Releasing Student Information: What's Public and What's Not

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SCHOOLS CREATE AND MANAGE an enormous amount of information about their students. This information comes from teachers, school counselors, nurses, coaches, parents, and others. It is found in student assignments, school newsletters, bulletin boards, report cards, standardized tests, transcripts, and disciplinary reports. Agencies outside the school may furnish information about a student; for example, juvenile court counselors will notify the school if a student is alleged or found to have committed an offense that would be a felony if committed by an adult.[1]

Teachers and school administrators need to know what information *must* be released if requested, what must *not* be released, and what may be released or not, depending on the school system's policies. Administrators also must recognize situations in which specific information *must* be provided to agencies such as the department of social services or a law enforcement agency, regardless of whether the agency has requested the information.

This article summarizes the law regulating the release of student information. "Student information" as used here refers both to personal knowledge that school employees have about students and to data found in records maintained by school employees. It includes information not only about individual students but also about groups of students: information found in school publications and announcements; in students' report cards, test scores, and other information about individual students; in the statistical information about a school's population; and in records of the activities, programs, clubs, meetings, teams, assemblies, and so forth that involve students. This article does not address the law governing release of information about school personnel.

Generally, school administrators should consider the following in responding to requests for information:

- Is disclosure of the requested information regulated by the federal Family Educational Rights and Privacy Act (FERPA)? This statute is the single most significant source of regulation of student information.
- Is disclosure of the requested information regulated by a federal or state statute other than FERPA? Such statutes usually target a specific situation or type of information.
- Is the requested information a public record under North Carolina state law? The public records law applies to most student information not regulated by another statute.
- What is the school system's policy on release of the information?

The statutes are confusing, and the issues have been litigated very infrequently in North Carolina. Thus, precise answers to many questions remain a matter of conjecture, although evaluation of appellate cases from other jurisdictions may offer guidance.

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1. *See* N.C. GEN. STAT. § 7B-3101 (hereinafter G.S.).

Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA, also known as the Buckley Amendment),[2] is a federal statute that regulates access to students' education records. Generally, the law conditions receipt of federal funds on schools' providing parents and guardians with access to their children's education records,[3] while protecting the same records from public access.[4] FERPA imposes three primary duties on schools:

- Schools must allow parents and guardians to inspect their children's education records and to challenge the contents of these records;
- Schools must guard education records from inspection by others, unless (1) the student's parent or guardian consents to the disclosure, or (2) the request is within one of the statutory exceptions to the consent requirement; and
- Schools must notify parents annually of their rights under FERPA.

Regulation limited to education records

FERPA's regulations apply only to "education records," defined as records "directly related to a student" that are maintained by a school "or by a party acting for" the school,[5] that personally identify a student, and that pertain to the student's school career. Education records are more than the official transcript maintained by a school. Education records clearly include the "official record" of each student, as defined by North Carolina statute,[6] and a student's report card, transcript, and individual tests and assignments (not all of which will be in the "official record").[7] Do education records also include disciplinary information, information provided by a guidance counselor, and other materials that document a student's activities, behavior, or progress in school? Probably yes. For example, school guidance counselors' notes have been held to be education records.[8] Other cases have held that education records include a school district's attorney's records of juvenile proceedings that were relevant to the child's school placement,[9] an "Automobile Information Sheet" completed by a student and containing information about his vehicle,[10] and the answers given by a student to the Rorschach inkblot test.[11]

Courts have generally adopted a broad definition, as illustrated by two recent cases. Teachers in an Oklahoma school district had engaged in the common practice of asking students to exchange tests or assignments and grade each other's work. When a parent sued, alleging a violation of FERPA, the 10th Circuit Court of Appeals held that the tests were educational records and that students' seeing each other's work was a release of educational records prohibited under FERPA.[12] For example, in 1998 a federal district court in Louisiana considered the following situation: a parent wrote a letter to a teacher expressing the parent's views on the Holocaust and objecting to her son's inclusion in class activities related to the curriculum on the Holocaust. The teacher brought the letter home, and several years later when the parent ran for local office, the teacher released the letter to a newspaper. The parent sued the teacher and the school board, alleging that the publication of the letter was in violation of FERPA. The court noted that it was "an uncontested fact … that the letter was an educational record protected by FERPA."[13]

The only North Carolina case to address the issue of the definition of education records held that records of university student disciplinary hearings are education records in the meaning of FERPA, a view recently adopted by a federal district court in Ohio.[14] On the other hand, at least one appellate court in Georgia has taken a more restrictive view, holding that records of disciplinary proceedings against college students are not education records because the records were unrelated to

2. FERPA, 20 U.S.C. § 1232g, was enacted in 1974 and amended in 1993. Federal regulations governing its administration are at 34 C.F.R. § 99.1–99.67.

3. If a student is enrolled in an institution of postsecondary education or is over eighteen years old, then the student—rather than his or her parents—may exercise the rights associated with FERPA. This article assumes that it is the parents who enjoy rights under FERPA, and does not address the rights of such students.

4. Exceptions to the bar on public access are discussed below.

5. 20 U.S.C.A. § 1232g(a)(4)(B). *See also* 34 C.F.R. § 99.3.

6. *See* G.S. 115C-402 for a definition of "official record."

7. *See*, *e.g.,* Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992) ("no dispute" that students' social security numbers are educational records within ambit of FERPA).

8. *See, e.g.,* Zaal v. Maryland, 326 Md. 54, 602 A.2d 1247 (1992).

9. Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994).

10. Connoisseur Communication of Flint v. University of Mich., 230 Mich. App. 732, 584 N.W.2d 647 (1998).

11. John K. v. Board of Educ. for Sch. Dist. # 65, Cook County, 152 Ill. App. 3d 543, 504 N.E.2d 797 (1987).

12. Falvo v. Owasso Independent School District, 233 F.3d 1203 (2000).

13. Warner v. St. Bernard Parish Sch. Bd., 99 F. Supp. 2d 748, 749 (2000).

14. *See* D.T.H. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8, *review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998). U.S. v. Miami University, 91 F. Supp. 1132 (2000).

A kindergarten class puts on a play and a parent takes issue with the play's content. The parent writes a letter to the principal protesting both the play's production and also her son's participation in the play. A television reporter wants to see the script and the parent's letter. What should the principal do?	The script of the play is a public record under North Carolina's public records law and must be given to the reporter. The parent's letter probably is an educational record under the federal Family Educational Rights and Privacy Act (FERPA) and should not be given to the reporter.
Second grade teacher Wilma Jones has seen lice in the hair of several of her students and sends a letter home to parents warning them and giving them advice on getting rid of lice. A parent wants Ms. Jones to tell him the names of the children with lice. What should Ms. Jones do?	Since Ms. Jones knows who has lice by her own observation and not by consulting the students' records, FERPA does not prevent her from telling their names. On the other hand, no law *requires* her to tell the names. She must use her own judgment, taking into account relevant school policies.
A parent requests the names, addresses, and phone numbers of the children in her son's class to use for birthday party invitations. Under what circumstances may the teacher provide such a list?	The requested information falls under the exception to FERPA for "directory information." Directory information generally may be disclosed, provided the school has informed parents that such information may be released during the school year, and has provided an opportunity for parents to opt out.
A church group wants a copy of a teacher's curriculum plan for teaching evolution. May the teacher keep her lesson plan private?	The curriculum plan is a public record under North Carolina's public records law and must be given to a representative of the church group.
A social worker from the department of social services (DSS) is investigating allegations of abuse of a student and wants to speak with the school guidance counselor about the student. How much may the counselor disclose?	If the social worker presents a court order, she may obtain access to records of the student's meetings with the guidance counselor. If DSS has assumed custody of the child, it would be acting *in loco parentis* and thus would be entitled to see the child's educational records. Otherwise, the guidance counselor's records would be educational records under FERPA and could be released only if otherwise authorized by that statute; for example, if the parent consents to the release.
A newspaper reporter requests a copy of the average scores of the school's 4th grade class on statewide end-of-grade tests, by race and gender if possible. He also would like to know if it is true that a 4th grader received a perfect score on the test; if so, he would like to interview the student. How should the principal respond?	(1) If the school has compiled the average test scores for 4th graders, that document is a public record under North Carolina's public records law and must be given to the reporter. If the school has not compiled such a list, it is not required to do so merely to satisfy the reporter's request. It may do so, if it wishes, but it is not required to. (2) The answer is the same for a list broken down by race and gender. (3) The school must obtain the parent's consent before releasing the student's name to the reporter. Alternatively, the school might tell the student's parents that the newspaper wants to interview the student and let the family determine how to respond. If the student's parents consent to an interview, the question of whether to allow an interview to be conducted at the school is a matter of policy not governed by FERPA.
The parents of a 7th grader are upset about a fight at school, and demand to know what discipline was administered to the student who hit their child. Does the appropriate response depend on the nature of the discipline that was imposed?	If the teacher knows what discipline was administered because she administered it informally herself—keeping the student from recess or barring the student from a field trip—it might be argued that she has not gotten the information from the student's educational records, and thus might reveal it without violating FERPA. However, the administration of discipline is directly related to the educational function (unlike the observation of head lice), so revealing information about it may give the appearance of attempting to circumvent FERPA's confidentiality requirements.
Ms. Smith, a 1st grade teacher's assistant who doubles as a bus driver, reports that one student threatened another with a knife on the bus this morning. Ms. Smith took the knife away and no one was hurt; she knows the families involved, and to avoid bad publicity for the school she would rather the incident "not go any further." What are the principal's options in this situation?	Under 115C-288(g), the principal is required to report certain criminal or delinquent acts to a law enforcement agency. These acts include any assault with a weapon or possession of a weapon in violation of the law. The principal would have to report the incident, regardless of his or the driver's assessment of the situation.

the students' "academic performance, financial aid, or scholastic probation."[15]

Education records may include materials that are physically located outside the school. For example, education records have been held to include documents in the possession of a school psychologist,[16] in the possession of a school district's attorney,[17] and in the home of a classroom teacher.[18] One appellate opinion has noted that during the public comment period prior to the issuance of regulations for FERPA, there were many requests to replace the term "education records" with "school records," but that the U.S. Department of Education instead stated that "[t]he statute does not provide for a differentiation between records . . . based on the source of those records."[19]

Personally identifying information

FERPA's regulations apply to the release of education records only if the records personally identify a student. "Personally identifying" information includes a student's name, parent's name, home address, and social security number.[20] The term also encompasses personal characteristics or other information "that would make the student's identity easily traceable."[21] FERPA does not bar release of information that does not personally identify a student, such as the average test score of a group of students. However, courts sometimes have required schools to alter records before release in order to eliminate personally identifying information. For example, in one case a university student requested the names of the school's transfer students, the schools to or from which they had transferred, and the tests taken as part of the admission process. The court held that, although FERPA prohibited the release of personally identifying information, the student was entitled to the same information in a statistical summary form.[22]

A school may be required to release personally identifying information in a scrambled order to conceal individual identities. In one case, an elementary school was ordered to release standardized scores of third graders in other than alphabetical order and with students' names deleted.[23] This is appropriate only if redaction, or concealing of names, adequately protects the privacy of the individual. For example, a Wisconsin appellate court has held that where a student requested the interim grades of just one other student in a dispute about who was the appropriate recipient of a scholarship, deleting the name of the student would not sufficiently guard that student's identity, so the information should not be released.[24]

Independent source of information

FERPA governs release of personally identifiable information from education records. What if the person making the disclosure knows the information from an independent source, but the information is also included in a student's education records? For example, a teacher or administrator may know the details of a student's suspension or other discipline from personal observation or word of mouth. A teacher may personally observe that a child suffers from a medical or psychological condition, without resorting to reading a nurse's report for the information. May information that is in fact in education records be disclosed if the person disclosing it has obtained the information from a source other than education records? A joint publication of the U.S. Department of Education and the U.S. Department of Justice[25] takes the position that educators are free to share information "based on their personal knowledge or observation, provided the information does not rely on the contents of an education record." However, the document also cautions school personnel "not to circumvent the requirements of FERPA by [disclosing information] that is predicated on knowledge obtained from education records."

15. *See* Red & Black Publ'g Co., Inc. v. Board of Regents, 262 Ga. 848, 427 S.E.2d 257 (1993).

16. Parents Against Abuse in Schools v. Williamsport Area Sch. Dist., 140 Pa. Commw. 559, 594 A.2d 796 (1991).

17. Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994).

18. Warner v. St. Bernard Parish Sch. Bd., 99 F. Supp. 2d 748 (2000).

19. *Belanger*, 856 F. Supp. at 49.

20. *See* 34 C.F.R. § 99.3.

21. *See, e.g.*, Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D. Ky. 1996), holding that it was a question for the jury whether disclosure of the fact that a student was an hermaphrodite constituted release of "personally identifying" information in violation of FERPA.

22. Naglak v. Pennsylvania State Univ., 133 F.R.D. 18 (M.D. Pa. 1990).

23. Kryston v. Board of Educ., East Ramapo Cent. Sch. Dist., 430 N.Y.S.2d 688, 77 A.D.2d 896 (1980).

24. *See* Blum v. Board of Educ., Sch. Dist. of Johnson Creek, 209 Wis. 2d 377, 565 N.W.2d 140 (1997).

25. "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997. Copies may be obtained from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Web site at http://ojjdp.ncjrs.org/ or by writing to Juvenile Justice Clearinghouse, Box 6000, Rockville, Maryland 20849. The toll-free number is 1-800-638-8736.

Apparently, only one appellate case has directly addressed this issue.[26] An edition of a high school newspaper was withdrawn for allegedly containing vulgar language and false statements about a student. One of the contested articles in the paper included references to a student's suspension. The court said that "the prohibitions of [FERPA] cannot be deemed to extend to information which is derived from a source independent of school records. Even though a school suspension is listed in protected records, . . . the suspension would also be known by members of the school community through conversation and personal contact. Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records."

School personnel frequently obtain student information from sources other than education records. In that case, FERPA may not prohibit disclosure. However, this does not mean that the school must disclose such information, or that it would necessarily be a good policy to permit this disclosure. See the discussion in this article on the responsibility of a school system to set policies regarding disclosure of information.

Exceptions to FERPA's definition of education records

FERPA exempts certain documents from the definition of education records and therefore does not regulate disclosure of those documents. The exceptions most relevant to students in grades kindergarten through twelfth grade include the exceptions for "sole possession" notes and for the records of law enforcement units.[27]

"Sole possession" notes. FERPA excludes from its definition of education records the records of teachers, school administrators, and other school personnel that "are in the sole possession of the maker thereof" and are not shared with anyone but a substitute for that teacher.[28] The statute states that "the term 'education records' *does not include*" such notes (emphasis added); thus these records simply are not governed by FERPA. This exception encompasses a teacher's "desk file," or personal notes about a student that are not shared with or available to anyone else except a substitute for that teacher. If records are made by noninstructional personnel, the terms of the contract with that person may determine whether the records fall within the "sole possession" exception to the definition of education records for teachers' notes.[29]

The U.S. Department of Education interprets this section strictly, excluding from the definition of education records only those notes that are in the *sole possession* of the teacher (or a substitute). If the notes are shared with others—whether by accident, in response to a court order or subpoena, or pursuant to a state's public records law—the records lose their protected status and become education records. Paradoxically, this interpretation means that private notes are not education records under FERPA, but if the notes are shared, they become education records.[30] For example, a federal case recently held that a teacher's gradebook does *not* fit this exception if the grades recorded there are shared with other students.[31]

Furthermore, the Department of Education's interpretation of "sole possession notes" does *not* include "information that is documented as a result of counseling or testing of a student."[32] Even though the statutory basis for this determination is not apparent, school officials should know that this is the position taken by the Department of Education. Under this interpretation, a guidance counselor's notes would be education records, even if they are not shared with any other school personnel.

The "sole possession" exception removes a teacher's notes from both of FERPA's primary features: the requirement of disclosure to parents and the protection from disclosure to others. Since these notes are not education records in the meaning of FERPA, we must look to other federal and state laws, such as North Carolina's public records law, to assess whether a teacher's notes may be disclosed. A teacher's personal notes, not available to other school personnel, arguably

26. Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979).

27. The other exceptions, not discussed here, are records of students who are also employees of the school system, certain medical or psychiatric records of students over eighteen years old, and information about the activities of alumni following graduation. 34 C.F.R. § 99.3; 20 U.S.C.A. § 1232g(a)(4).

28. 20 U.S.C.A. § 1232g(a)(4)(B)(i).

29. *See, e.g.,* Parents Against Abuse in Schools v. Williamsport Area Sch. Dist., 140 Pa. Commw. 559, 594 A.2d 796 (1991) (notes made by psychologist under contract to investigate abuse of children by their teacher held to be education records *not* exempted by the exception for notes kept in the maker's sole possession and not accessible to others; the contract between the psychologist and the school specified that the parents would have access to the psychologist's results).

30. Discussions with Jim Bradshaw and Ellen Campbell, Department of Education representatives, Fall 1998.

31. Falvo v. Owasso Independent Sch. Dist., 233 F.3d 1203 (10th Cir. 2000).

32. Discussions with and memoranda from Jim Bradshaw and Ellen Campbell, Department of Education representatives, Fall 1998.

should not be public records, even if they concern the school or a student. However, the issue has not been litigated in North Carolina, and thus school officials might be advised to proceed on the assumption that any written record *might* be held by a court to be a public record. See the discussion below for more on North Carolina's public records law.

Records of a school law enforcement unit. FERPA excludes from the definition of education records documents that are "records of the law enforcement unit of an educational agency or institution."[33] A law enforcement unit is any individual, department, or division (such as a police officer or security guard at a school) charged with enforcing state or federal law. The records of a law enforcement unit are not education records, provided they are (1) created by the law enforcement unit (2) for a law enforcement purpose[34] and (3) are maintained by the law enforcement unit. This exception does not apply to records that are created for a purpose other than law enforcement, such as enforcement of school rules or use in a school disciplinary proceeding.[35]

As originally written, the law enforcement unit exception applied only to law enforcement records that were kept apart from other records and were unavailable to anyone other than law enforcement officials. If campus law enforcement records were shared with the general public, they would become education records, a result that spawned several lawsuits challenging the constitutionality of this provision.[36] FERPA was amended in 1993 to exclude *all* law enforcement unit records from FERPA's definition of education records.

Because records of a law enforcement unit are exempt from FERPA's definition of education records, their disclosure is regulated by North Carolina state statute.[37] Public access to records of criminal investigations is governed by G.S. 132-1.4, which bars such records from disclosure, subject to certain exceptions. Prosecutors' and criminal defendants' rights of access to information are governed by specific statutes in G.S. Ch. 15A.[38]

Release of information to parents

FERPA guarantees parents access to their children's education records. The term "parent" includes a natural parent, guardian, or individual acting as a parent in the absence of a parent or guardian.[39] FERPA does not define "guardian," but under North Carolina law the term includes either a guardian or guardian *ad litem* appointed as part of a proceeding in juvenile court or an investigation into allegations of abuse or neglect.[40] The rights of parents with respect to FERPA extend to both parents, even if they are divorced. The custodial parent may not bar the noncustodial parent from access to their child's education records, unless there is a court order or other legally binding document that specifically revokes a parent's rights of access to education records.[41]

Parents have the right to inspect and review their children's education records.[42] A request to inspect education records must be granted within a "reasonable time," which may not exceed forty-five days.[43] If "circumstances effectively prevent" a parent's inspection of records, the school must provide a copy of the records;[44] however, the statute does not address what "circumstances" are contemplated. The school may not charge a fee for inspection of education records, although it may charge a fee for copying them, provided the parent can afford to pay.[45]

Sometimes education records contain information on more than one student; for example, a group of students might produce a report or project. A parent is entitled to inspect only that portion of the records concerning his or her own child.[46] The statute does not

33. 20 U.S.C.A. § 1232g(a)(4)(B)(ii).

34. *See, e.g.,* Culbert v. City of New York, 679 N.Y.S.2d 148 (N.Y. App. Div.) (educational records do not include records of a law enforcement unit that are compiled to maintain physical security and safety of a school).

35. 34 C.F.R. § 99.8.

36. *See, e.g.,* Student Press Law Ctr. v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991) (appellate court finds "likelihood" that challenged provision of FERPA violates First Amendment right to gather information regarding campus crimes); Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991) (finding violation of equal protection component of Due Process Clause of Fifth Amendment in imposition of penalty for disclosure of student security and crime reports).

37. *See* C.F.R. § 99.8(d), which states that FERPA "neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement records."

38. *See, e.g.*, G.S. 15A-901 through -920, governing discovery in criminal cases.

39. 34 C.F.R. § 99.3.

40. *See* G.S. 7A-585, "Appointment of guardian," *and* G.S. 7A-586, "Appointment of guardian ad litem."

41. 34 C.F.R. § 99.4. *See also* Page v. Rotterdam-Mohonasen Cent. Sch. Dist., 109 Misc. 2d 1049, 441 N.Y.S.2d 323 (1981).

42. 34 C.F.R. § 99.10. Recall that "education records" under FERPA are more than the transcript or cumulative folder of a student; they include records that may not be defined by a particular school board as part of the "official record."

43. 20 U.S.C.A. § 1232g(a)(1)(A).

44. 34 C.F.R. § 99.10(d).

45. 34 C.F.R. § 99.11.

46. 34 C.F.R. § 99.12.

specify how a school is to proceed when it is not possible to separate the contributions made by individual students to an education record.

Parents have the right to correct mistakes and clerical errors in their children's education records. This right does not extend to substantive challenges to grades or test answers.[47] If a parent believes the education records of his or her child contain information that is inaccurate or misleading or that violates the student's rights of privacy, the parent may ask the school to amend the record. The parent either may obtain an amendment to the records or must be allowed to include an explanatory statement in the record.[48] FERPA also sets out procedures for a hearing on the contested records.

Release of information to people other than parents

This section discusses the release of information in education records to persons other than the student's parents.

Parents' consent to release of information. FERPA provides that a school may release personally identifying information from a student's education records if the student's parents have provided a signed and dated written consent. The consent must specify (1) which records may be disclosed, (2) the purpose of the disclosure, and (3) the parties or class of parties to whom disclosure is authorized.[49] The statute does not require a parent to specify the length of time for which consent is valid, nor does it address the appropriate course of action if a student's parents disagree about granting consent. Even with the parents' consent, the school may disclose information only on the conditions that the recipient not redisclose the information to a third party without obtaining consent and not use the information for a purpose other than the one for which disclosure was made.[50] A recipient of information from education records who improperly rediscloses information may not have access to information from education records for at least five years.[51]

When is consent *not* required? Parental consent is not required before disclosure of personally identifying information from education records if the information or the circumstances of its release are within one of FERPA's statutory exceptions.

Directory information. "Directory information" is FERPA's term for basic identification data about a student. It may include a student's name, address, telephone listing, date and place of birth, major field of study, participation in sports and activities, dates of attendance, degrees and awards received, and the school previously attended by the student.[52] Such information may be disclosed without obtaining parental consent, provided the school first takes the following steps:[53]

(1) The school or school system must determine what types of information it will designate as directory information.[54]
(2) The school must notify parents of (a) the types of personally identifiable information designated as directory information, (b) the parents' right to refuse to allow the school to release information from any or all of the designated categories, and (c) the date by which parents must notify the school if they do not want information released.[55]
(3) After notification, the school must "allow a reasonable period of time" for parents to inform the school that designated information should not be released without the parent's prior consent.[56] The statute does not suggest what length of time is reasonable.

If the parent instructs the school not to include his or her child's data among the published directory information, the school may not include it. This is referred to as "opting out."

Schools generally include notification about the release of directory information in the annual notification to parents of their rights under FERPA. If this is done, the school is in compliance with FERPA and may release directory information. For example, a federal dis-

47. *See, e.g.,* Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) (FERPA does not permit challenge to grade assigned student, other than to correct ministerial error); Lewin v. Medical College, 931 F. Supp. 443 (E.D. Va. 1996) (FERPA authorizes challenge to technical accuracy of records but not to merit of underlying testing procedures or test answers); Altschuler v. University of Pa. Law Sch., 1998 WL 113989 (S.D.N.Y. March 13, 1998) (FERPA does not entitle law student to challenge grade received in legal writing course).

48. 34 C.F.R. § 99.20–22.

49. 34 C.F.R. § 99.30.

50. 34 C.F.R. § 99.33.

51. 34 C.F.R. § 99.33(e).

52. 20 U.S.C.A. § 1232g(a)(5)(A); 34 C.F.R. § 99.3(b).

53. *See* Kestenbaum v. Michigan State Univ., 97 Mich. App. 5, 294 N.W.2d 228 (1980) (FERPA held not to bar release of list of students' names and addresses where school complied with applicable statutory provisions).

54. 34 C.F.R. § 99.37(a)(1). *See also* Krauss v. Nassau Community College, 122 Misc. 2d 218, 469 N.Y.S.2d 553 (1983) (where school did not designate names and addresses as "directory information," it was not authorized under FERPA to disclose the names of students).

55. 34 C.F.R. § 99.37(a)(2) and (3).

56. 20 U.S.C.A. § 1232g(a)(5)(B).

trict court in Pennsylvania recently held that the Philadelphia School was not in violation of FERPA by giving the police the addresses of student suspects in an assault case.[57] Notwithstanding this annual notification, many parents, teachers, and school personnel are convinced that the release of names, addresses, or phone numbers is "against the law," a firmly held belief which has circulated so widely that it is generally assumed to be true. Thus, the release of names or phone numbers—even to a PTA committee or classroom parent—may generate confusion or controversy within the school community. For this reason, it might be advisable to repeat the notification just before release of directory information, rather than assuming that parents have digested the information in the annual notification of rights. Moreover, since a commonly offered explanation for the purported illegality of release of directory information is that "it has to do with custody arrangements," school officials should be careful to send duplicate notifications to parents who are separated or divorced in order to avoid unnecessary complaints.

Although release of directory information is not barred by FERPA (unless the parent has opted out), the indiscriminate release of such information certainly is not required by law. For example, since basic identification data about a student generally is included in the student's official record, the information is not a public record under North Carolina law (as discussed below), and thus is not required to be available for public inspection.[58]

Court order. School officials do not violate FERPA by releasing personally identifying information "in compliance with judicial order, or pursuant to lawfully issued subpoena."[59] The school must make "a reasonable effort" to notify parents of the court order or subpoena in advance of compliance,[60] unless the issuing court has ordered that the existence of the subpoena or its contents not be disclosed.[61]

Questions sometimes arise concerning standing court orders that direct schools to cooperate with investigations by agencies such as the department of social services (DSS) or to supply otherwise confidential information upon request.[62] Does such a blanket order—issued in advance of any proceeding, rather than pursuant to judicial evaluation of the facts of a specific situation—suffice to keep a school in compliance with FERPA if it discloses information to the person or agency designated in the standing order? Although the policies that undergird FERPA might appear to support a preference for assessment of individual fact situations rather than reliance on standing orders,[63] the U.S.

Newspaper and Web Site Roll Lists: Violation of FERPA Provisions?

Newspapers and school Web sites often carry lists of students on the honor roll. Such lists typically announce that "the following students at Lawndale High School received all A's this grading period," or "the following students were on the A/B honor roll." These students and their parents are naturally proud and would be unlikely to complain. However, such lists disclose information from educational records and, absent consent, are not authorized under FERPA any more than a public listing of all students who received an F or were suspended would be. The listings also are an implied disclosure of the fact that all the *other* students made at least one B or C. This reasoning will not seem arcane or trivial to the parent who has been asked by a neighbor, "Is Daria having a problem with school? Her name wasn't on the honor roll list this time." School officials might consider obtaining permission at the start of the school year to publish honor roll lists. If the announcement stated that "these students have consented to our announcing that they are on the honor roll this semester," it also would permit the face-saving fiction that not all of the other students had received lower grades.

57. Patterson v. Sch. Dist. of Philadelphia, 2000 WL 1020332 (E.D. Pa. Jul. 19, 2000).

58. *See* G.S. 115C-402.

59. 20 U.S.C.A. § 1232g(b)(2)(B). *See also* U.S. v. Hunter, 13 F. Supp. 2d 586 (D.Vt. 1998) (criminal defendant seeks to quash subpoena for school records; court notes that FERPA does not forbid release of information pursuant to valid subpoena); Rios v. Reed, 73 F.R.D. 589 (E.D.N.Y. 1977) (school not subject to sanctions for release of information in compliance with judicial order).

60. 20 U.S.C.A. § 1232g(b)(1), (b)(2), (b)(4); 34 C.F.R. § 99.31(9)(i) and (ii).

61. *See* 34 C.F.R. § 99.31(9)(ii)(A) (federal grand jury subpoena) *and* (ii)(B) (other subpoena issued for law enforcement purpose).

62. *See, e.g.,* the sample court orders on pp. 27–28, reprinted from "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997.

63. *See, e.g.,* Rios v. Reed, 73 F.R.D. 589 (E.D.N.Y. 1977) (court notes that although FERPA may not sanction release of information pursuant to court order, "inquiry cannot end here"; rather, the court evaluates the policy expressed by FERPA of protecting students' privacy).

Department of Education generally does not distinguish among types of court orders, taking the position that a school does not violate FERPA if it releases personally identifying information pursuant to a standing court order.[64] In fact, a joint publication of the U.S. Department of Justice and Department of Education includes several sample standing court orders as examples of the FERPA exception for judicial orders.[65]

Although appellate cases generally have held that FERPA will not bar the school from releasing requested information pursuant to a valid court order or subpoena, the issuing court likely will consider FERPA as just one of several factors in determining whether to order disclosure.[66] Moreover, school officials may face many other substantive and procedural issues connected with their response to subpoenas and court orders.[67]

Disclosure to juvenile justice system. FERPA does not require parental consent before schools disclose personally identifying information to state and local officials if the disclosure "concerns the juvenile justice system and the system's ability to serve, prior to adjudication,[68] the student whose records are released."[69] The officials to whom the records are disclosed must certify in writing to the school that the information will not be disclosed to a third party without the prior written consent of the student's parents.[70] This exception permits schools to share information about students who are at risk of engaging in delinquent behavior in order to identify their needs and intervene appropriately. To the extent permitted under state law, FERPA allows a juvenile justice system agency to obtain education records concerning a student if it seeks these records to serve the student at any time after the student has come to the attention of the agency but before adjudication as a delinquent. FERPA does not permit disclosures solely for use by the court in making a dispositional order following adjudication of delinquency.[71] It does not require that the agency wait until a petition has been filed.[72] However, in North Carolina, G.S. 7B-3100(a) requires the Office of Juvenile Justice to promulgate rules that designate agencies authorized to share information in situations where "a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent." Thus, disclosure would not be authorized under state law if no petition had been filed.

The rules that have been adopted in accord with G.S. 7B-3100(a) include "local school administrative units" among the agencies designated to share information.[73] If a student is the subject of a juvenile petition, FERPA does not bar the release of education records in accordance with G.S. 7B-3100.

Health and safety emergency. Schools may release information from students' education records without obtaining consent if the disclosure is in connection with an emergency, and if the information is necessary to protect the health or safety of the student or other persons.[74] The triggering feature of this exception is the need for *immediate* sharing of information. For example, if a student had described in a writing assignment the procedures for making an explosive device and then later called in a bomb threat, the information in the assignment might be released pursuant to this exception.

Although FERPA requires that this exception be strictly construed against the disclosure of information without consent,[75] the statute does not define "emergency." The discretion given to school officials to define "emergency" was expanded in 1988, when amendments to the regulations *removed* four previously listed criteria for determining whether the emergency exception applies. Apparently, only one appellate case addresses the issue.[76] In that case a university had released a list of all

64. Discussions with Jim Bradshaw, Department of Education representative, October 1998.

65. "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997.

66. *See, e.g.,* Zaal v. Maryland, 326 Md. 54, 602 A.2d 1247 (1992) (court notes that although FERPA does not penalize schools for release of information pursuant to court order, this "does not mean that a student's privacy or confidentiality interest in his or her education records is automatically overridden whenever a court order to review them is sought").

67. For information on such issues, see John Rubin, "Responding to Subpoenas: A School Employee's Guide," *School Law Bulletin* 24 (Spring 1999): 1.

68. "Adjudication" refers to a court's finding that a juvenile is a "delinquent juvenile," defined in G.S. 7B-1501(7) as one who has committed a crime or infraction under state law or under an ordinance of local government, including violation of motor vehicle laws. Adjudication of delinquency is the juvenile justice equivalent of a criminal conviction.

69. 20 U.S.C.A. § 1232g(b)(1)(E); 34 C.F.R. § 99.31 and § 99.38.

70. 20 U.S.C.A. § 1232g(b)(1)(E)(ii)(II); 34 C.F.R. § 99.38(b).

71. The dispositional order specifies what conditions are imposed following an adjudication of delinquency; it is the juvenile justice equivalent of the sentence imposed upon conviction of a criminal offense by an adult. Note that if a juvenile who has been adjudicated delinquent subsequently is the subject of another petition alleging a different offense, the school may release information from the student's education records if the disclosure will help the juvenile justice system respond to the new petition.

72. *See* 20 U.S.C.A. § 1232g(b)(1)(E); 34 C.F.R. § 99.31 *and* § 99.38; "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997.

73. *See* 9 NCAC 5G.0103(6).

74. 20 U.S.C.A. § 1232g(b)(1)(I); 34 C.F.R. § 99.36.

75. 34 C.F.R. § 99.36(c).

76. Brown v. City of Oneonta, N.Y., Police Dept., 106 F.3d 1125 (2d Cir. 1997).

black male students in response to a request from the local police department investigating an assault. The students brought a civil suit against the school, alleging a violation of FERPA. The appellate court noted that "at the time of the events in question, there were no adjudications that made the scope of the emergency exception clear," and concluded that the school officials were entitled to qualified immunity for their disclosure of information.

Disclosure to school personnel. FERPA authorizes the release of personally identifying information from students' education records to educational personnel with "legitimate educational interests," which "may include" the interests of the student whose records are sought.[77] Presumably, such disclosures also are valid if they serve legitimate educational interests unrelated to the student in question. For example, if a teacher were considering whether to assign a project, information about how other students in the same grade had handled a similar assignment might be of legitimate educational interest to the teacher.

Other exceptions to prior consent requirement. There are several other statutory exceptions to the requirement of prior consent. These include: (1) disclosures made in connection with a student's application to attend another school;[78] (2) disclosures made in connection with a student's application for financial aid;[79] (3) disclosures to federal and state officials in connection with a school's participation in federally supported education programs;[80] (4) disclosures connected with educational research;[81] and (5) disclosures connected with school accreditation.[82]

Conflicts between FERPA and state statutes

One of the trickier dilemmas that a school official may face is the proper course of action when there is a conflict among various laws. In the context of a school's release of student information, this may occur when one statute or regulation appears to require sharing of information, while another forbids or penalizes disclosure of the same information. This most often arises as a conflict between a state's open meetings and public records laws on the one hand and FERPA's restrictions on disclosure of education records on the other.[83]

Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails under the legal doctrine known as preemption. That is, federal law, being a higher authority, preempts state law, and the federal law controls. However, FERPA does not actually regulate conduct; instead it operates by providing a powerful financial incentive for school systems to comply. Thus, if schools wish to receive federal funds, they must comply with FERPA. But they do not *have* to comply. They could (at least theoretically) choose to forego the federal funds and ignore FERPA. For this reason, if a state law flatly requires disclosure, FERPA does not preempt the state law.[84] This interpretation may be technically correct; however, appellate courts are not eager to jeopardize federal funding of the schools in their jurisdiction.[85] Courts look for a way to hold that the student records covered by FERPA are not subject to state open records laws. If state law evinces an intent (even if somewhat clumsy or incomplete) to reference FERPA or to create an exception to a right of public access for education records, courts generally have accepted a school system's refusal to disclose information to avoid violation of FERPA.

This pattern is seen in the two North Carolina cases that have addressed the issue. In *S.B.A. v. Byrd*,[86] a 1977 case, the North Carolina Supreme Court noted that FERPA does not *forbid* release of student records, although violation of the federal statute subjects the school to loss of funds. The open meetings law then in effect made no reference to FERPA or to any exception that might be construed as covering education records. The court held that if a meeting was required by state statute to be open to the public, the possibility of loss of

77. 20 U.S.C.A. § 1232g(b)(1)(A).
78. 20 U.S.C.A. § 1232g(b)(1)(B).
79. 20 U.S.C.A. § 1232g(b)(1)(D).
80. 20 U.S.C.A. § 1232g(b)(1)(C) and (b)(3).
81. 20 U.S.C.A. § 1232g(b)(1)(F).
82. 20 U.S.C.A. § 1232g(b)(1)(G).
83. *See, e.g.,* Maynard v. Hoyt, 876 F. Supp. 1104 (D.S.D. 1995) (court notes that FERPA does not preempt relevant Idaho statute requiring disclosure of school board minutes and that school board's violation of FERPA's provisions was "solely an attempt to accommodate conflicting statutory requirements").
84. *See* U.S. CONST., art. VI, cl. 2 (the Supremacy Clause); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986); Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998) (preemption occurs only when Congress expresses a clear intent to preempt state law). *See also* Troutt Bros., Inc. v. Emison, 311 Ark. 27, 841 S.W.2d 604 (1992) (federal law conditioning receipt of funding for juvenile justice programs on agencies' nondisclosure of certain records held *not* to exempt the relevant records from Arkansas's public records and freedom of information statutes).
85. *See, e.g.,* S.B.A. v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977) ("the possibility that all further Federal financial aid to [UNC] may be jeopardized . . . is an additional reason for care in [interpreting the relationship of North Carolina's open meetings law to FERPA]"); Sauerhof v. City of New York, 108 Misc. 2d 805, 438 N.Y.2d 982 (1981) (court holds that although FERPA "is not binding on the schools, much less this court, the court views the objectives of the Act as being salutary, and intends to act within its spirit . . . to avoid causing any disruption of essential federal funding").
86. S.B.A. v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977).

funds would not entitle the body or agency to close a meeting, even if information about specific students was to be discussed. The door was thus open to disclosure of student records under North Carolina's open meetings law. The court avoided that undesirable outcome—with its potential for loss of federal funds—however, by concluding that the meeting at issue need not be open to the public, thus preventing a potential violation of FERPA.

Twenty years later, the North Carolina Court of Appeals revisited a similar issue in *D.T.H. v. University of North Carolina.*[87] The court considered whether the University of North Carolina's undergraduate court could hold student disciplinary proceedings in closed session. North Carolina's open meetings law allows a meeting to be closed if necessary "to prevent the disclosure of information that is privileged or confidential pursuant to the law of the State or of the United States."[88] This was enough for the court to uphold closing the meetings in question. Though noting that FERPA "does not specifically employ the terms 'privileged' and 'confidential,'" and that FERPA "does not require UNC to do anything, but instead operates by withholding funds," the court found that FERPA nonetheless comes close enough to making "student educational records 'privileged or confidential' for purposes of North Carolina's present open meetings law."[89] The reasoning of this case indicates that if disclosure of student information would violate FERPA, our courts might uphold a school's refusal to release the information, even if the open meetings or public records law would seem to require disclosure, provided that the court could identify some statutory justification for this position.

There are several potential conflicts between North Carolina statutes and FERPA. First, may certain education records protected by FERPA also be public records open to inspection under the state's public records law? Possibly so. G.S. 115C-402 specifies that the "official records" of students are not public records. However, the definition of "official record" leaves significant discretion to local school boards.[90] Moreover, FERPA's definition of education records includes many records not generally included in a student's official record. For example, tests and assignments, art projects, or a teacher's written comments on a student's term paper—none of which are likely to be in a student's "official record"—all are education records. Accordingly, it is possible that information might be sought that is *not included* in a student's official record (thus allowing or—if the information is held to be a public record—requiring the school to release it) but *is included* in the federal definition of education records (thus exposing a school system to loss of funding or a lawsuit upon release).

Another possible area of conflict is the muddy area trod both by FERPA and by the legal privileges applicable to treatment for medical, substance abuse, or emotional problems. An agency (such as DSS), a criminal defendant, or a prosecutor may seek information about a student that arguably should not be disclosed, even if relevant to issues in a case, because it is privileged[91] or because its disclosure is not authorized under FERPA.

Sometimes information in education records may be subject to conflicting mandates. For example, under G.S. 90-21.5, a minor may seek treatment for pregnancy, emotional disturbance, venereal disease, or abuse of controlled substances or alcohol. If information about such treatment finds its way into a student's education records, FERPA would require parental access, while disclosure would violate the student's general right to keep such treatment confidential.[92] A student may seek help for a substance abuse problem through a school-based program. Substance abuse treatment records are subject to strict federal confidentiality guidelines[93] that are in conflict with FERPA's required disclosure of education records to parents. Neither FERPA nor state statutes ex-

87. D.T.H. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), *review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998).

88. G.S. 143-318.11(a)(1).

89. Other appellate cases that have considered the issue have uniformly held that FERPA does *not* create a privilege. *See, e.g.,* Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991) (FERPA does not render educational records privileged or confidential so as to bar their release under Missouri's Sunshine Law; the court cites *S.B.A. v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), in support of its holding that FERPA "is not a law that prohibits disclosure of educational records"); Rios v. Reed, 73 F.R.D. 589 (E.D.N.Y. 1977) ("the 1974 Act does not provide a privilege against disclosure of student records; it says nothing about the existence of a school–student privilege analogous to a doctor–patient or attorney–client privilege").

90. G.S. 115C-402 requires that basic transcript information be included in each student's official record, to be supplemented by "such other factual information as may be deemed appropriate by the local board of education."

91. *See, e.g.,* G.S. 8-53.3, "Communications between psychologist and client or patient"; G.S. 8-53.4, "School counselor privilege"; G.S. 115C-401, "School counseling inadmissible evidence."

92. *See* G.S. 90-21.4, which provides that a physician "shall not notify a parent, legal guardian, person standing in loco parentis, or a legal custodian other than a parent when granted specific authority in a custody order to consent to medical or psychiatric treatment, without the permission of the minor, concerning the medical health services set out in G.S. 90-21.5 (a)."

93. *See* 42 U.S.C. § 290dd-2; 42 C.F.R. Part 2. *See also* Legal Action Center, *Legal Issues for School-Based Programs* (New York, N.Y.: Legal Action Center, 1996).

plicitly resolve the questions that may arise concerning medical or other privileges applicable to information in education records.[94]

What is a safe course of action for a school official?[95] To begin with, school officials might avoid creating unnecessary education records of a type that is subject to conflicting statutory mandates. School officials also are directed by applicable federal regulations to notify the Department of Education of such conflict, although the regulations do not suggest that this notification would relieve the school system from the obligation to comply with FERPA.[96] If it appears that release of information would violate FERPA, school officials might be advised not to share the information, even if a state statute arguably authorizes or even requires disclosure. Instead, school officials might require the party seeking information to obtain a court order or subpoena before releasing questionable information. If the correct interpretation of the relationship between state and federal law is not clear, obtaining a court's ruling on the issue is appropriate.[97] There also is a practical benefit to the school in this course of action: if the information is released pursuant to a court order, the school will not be in violation of FERPA.[98]

Violating FERPA

FERPA is not a criminal statute; it does not authorize arrest, imprisonment, or other criminal penalties for its violation. Rather, it operates by conditioning schools' receipt of federal funds on compliance with its directives. The U.S. Department of Education is authorized to terminate all federal funding to an educational institution that has violated provisions of FERPA if "compliance cannot be secured by voluntary means."[99] If the Compliance Office determines that a school or school system is in violation of FERPA, it will advise the school of the violation and of the measures required for compliance with the law. If the school were to fail to comply, the Compliance Office might issue an order to cease the violation or might issue a notice of intent to terminate funding. To date, the Department of Education has always been able to secure voluntary compliance with FERPA. If, however, a school were to fail to comply, federal funding would be cut off at the school district level rather than affecting only the individual school whose employees had violated the statute.[100]

There is no private right of action under FERPA.[101] However, case law establishes that a private citizen may bring a suit under 42 U.S.C.A. § 1983[102] to vindicate a plaintiff's loss due to a violation of FERPA.[103] If a school has a policy or practice violating FERPA, this conduct would support a § 1983 action against the school. Thus, violation of FERPA potentially exposes a school or school system to lawsuit as well as to termination of federal funds.

North Carolina Public Records Law and Student Information

It is worth repeating that FERPA[104] is the primary source of regulation of information about students. It generally prevents disclosure of a student's education records. However, where FERPA does not apply, North Carolina's public records law may step in to require disclosure. The reach of the public records law often surprises government employees, including school personnel. Schools and school systems are clearly public agencies subject to the public records law.[105] Generally, public records are documents produced or received by any public agency in connection

94. For more information on related issues, *see* Mary H. B. Gelfman and Nadine C. Schwab, *School Health Services and Educational Records: Conflicts in the Law*, 64 ED. LAW REP. 319 (1991).

95. Generally, school officials should consult the school board's attorney for assistance with such statutory conflicts.

96. 34 C.F.R. § 99.61.

97. *See, e.g.,* Zaal v. Maryland, 326 Md. 54, 602 A.2d 1247 (1992), in which the court balances various factors—including FERPA and the student's privacy interests—that bear on the court's decision to allow a criminal defendant access to student records relevant to the charges brought against the defendant.

98. 20 U.S.C.A. § 1232g(b)(2)(B). *See also, e.g.,* Red & Black Publ'g Co., Inc. v. Board of Regents, 262 Ga. 848, 427 S.E.2d 257 (1993) (court notes that FERPA "specifically provides that the sanction of loss of federal funding does not occur when the institution furnishes information in compliance with a judicial order"; thus, "because the trial court ordered the records released," FERPA is not a bar to disclosure).

99. 20 U.S.C.A. § 1232g(f).

100. Discussion with Jim Bradshaw, U.S. Department of Education representative, October 1998.

101. *See, e.g.,* Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990); Lewin v. Medical College, 931 F. Supp. 443 (E.D. Va. 1996).

102. 42 U.S.C.A. § 1983 provides: "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

103. *See, e.g.,* Brown v. City of Oneonta, N.Y., Police Dept., 106 F.3d 1125 (2d Cir. 1997); Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994).

104. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

105. For the general analysis and much of the information in this section, the author acknowledges David M. Lawrence, *Public Records Law*

with public business. If a document is a public record, the statute requires that the public agency involved must allow members of the public to inspect and copy it.[106]

The public records law serves as the "default setting" that governs release of information by schools. That is, unless some other state or federal law restricts or bars release of information in a particular case, *all* materials produced by a school system in connection with the school's educational purpose are public records and cannot be shielded from public scrutiny. School employees are advised to keep this in mind when preparing records, committing observations to writing, or sending e-mail messages. As a practical matter, however, FERPA and scattered state statutes effectively prevent indiscriminate release of most personally identifying information about individual students.

Which school documents are public records?

Public records are defined by G.S. 132-1 to include "all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or other characteristics" that are made or received "in connection with the transaction of public business by any agency of North Carolina government[.]" These records may include information stored on computer disks or on the hard drive of a computer, e-mail files, data and research results, paper documents, school publications, and reports. Thus, the term "public record" has an expansive definition, unrestricted by the nature of the material in question. This is significant in the context of student information, because a school may generate unconventional documents and materials. For example, hallway bulletin boards, school yearbooks and calendars, assembly programs, flyers about upcoming teacher committee meetings, school newspapers, fundraising announcements, and form letters distributed to groups of parents all are public records. Questionnaires and surveys also may be public records.[107] Public records may include documents that the school does not produce but receives or distributes. For example, if a school distributes an announcement about a private summer camp or tutoring program, these are public records, as are order forms for school pictures or books offered for sale.

Note that public records must be *records* of some description. For example, a teacher's private observations and thoughts about a student that have not been written down or recorded in some form are not records.

Potential inconvenience or embarrassment to a school system does not create an exemption to public records law. For example, the Ohio State Supreme Court has held that previously administered editions of proficiency tests given to high school seniors are public records under that state's public records law.[108] The Ohio Department of Education had objected to granting public access to these tests, arguing that the department then would be required to develop an entirely new test annually, rather than recycling a certain number of questions from year to year. The court, however, held that because the state school system owns and develops the tests, they are public records subject to the public's right of inspection.

Statistical information about a school or its students is public record. This might include the annual school "report card" issued by the North Carolina Department of Public Instruction, the average test score received by all students or by a subset of the student population taking end-of-grade tests, and information such as the percentage of students who drop out or the percentage of gifted students who are female.

There are certain types of records whose status is unclear in North Carolina. For example, case law from other jurisdictions provides support for the position that a teacher's notes or preliminary drafts of reports concerning school-related matters are not public records, if they are not shared with or available to anyone else.[109] Furthermore, G.S. 132-1 restricts public records to materials that are produced or received in connection with public business. Logically, personal correspondence unrelated to a school activity should not be a public record; this position also finds some support in recent case law from other states.[110] However, neither of these issues has been addressed by our appellate courts, and the North Carolina public records statute does not shield intra-

for North Carolina (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

106. G.S. 132-1.

107. *See, e.g.,* Yacobellis v. City of Bellingham, 55 Wash. App. 706, 780 P.2d 272 (1989) (questionnaire sent by city's parks department to other governmental agencies is public record).

108. Rea v. Ohio Dep't of Educ., 81 Ohio St. 3d 527, 692 N.E.2d 596 (1998).

109. *See, e.g.,* Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633 (Fla. 1980) (notes taken during hiring interview not public record).

110. *See, e.g.,* Wilson-Simmons v. Lake County Sheriff's Dep't, 82 Ohio St. 3d 37, 693 N.E.2d 789 (1998) (racist e-mail messages circulated among members of the sheriff's department were not public records where

office communications from the definition of public records. Thus, if a teacher writes lesson plans to which the school principal has access or that are periodically submitted to the school principal for review, these would be public records. School personnel might be advised to assume that any written communications sent to another person, or available for inspection by another school employee, that do not fall within a statutory exception to public records, *might* be held by a court to be a public record. Thus, memos, letters, or any other records that either concern school business, are written during school hours, or are produced using school equipment (such as computers, notepaper, etc.) *might* be held by a court to be public records, even if revealing such documents would be an embarrassment.

Statutory exceptions to the public records law

North Carolina statutes exempt several types of school records from the definition of public records.

Students' official records. Under G.S. 115C-402, the "official record" of a student is not a public record and therefore is not subject to a right of inspection by members of the general public. The statute provides that the official record of each student must include the student's name, address, birth date, and grading and promotion data.[111] This minimal information may be supplemented by "such other factual information as may be deemed appropriate by the local board of education [for inclusion in the official record.]" Because the statute does not suggest what kinds of additional information are anticipated, the documents that are included in a student's "official record" may vary among school districts. Furthermore, the statute does not address whether a school board must adopt policies in advance defining what is included in the official record, or whether a board may decide to include particular materials in the official record after receiving a request to see the document in question.

Kindergarten health assessments. Under G.S. 130A-440, every child entering public school kindergarten must have a health assessment.[112] G.S. 130A-441 states that the health assessment results are to be submitted to the school, which is required to "maintain the confidentiality"[113] of the health assessment results.[114]

Standardized test results. G.S. Ch. 115C, Article 10A, governs the administration of standardized tests in North Carolina, such as end-of-grade tests, high school competency tests, and the SAT. Under G.S. 115C-174.13, documents containing "identifiable scores of individual students" on a standardized test are not public records and may not be shared except as permitted by FERPA. This exception to the definition of public records does *not* apply to test results or statistics for groups of students, such as the number of students taking the SAT at a school, or the average test score attained by students of a school. Test results that do not identify individual students are public records and must be shared upon request. In some situations deleting names of students may be insufficient to hide students' identity. In that case, before releasing test information, a school should "scramble" test results so that they are not in alphabetical order, reduce data to a statistical summary, or otherwise obscure the identity of individual students.[115]

Students with special needs. The privacy of school records of children with special needs[116] is closely guarded under state statute. G.S. 115C-114 bars release of "any records, data or information" on any child with special needs unless certain conditions are met.[117] The statute does not specify whether it prohibits release of information about students with special needs that is

they had no connection with any of the functions or activities of the sheriff's department); District 1199, Health Care & Soc. Serv. Union, SEIU, AFL-CIO v. Gulyassy, 107 Ohio App. 3d 729, 669 N.E.2d 487 (1995) (public records do not include personal memoranda created for the writer's own benefit).

111. G.S. 115C-402 also requires an official record to include a record of any suspension longer than ten days, any expulsion, and a description of the conduct for which the student was suspended or expelled. The statute requires removal of the information about suspension or expulsion from the student's official record either upon graduation or in two years, if the student is not suspended or expelled during the two years following the suspension or expulsion in question.

112. The kindergarten assessment must include a medical history, physical examination, and screening for vision and hearing, and also may include screening for anemia and tuberculosis, dental screening, and assessment of cognition, language, and motor function.

113. However, kindergarten health assessments are subject to inspection by the Department of Health and Human Services and the Department of Public Instruction or their authorized representatives. *See* G.S. 130A-441.

114. The screening results also may be subject to rules governing the confidentiality of physician–patient communications. *See* G.S. 8-53, "Communications between physician and patient."

115. *See, e.g.,* Kryston v. Board of Educ., East Ramapo Cent. Sch. Dist., 430 N.Y.S.2d 688, 77 A.D.2d 896 (1980) (school required to release test scores after randomizing the order of the results, rather than leaving them in alphabetical order).

116. G.S. 115C-109 defines "children with special needs" as including all children ages five through twenty with any "permanent or temporary mental, physical or emotional handicaps" whose needs cannot be met in a regular class. The statute was amended in 1996 to exclude academically gifted students from the definition. Provision of services for academically gifted students now is governed by G.S. 115C-150.5 through -150.8, and the school records of gifted students are not subject to any special rules regarding privacy.

117. Records and information concerning children with special needs may be released: (1) with consent of either the student or his or her parent or guardian; (2) as permitted by federal law; (3) to school officials

unrelated to those needs. Note that the language of G.S. 115C-114 ("*any* records, data, or information") is broader than that of G.S. 115C-402 (the "official record") and tracks FERPA more closely than does the statute on students' official records.

Juvenile court notifications. Juvenile court counselors[118] must notify the principal of the school that a juvenile attends if the juvenile is alleged or found to be delinquent for an offense that would be a felony if committed by an adult.[119] This notification is required when the petition[120] is filed if such petition is dismissed, if the case is transferred to superior court, or if the dispositional order is modified or vacated.[121]

Under G.S. 115C-404, such notifications are strictly confidential. They are not public records, nor may they be part of a student's official record. These notifications must be kept separate from the student's other school records, may be shared only with school personnel who have a "specific need to know in order to protect the safety of the student or others," and must be destroyed if the petition is dismissed, jurisdiction is transferred to superior court, or the student's petition for expunction is granted.

Responding to requests for public records

G.S. 132-1 provides that public records and information are "the property of the people," who are entitled "to obtain copies of their public records free or at minimal cost." If a school gets a request for a record that is a public record, and the disclosure is not barred by another law, the school must allow public inspection.

G.S. 132-6 addresses the procedures governing the public's right to inspect and copy public records. The key points for school administrators to bear in mind regarding release of public records information are the following:

- The school may not require that the person making the request tell the reason that the records are sought as a condition of release; public records are available to all, regardless of motive.
- A request to inspect and copy public records may not be denied on the basis that public and confidential records are commingled. If this is the case, the school must extract the public parts of the record.
- The time that the school takes to respond to a request for public records and the hours that are designated for availability must be reasonable. The issue of "reasonability" has not been litigated in the public school context. Presumably, it would be reasonable to ask that public inspection be restricted to noninstructional hours. The amount of delay that is reasonable before honoring a request will depend on the complexity of the request.
- The school may not charge a fee for inspection of records, but may charge a reasonable fee for the cost of copying records.
- The school has no obligation to *create* new records that do not already exist in response to a request to inspect or copy. If, for example, the school maintains records on test results by grade level, gender, race, or some other classification scheme, these must be made available to the public; if it does not do so, the public has no right to insist that such records be created.

Sharing Information with Other Agencies

This section outlines selected instances in which schools may be statutorily required to share information with specific state agencies or agents.

Criminal justice system

Each local board of education must develop a plan to provide for school security.[122] The safe school plan must have a statement of the principal's duties, including the duty of a school principal to report certain criminal acts under G.S. 115C-288(g). This statute imposes an affirmative duty upon a school principal to report specific criminal or delinquent acts to "the appropriate local law enforcement agency." Offenses

with a legitimate educational interest; (4) to school officials of schools in which the student intends to enroll; or (5) to government representatives in connection with determining the student's eligibility for aid. These exceptions to the bar on disclosure generally track those of FERPA.

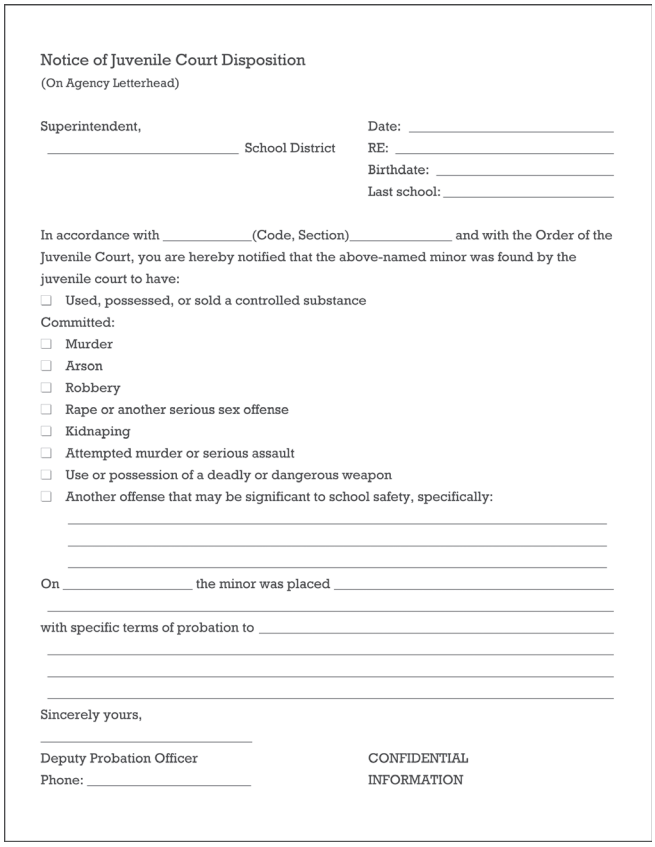
118. Juvenile court counselors are "responsible for probation and post-release supervision of juveniles." G.S. 7B-1501(5).

119. G.S. 7B-1501(7) defines "delinquent juvenile" as one who has committed a crime or infraction under state law or under an ordinance of local government, including violation of motor vehicle laws, while at least six years old and not yet sixteen years old.

120. The petition is the document that is filed to begin a proceeding in juvenile court.

121. *See* G. S. 7B-3101.

122. *See* G.S. 115C-105.47(b)(3), "Local safe school plans."



Notice of Juvenile Court Disposition
(On Agency Letterhead)

Superintendent,
_____ School District

Date: _____
RE: _____
Birthdate: _____
Last school: _____

In accordance with _____(Code, Section)_____ and with the Order of the Juvenile Court, you are hereby notified that the above-named minor was found by the juvenile court to have:

☐ Used, possessed, or sold a controlled substance

Committed:

☐ Murder
☐ Arson
☐ Robbery
☐ Rape or another serious sex offense
☐ Kidnaping
☐ Attempted murder or serious assault
☐ Use or possession of a deadly or dangerous weapon
☐ Another offense that may be significant to school safety, specifically:

_____
_____
_____

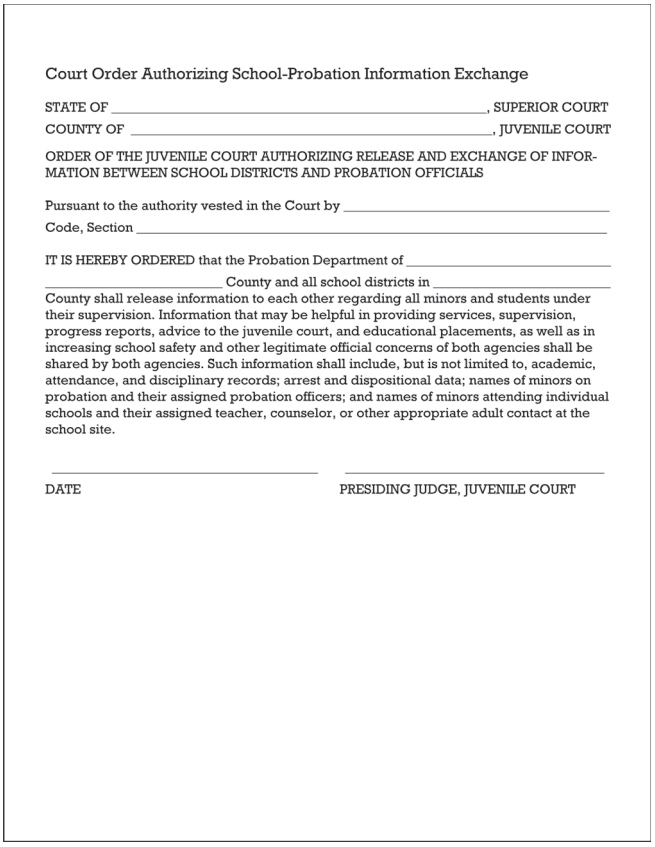
On _____ the minor was placed _____
_____

with specific terms of probation to _____
_____
_____
_____

Sincerely yours,

_____
Deputy Probation Officer
Phone: _____

CONFIDENTIAL
INFORMATION



Court Order Authorizing School-Probation Information Exchange

STATE OF _____, SUPERIOR COURT
COUNTY OF _____, JUVENILE COURT

ORDER OF THE JUVENILE COURT AUTHORIZING RELEASE AND EXCHANGE OF INFORMATION BETWEEN SCHOOL DISTRICTS AND PROBATION OFFICIALS

Pursuant to the authority vested in the Court by _____
Code, Section _____

IT IS HEREBY ORDERED that the Probation Department of _____
_____ County and all school districts in _____
County shall release information to each other regarding all minors and students under their supervision. Information that may be helpful in providing services, supervision, progress reports, advice to the juvenile court, and educational placements, as well as in increasing school safety and other legitimate official concerns of both agencies shall be shared by both agencies. Such information shall include, but is not limited to, academic, attendance, and disciplinary records; arrest and dispositional data; names of minors on probation and their assigned probation officers; and names of minors attending individual schools and their assigned teacher, counselor, or other appropriate adult contact at the school site.

_____ _____
DATE PRESIDING JUDGE, JUVENILE COURT

Sample court orders, reprinted from "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997.

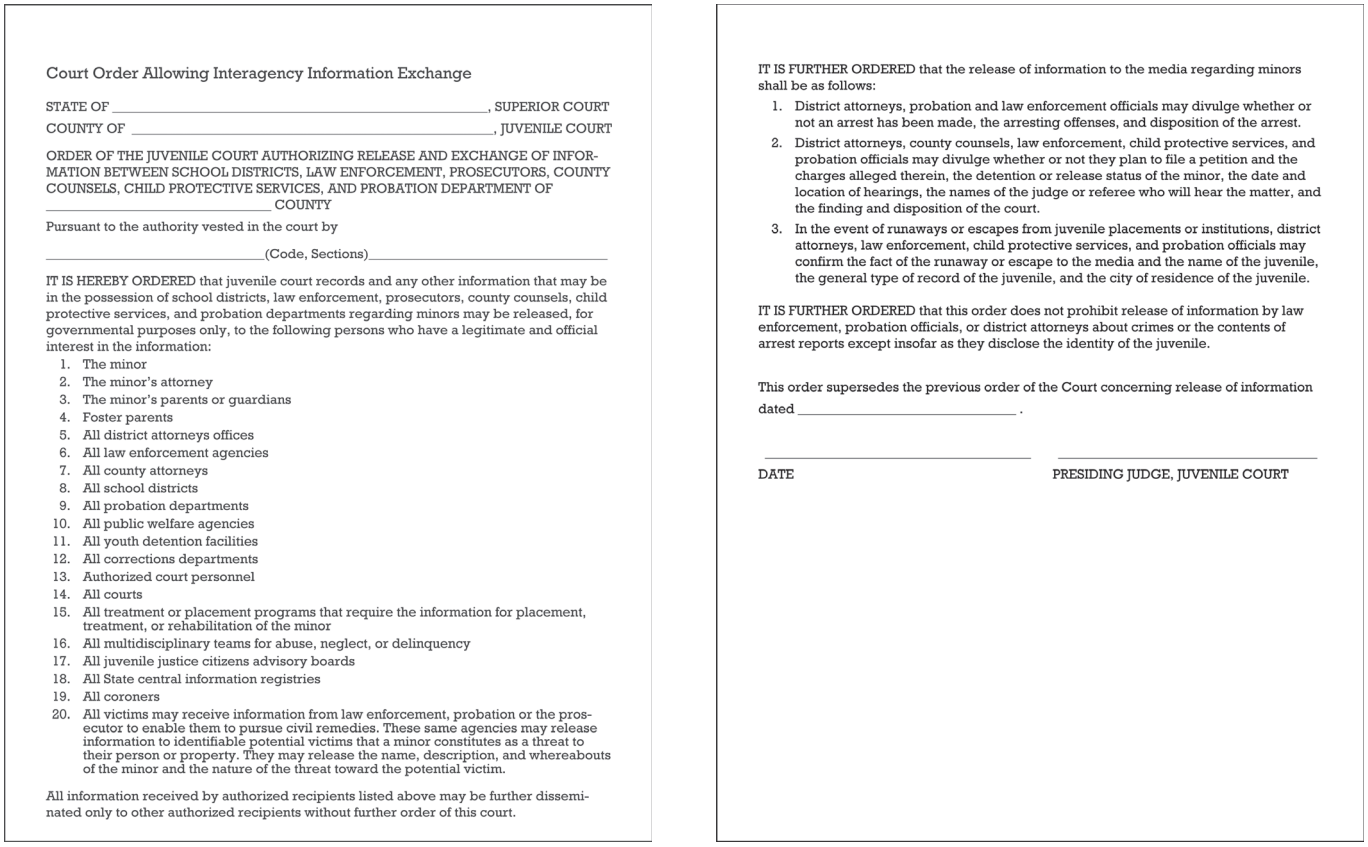
that must be reported include assault resulting in serious personal injury, sexual assault or offense, kidnapping, rape, indecent liberties, assault with a weapon, possession of a weapon or firearm in violation of the law, or possession of a controlled substance in violation of the law. The duty to report arises when the principal has "personal knowledge or actual notice from school personnel" about the offense. Thus, the duty is not triggered by rumors circulated among students. The statute applies to offenses that occur in the school building, on the school bus, in any recreational area of the school, in outbuildings, or in any other part of the school campus. Failure to make a report is a Class 3 misdemeanor.

Another statute, G.S. 7B-2513, governs procedures for commitment of a juvenile to training school. Under G.S. 7B-2513(d), the court counselor must insure that school records are forwarded to the training school. The North Carolina Office of the Attorney General has issued an advisory opinion that this sharing of information is not in violation of FERPA.[123]

Department of social services

School officials and personnel have several duties regarding students who may be abused or neglected. G.S. 7B-301 requires any person with "cause to suspect" that a child is abused, neglected, or dependent to report the matter to the department of social services (DSS). This obligation is further emphasized in G.S. 115C-400, which specifically directs school personnel to report child abuse or neglect. G.S. 7B-302 addresses DSS investigations of reported abuse, neglect, or dependency of a juvenile. As part of such an investigation, the statute authorizes employees of DSS to "consult with any public or private agency or individuals," and to "make a written demand for any information or reports, whether or not confidential, that may . . . be relevant to the investigation[.]" If DSS requests information from a school or other agency, the agency or individual "shall provide access to and copies of this confidential information and

123. *See* Opinion of C. Robin Britt, Sr., Secretary North Carolina Department of Human Resources, 1995 WL 516847 (N.C.A.G. 1995) (forwarding of educational records to training schools permitted under 20 U.S.C.A. § 1232g(b)(B), which authorizes release of records to a school that the student is attending).



Court Order Allowing Interagency Information Exchange

STATE OF _____, SUPERIOR COURT
COUNTY OF _____, JUVENILE COURT

ORDER OF THE JUVENILE COURT AUTHORIZING RELEASE AND EXCHANGE OF INFORMATION BETWEEN SCHOOL DISTRICTS, LAW ENFORCEMENT, PROSECUTORS, COUNTY COUNSELS, CHILD PROTECTIVE SERVICES, AND PROBATION DEPARTMENT OF _____ COUNTY

Pursuant to the authority vested in the court by

_____(Code, Sections)_____

IT IS HEREBY ORDERED that juvenile court records and any other information that may be in the possession of school districts, law enforcement, prosecutors, county counsels, child protective services, and probation departments regarding minors may be released, for governmental purposes only, to the following persons who have a legitimate and official interest in the information:

1. The minor
2. The minor's attorney
3. The minor's parents or guardians
4. Foster parents
5. All district attorneys offices
6. All law enforcement agencies
7. All county attorneys
8. All school districts
9. All probation departments
10. All public welfare agencies
11. All youth detention facilities
12. All corrections departments
13. Authorized court personnel
14. All courts
15. All treatment or placement programs that require the information for placement, treatment, or rehabilitation of the minor
16. All multidisciplinary teams for abuse, neglect, or delinquency
17. All juvenile justice citizens advisory boards
18. All State central information registries
19. All coroners
20. All victims may receive information from law enforcement, probation or the prosecutor to enable them to pursue civil remedies. These same agencies may release information to identifiable potential victims that a minor constitutes as a threat to their person or property. They may release the name, description, and whereabouts of the minor and the nature of the threat toward the potential victim.

All information received by authorized recipients listed above may be further disseminated only to other authorized recipients without further order of this court.

IT IS FURTHER ORDERED that the release of information to the media regarding minors shall be as follows:

1. District attorneys, probation and law enforcement officials may divulge whether or not an arrest has been made, the arresting offenses, and disposition of the arrest.
2. District attorneys, county counsels, law enforcement, child protective services, and probation officials may divulge whether or not they plan to file a petition and the charges alleged therein, the detention or release status of the minor, the date and location of hearings, the names of the judge or referee who will hear the matter, and the finding and disposition of the court.
3. In the event of runaways or escapes from juvenile placements or institutions, district attorneys, law enforcement, child protective services, and probation officials may confirm the fact of the runaway or escape to the media and the name of the juvenile, the general type of record of the juvenile, and the city of residence of the juvenile.

IT IS FURTHER ORDERED that this order does not prohibit release of information by law enforcement, probation officials, or district attorneys about crimes or the contents of arrest reports except insofar as they disclose the identity of the juvenile.

This order supersedes the previous order of the Court concerning release of information dated _____ .

_____ _____
DATE PRESIDING JUDGE, JUVENILE COURT

Sample court order, reprinted from "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," U.S. Department of Justice and U.S. Department of Education, June 1997.

these records *to the extent permitted by federal law and regulations*" (emphasis added). A plausible interpretation of this restriction is that school employees may withhold information from DSS if disclosure would violate FERPA. Thus, a guidance counselor or other school employee may share his or her personal observations, but school personnel may not share information from education records without violating FERPA's provisions, unless the disclosure falls within one of the exceptions discussed above (parental consent, release pursuant to court order, etc.) However, if DSS has assumed custody of the child, that agency would be acting *in loco parentis* and would be authorized to view the child's education records or to consent to the disclosure of information to others.[124]

Department of Motor Vehicles

G.S. 20-11 requires schools to provide certain information to the Department of Motor Vehicles (DMV). This statute governs issuance of provisional drivers' licenses ("learners' permits") to persons between fifteen and eighteen years old. To obtain a learner's permit, an individual must either have a high school diploma or its equivalent or obtain a driving eligibility certificate. The certificate may be issued upon a showing that the applicant is "currently enrolled in school and is making progress toward obtaining a high school diploma or its equivalent," that the person "cannot make progress" toward obtaining a degree without a certificate, or that it would work a "substantial hardship" on the applicant or his or her family to deny a certificate. The application form for a driving eligibility certificate must be signed by the school principal or other school official. The student must pass five out of six courses each semester (or three out of four courses if the school is on a "4 x 4" block schedule) to qualify for a driving eligibility certificate. School officials must report to the DMV if a student drops out or fails to pass enough courses to qualify. There is no requirement that parents provide written consent in advance of schools' disclosure to the DMV of a student's progress in school—information that clearly is obtained from education records. Thus, the release of information to the DMV may be in violation of FERPA, although the issue has not been litigated.

124. *See* 34 C.F.R. § 99.3 (defining *parent* to include "an individual acting as a parent in the absence of a parent or guardian").

Missing persons

G.S. 115C-403 addresses the role of school officials in dealing with missing children and transfer students. G.S. 115C-403(a) requires school administrators to mark the official record of any student who is reported missing by a law enforcement agency or by the North Carolina Center for Missing Persons. The school must notify the agency that reported the child missing of any subsequent request for the student's transcript or other information. G.S. 115C-403(b) requires schools to obtain the official records of transfer students. If the child's parents (or guardians) supply a copy of the child's record, the school is to contact the school named on the transferring child's record to verify the information in the record. If it appears that the child is a missing person, this must be reported to the North Carolina Center for Missing Persons.

Policy Considerations for School Administrators

Notwithstanding the restrictions imposed by federal and state law, school administrators retain discretion to establish policies regarding the disclosure of certain types of information.[125] These are categories of information that the school system is authorized to share or not, depending on local policy. For example, the release of information that is the personal knowledge of teachers but not in any record or document is subject to regulation by the school district. Personal observations likely would be a part of several of the hypothetical examples: a teacher might have personal knowledge of which students had lice, of discipline that was administered to a student, or of the recent behavior of a student who is the subject of an investigation concerning abuse or neglect. Directory information may be released without violating FERPA if certain conditions are met. However, there is no requirement that this information be disclosed to the public; the names and addresses are part of a student's official record and thus are not public records. Schools may set policies on, for example, the sharing of names and addresses for commercial purposes. Considerations that school officials might consider in setting policies about release of information include:

- the use to which information would be put,
- whether the person or agency making the request has a need to know,
- harm that might result from disclosure, such as embarrassment, harassment, etc., and
- advisability of establishing a precedent in a given area. ■

125. *See, e.g.*, 34 C.F.R. § 99.31(b) (certain exceptions to FERPA neither require nor forbid disclosure).

Further Reading

Lawrence, David. *Public Records Law for North Carolina Local Governments.* Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997.

Legal Action Center. *Legal Issues for School-Based Programs*. New York, N.Y.: Legal Action Center, 1996.

Mason, Janet. *Reporting Child Abuse and Neglect in North Carolina*. Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1996.

Rubin, John. "Subpoenas and School Records: A School Employee's Guide," *School Law Bulletin* 30 (Spring 1999): 1.

U.S. Department of Justice and U.S. Department of Education. "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," June 1997. Copies may be obtained from the OJJDP Web site at http://ojjdp.ncjrs.org/ or by writing to Juvenile Justice Clearinghouse, Box 6000, Rockville, Maryland 20849. The toll-free number is 1-800-638-8736.