

U.S. Department of Education Releases FAQ Guidance Addressing Photographs and Videos as Student Records

On April 20, 2018, the U.S. Department of Education released a Frequently Asked Questions (“FAQ”) document relating to the privacy of student-identifying photographs and surveillance videos. The FAQ, located [here](#), addresses multiple aspects of the Family Education Rights and Privacy Act (“FERPA”). As to whether photographs or videos could be considered “education records” or student records, the FAQ generally provides that where a photo or video (1) “directly relates” to a student and (2) is maintained by the school/party acting for the school, then it would be considered a student record. Whether a visual representation is directly related to a student – rather than incidentally related to the student – is a context-specific determination. The FAQ includes examples of directly related records, such as a depiction of activity involving a student in

an act of disciplinary misconduct, audio or video content containing personally identifiable information, or content that intends to make a specific student the focus of the photograph or video. Where, however, a student's image is captured as part of a background or is incidental in the depiction, the FAQ clarifies that a student record is not created.

The new FAQ also addresses whether the same photograph or video can be the school record of more than one student, detailing that parents may inspect and review or "be informed of" the specific information pertaining to the parents' own children. When a school cannot – without otherwise destroying the meaning of the photograph or video – segregate or redact information so that no other student information is presented, the school may nonetheless permit parents to inspect and review the record. The FAQ indicates that the school is in the best position to make the determination of whether the meaning of the photograph or video would be destroyed by segregating or redacting the video. The FAQ also emphasizes that the Act does not require the district to provide a copy of the video to parents.

The FAQ also addresses issues such as a prohibition against charging parents for redaction or segregation (e.g. blurring or



cutting/excerpting) photographs and video surveillance; and a requirement to permit the legal representatives of a parent to be present with the parent to inspect and review photographs or videos.

The recent FAQ is hot on the heels of an earlier letter also addressing the application of FERPA to videos involving multiple students. “Letter to Wachter,” located [here](#), was in response to an attorney’s inquiry asking whether a surveillance video capturing images of student misconduct that was maintained by a school district constituted a school student record under the Act. In the attorney’s scenario, a school district’s surveillance system captured video footage of eight students – six students forcing two students into the school’s wrestling room where the two victims were hazed. This attorney indicated that the district could not afford to blur the faces of the students in the video and was unsure how to treat the records, which it used to mete out discipline to the offending students. In response to the inquiry, the U.S. Department of Education’s Chief Privacy Officer emphasized the right of parents to inspect and review education records or “be informed of” the specific information pertaining to their own children. Where possible,

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however, the Chief Privacy Officer indicated that districts should utilize available technology to blur students and cut portions of video to reflect a student's singular involvement.

Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices stand ready to assist with any questions you may have about the FAQ or Letter to Wachter. In addition, if you have additional questions about the maintenance and retention of student records in general, please contact one of our attorneys.