

VIDEO RECORDINGS OF STUDENTS:

Are They Education Records and Who May Access the Recordings?

Guidance by the U.S. Department of Education

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With the ever-increasing presence of cameras and videos on school corporation property, questions regarding the nature of these records and the release of these records to parents and other agencies are becoming more common. In Indiana, schools have generally treated any

video that depicts a student as an education record, as defined in the Family Educational Rights and Privacy Act (FERPA), and therefore, have been very cautious as to who may have access to

the videos. This practice has been upheld by the Public Access Counselor in several advisory opinions.

But confusion has arisen when the videos depict several students. Are the videos still considered education records when several students are in view? Are they records that are directly related to a student? Schools have been looking to the U.S. Department of Education for guidance that specifically addresses video recordings. Recently, concerns were expressed to the Federal Commission on School Safety as to whether schools were permitted under FERPA to release videos of incidents in school building.

The U.S. Department of Education, through its Student Privacy Policy Office, posted on its website some guidance through a “Frequently Asked Questions (FAQ) document,”



that the records had to be examined on a case-by-case basis to determine if they directly relate to any of the students depicted therein. But the Department did identify some factors that should be considered in determining whether a photo or video should be considered “directly related” to a student. Those factors included the following:

- (1) The educational agency uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);
- (2) The photo or video contains a depiction of an activity that:
 - (a) resulted in an educational agency using the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);
 - (b) shows a student in violation of local, state, or federal law;
 - (c) shows a student getting injured, attacked, victimized, ill, or having a health emergency;
- (3) The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or
- (4) The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student’s education record.

specific to photos and videos and the release of these records under FERPA.¹ The FAQ contains seven questions, with answers, that are summarized below.

IS A VIDEO RECORDING OF A STUDENT AN EDUCATION RECORD UNDER FERPA?

In response to this question, the guidance reiterated that an education record under FERPA is a record that (1) directly relates to a student and (2) is maintained by an educational agency. What is frequently challenging for schools, especially with videos, is determining whether the recording is “directly related” to a student.

The Department acknowledged that the FERPA regulations do not define when a record is “directly related” to a student and offered some guidance on this particular issue. The Department first stated that the determination is often context-specific, and

According to the guidance, records that would not be considered “directly related” to a student include photos or videos where a student’s image is incidental or captured only as part of the background and records that depict a student participating in school activities that are open to the public and without a specific focus on any individual.

The Department then identified examples of situations that may cause a video to be an education record as follows:

- (1) A school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting.
- (2) A classroom video that shows a student having a seizure is directly related to that student because the depicted health emergency becomes the focus of the video.
- (3) If a school maintains a close-up photo of two or three students playing basketball with a general view of student

spectators in the background, the photo is directly related to the basketball players because they are the focus of the photo, but it is not directly related to the students pictured in the background. Schools often designate photos or videos of students participating in public events (e.g., sporting events, concerts, theater performances, etc.) as directory information and/or obtain consent from the parents or eligible students to publicly disclose photos or videos from these events.

- (4) A video recording of a faculty meeting during which a specific student's grades are being discussed is directly related to that student because the discussion contains personally identifiable information from the student's education record.

WHAT IF THE RECORDING CONTAINS THE IMAGE OF MORE THAN ONE STUDENT?

The Department advised that a video that shows two students fighting on a school bus that the school uses and maintains for disciplinary purposes would be "directly related" to both of

the students and therefore an education record of both of the students.

IF A VIDEO IS AN EDUCATION RECORD FOR MULTIPLE STUDENTS, WHO MAY VIEW THE VIDEO?

Since FERPA affords a parent (or eligible student) the right to access any education record related to his/her child, in cases where a video is an education record of multiple students, the Department concluded that FERPA requires the educational agency to allow, upon request, each individual parent of the students (or the students if they are eligible students) to whom the video directly relates the opportunity to inspect and review the video.

School officials often ask if they are required to redact or blur other images in the video when allowing parents to view the video. According to the Department, if the educational agency can reasonably redact or segregate out the portions of the video



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directly related to other students, without destroying the meaning of the record, then the educational agency would be required to do so prior to providing the parent or eligible student with access. On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to access the entire record even though it also directly relates to other students.

MAY LEGAL REPRESENTATIVES OF A PARENT OR STUDENT BE GIVEN ACCESS TO THE VIDEO RECORDING?

The Department answered this question in the affirmative - FERPA permits legal representatives of a parent (or an eligible student) to inspect and review videos with the parent (or eligible student). The guidance notes that FERPA does not require educational agencies to allow parents (or eligible students) to bring their attorney or other legal representative with them when they exercise their right to inspect and review the student's education records, but that nothing in FERPA prevents educational agencies from allowing parents (or eligible students) to bring their attorney or other legal representative with them when they exercise their right to inspect and review the student's education records under FERPA.

Although the guidance seems to suggest that the legal representative may view the video with the parent (or eligible student), FERPA also allows a parent (or eligible student) to give written consent for a person to inspect the education records of a student. Thus, if a parent (or eligible student) authorizes in writing the school to give a legal representative access to a video, the school may do so without the parent (or eligible student) being present.

MAY SCHOOLS RELEASE VIDEO RECORDINGS TO LAW ENFORCEMENT AGENCIES?

In response to this question, the guidance stated that, if the videos are education records, educational agencies may not turn over videos to the police without having first either obtained the written consent of the parent (or eligible student) or determined that the conditions of an exception to the general requirement of consent have been met. Examples of such exceptions include if the disclosure is made in connection with a health or safety emergency (as defined at 20 U.S.C. 1232g(b)(1)(I) and 34 CFR §§ 99.31(a)(10) and 99.36) or the law enforcement officer has presented the educational agency or institution with a judicial order or a lawfully issued subpoena (as authorized at 20 U.S.C. 1232g(b)(1)(J) and (b)(2) and 34 CFR § 99.31(a)(9)).

This article is a brief summary of some selected issues in the Department's guidance. The entire FAQ should be reviewed and advice from local counsel should be sought before making a decision on allowing a parent or other entity access to a video. ➡

REFERENCES

¹ <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>