose to her any information concerning her own student. Accordingly, we find the LEA to be in compliance with regard to Student B.

- Students E1 and E2 - The LEA's response is as follows:

There was no unredacted PII of the Students E1 and E2. Instead, the only references to students E1 and E2 were their initials, and FCPS Parent E's own name is listed on the records. Under the definition of PII, information is PII if it is possible to identify a student with reasonable certainty. In this case, students E1 and E2 have a different last name as the parent, and so the disclosure of parent name does not make the students identifiable.

We disagree with the school division's analysis in this instance, as it fails to address the nature of the audience - the school community. More specifically Item (f) provides that PII includes "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty [emphasis added]."

In commentary accompanying the regulations, the United States Department of Education (US ED) commented that "records that identify a student by initials, nicknames, or personal characteristics are personally identifiable information if, alone or combined with other information, the initials are linked or linkable to a specific student and would allow a reasonable person in the school community who does not have personal knowledge about the situation to identify the student with reasonable certainty [emphasis added]."¹³

US ED continued: "For example, if teachers and other individuals in the school community generally would not be able to identify a specific student based on the student's initials, nickname, or personal characteristics contained in the record, then the information is not considered personally identifiable and may be released without consent. Experience has shown, however, that initials, nicknames, and personal characteristics are often sufficiently unique [emphasis added] in a school community that a reasonable person can identify the student from this kind of information even without access to any personal knowledge, such as a key that specifically links the initials, nickname, or personal characteristics to the student. In contrast, if a teacher uses a special code known only by the teacher and the student (or parent) to identify a student, such as for posting grades, this code is not considered personally identifiable information under FERPA because the only reason the teacher can identify the student is because of the teacher's access to personal knowledge of the relevant circumstances, i.e., the key that links the code to the student's name."¹⁴

¹³ US ED at 74831.

¹⁴ Id.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 13

US ED further opined that, the reasonable person in the “school community” is an individual “such as a student or professor,” rather than an individual in the larger community.¹⁵ Further, this “reasonable person” within the school community would not be “someone with personal knowledge of the relevant circumstances....”

While we agree that a random individual in the locality in question would be unlikely to identify the students based on the information provided. However, we must look, not at the larger community, but at the school community, a more limited universe. We find that a reasonable person in Student E1 or E2’s school community could link the parent’s name to each individual student with reasonable ease, and could conclude that the family was involved in a legal dispute of some kind with the school division. Accordingly, we find the LEA to be in noncompliance with regard to Student E1 and E2.

- Students F1 and F2 – Additionally, the school division asserts that the disclosure contained only the parent’s first and last name, and not that of the student. We note that, in this case, unlike that above, not only were the students’ names absent from the disclosure, the disclosure did not include students’ initials. The lack of any connection to the students in question make it much less likely that a reasonable person in the school community, without additional context, would be able to identify the students. Accordingly, we find the LEA to be in compliance with regard to Students F1 and F2.
- Students G, J and P - Although the student’s first and last name were disclosed, the LEA argues that this constitutes only directory information, and that, accordingly, an exception permits the disclosure. We disagree. The information disclosed is sufficient for a reasonable person in the school community without additional knowledge to conclude that the student was involved in litigation with the school division. Accordingly, we find the LEA to be in noncompliance with regard to Students G, J and P.
- Students I and K - Conversely, in each of these cases, the disclosure contained the last name only of the student, together with a notation of the legal representation involved (settlement conference, resolution session). We agree that the use of the student’s last name alone, without any other information that would link the student to a school or parent, even though it involves litigation, would be insufficient for a reasonable person in the school community to identify the student. As a result, we find the school division to be in compliance with regard to Students I and K.

¹⁵Z. Greenberg and A. Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. Legis. 22 at 27, 43 (2017). The authors have described US ED’s clarification as “circular reasoning” and cite potentially “bizarre and detrimental ramifications of this change” in the interpretation of “school community.” They describe application of this clarified standard as a “catch 22 *within* [italics in original] a catch 22,” as “the student body cannot be told [a student’s] identity because they already know [a student’s] identity....[US ED] has set a standard that no one can be told what he or she is reasonably likely to already know.”

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 14

Systemic Claim

The LEA argues, in essence, that the disclosure involved in this complaint arose out of a somewhat unique FOIA request, that the school division faced unique circumstances in that it had experienced personnel changes in both its FOIA office and office of Legal Counsel, and that no similar violation had occurred in the past. Thus it urges us to find that the violations noted herein were not systemic in nature.

We note that other allegations of FERPA violations by the LEA have been made by Complainant and others over the past several years. In some cases, where we were presented with a complaint meeting the sufficiency requirements of the regulations, and our investigations resulted in findings of both compliance and noncompliance.

The complaints presented, whether sufficient or not, involved a variety of fact patterns, different individuals and/or schools, and different sources of information. In that light, given (i) the fact that the division had in place policies and procedures that were compliant with the law; (ii) the size of the division; (iii) the diverse facts, individuals and areas of the division involved and (iv) the human propensity to make mistakes, we were not inclined to characterize this as a systemic issue.

Systemic complaints typically involve a policy or practice in a classroom, school or division that has more common features. That is still lacking in this instance, and therefore, we find no systemic violation arising out of this particular situation. However, we are concerned that continuing complaints in this area could signal larger issues in the school division's response to matters concerning FERPA or an issue with insufficient training and/or procedures. Additional actions addressed through the state educational agency's general supervision authority will be forthcoming.

CORRECTIVE ACTION:

The LEA has been found to be in noncompliance with regard to the students identified above.

The LEA notes that it has taken actions to notify parents of students identified in this complaint of the disclosure, and to remove unredacted copies within its control from public availability. We note, for the record, that whether or not the individuals who are in possession of the unredacted documents are required to return them to the school division is the subject of current litigation. Regardless of the actions taken to reduce the impact of the disclosures, the violation cannot be undone. While there may be other remedies available to affected families apart from our process, the actions taken by the school division in the individual cases of noncompliance is sufficient under the circumstances. However, in order to ensure that such violations do not recur in this particular context:

1. Provide a checklist of steps taken in its FOIA office's process to ensure that documents disclosed do not contain PII.

LETTER OF FINDINGS

Dr. Michelle Boyd
Ms. Dawn Schaefer
Ms. Callie Oettinger
November 26, 2021
Page 15

2. Keep a log of such requests, with documentation that the steps have been completed. Our office will review such records onsite within a year from the issuance of these findings, with permissible redactions, to ensure that the steps have been followed.

Please submit this corrective action to our office by December 27, 2021

Please maintain documentation of the actions taken as required in this Corrective Action Plan (CAP), including the documentation referenced in the CAP, as this information may be requested during our CAP implementation follow-up process on a later date.

APPEAL INFORMATION:

Please note that the findings in this Letter of Findings are specific to this case. While general rules are cited, findings in other cases may differ due to distinctions in the specific facts and issues in each case.

Either party to this complaint has the right to appeal these findings within 30 calendar days of our office's issuance of the Letter of Findings. Any appeal must be received by our office no later than **December 27, 2021**.

Enclosed is a copy of the appeal procedures. Written appeals should be sent directly to:

Patricia V. Haymes
Director - Office of Dispute Resolution and Administrative Services
Virginia Department of Education
P. O. Box 2120
Richmond, Virginia 23218

An appeal may also be filed via e-mail correspondence to ODRAS@doe.virginia.gov, or via facsimile transmission to (804) 786-8520.

A copy of the appeal, along with any submitted documentation, must be sent simultaneously to the non-appealing party. Questions regarding these procedures should be addressed to Ms. Sheila Gray at (804) 225-2771, or e-mail at: Sheila.gray@doe.virginia.gov.

Attachment - Appeal Procedures