American Bar Association
Section of State and Local Government Law

2012 EDUCATION LAW SYMPOSIUM AND FALL MEETING

Sharing Student Information with Police: Balancing Student Rights with School Safety

Lynn M. Daggett, J.D., Ph.D.
Professor, Gonzaga Law School
P.O. Box 3528
Spokane, WA 99220
(509) 313 6400
ldaggett@lawschool.gonzaga.edu

October 4 - 7, 2012
Kansas City, Missouri

Introduction

The issue of schools' sharing information about their students with the police is in the spotlight. Most notably, it has been reported that Jared Loughner, the alleged "Tucson shooter" of Rep. Gabby Giffords and many others, engaged in disruptive and threatening behavior resulting in his suspension from community college, but not in the school's notification of the police.[1] These facts eerily echo those involving the shootings at Virginia Tech, where the school knew of the student shooter's apparent mental illness and behavioral concerns and did not reach out to the parents or to law enforcement authorities.[2] Immediately after the tragic 2007 on-campus killings by a student at Virginia Tech,[3] the country learned that the shooter had a history of mental illness, and had received both mental health treatment and discipline on campus.[4] Some media commentators seemed to suggest the student's parents and classmates and others should have been made aware of this information.[5] A report commissioned by Virginia's governor to investigate includes a finding that a misunderstanding of FERPA prevented appropriate sharing of information about the student to parents, school employees, and others.[6]

Schools struggle with whether, when, and how to involve police, both when students appear to present a threat to others, as in these high profile cases, and also when the school suspects a student of criminal behavior. Perhaps even more frequently, police approach schools

---

[1]USA Today reported that Pima Community College personnel notified campus law enforcement officials of Loughner's threatening behavior. "Pima Community College, where Loughner had been a student until last fall, created teams to help assess whether students are potentially dangerous. The college suspended Loughner last year for classroom and library disruptions, according to a statement from the school. Officials briefed his parents, and told Loughner to come back only after a mental health professional had assessed that he was not a danger to himself or others. After that, 'there was no further college contact with Loughner,' the college says." Mary Beth Marklein and Brad Heath, Second-guessing red flags, action taken in Tucson case, USA TODAY Jan. 13, 2011, available at http://www.usatoday.com/news/nation/2011-01-12-students12_ST_N.htm.

[2]*See* VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007), available at http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf (providing detailed timeline of shootings).

[3]*See id.* at 24-29.

[4]*See id.* at 31–53 (providing twenty-plus page mental health history of the shooter).

[5]In fact, from a student privacy perspective, one wonders why the English professor and other Virginia Tech employees, as well as the authors of the investigative report, were publicly sharing details of the student's discipline and health records as well as his academic assignments.

[6]*Id.* at 68.

seeking information about students.

As a simple example, suppose one student has beaten up a classmate, causing significant injuries requiring some outpatient medical treatment. Can/must/should the school report this to the police? After all, the fight may be chargeable criminally as assault.

To a significant extent, a school's decisions about this fight, and these issues generally, is not a legal one. Schools reasonably disagree about the extent to which student behavioral issues should be dealt with internally, or should be referred to parents, or should be referred to the police or other outsiders. This paper does not attempt to tackle that difficult educational policy question.

This paper focuses instead on the (also complex and difficult) body of laws governing schools' sharing of student information with police, an issue in both K-12 and higher education, and in both public and private schools.[7] It is most obviously FERPA and other privacy laws which inform these decisions. In addition to privacy law, there are actually many other laws relevant to the issue: 1) disability law, 2) student constitutional rights, 3) discrimination laws, 4) state statutory requirements to report crimes and/or to cooperate in investigations, and 5) possible tort liability for failing to prevent harm to, or by, students.

The paper examines the extent to which each area of law forbids, requires, or permits but does not require, schools to share information with police. The paper also notes potential consequences for violations (such as sharing information when the law forbids it, or not sharing information when the law requires it). These consequences may be direct: liability or penalties for violations of the relevant laws. There may also be indirect consequences; for example, if a school's sharing of information with police violates FERPA, is that information inadmissible in resulting criminal proceedings? The paper then explores the variety of arrangements police have with schools, and how these arrangements impact legal regulation of information sharing by schools.

---

[7]The focus of the paper is on schools' sharing student information with police, either in response to police request or at the school's initiative. The legal terrain when police share information about students with schools is beyond the scope of this paper. It should be noted, however, that student information given by police to schools, which the school then maintains in its records, becomes governed by FERPA. The issue of school (and joint school-police) collection of information from students (such as criminal activity) which might be shared with police is also beyond the scope of this paper. It should be noted, however, that the PPRA (20 U.S.C. § 1232h) limits K-12 schools' collection of information from students about criminal activity or other illegal activity via certain surveys and evaluations. Moreover, to the extent a school collects information through search and seizure of students, or interrogations, there are obvious constitutional limitations. This paper's focus is on existing student information in a school's possession and whether it can, must, or must not be, shared with the police.

I. Privacy law

A. FERPA

FERPA[8] is a federal statute regulating student records. It applies to any school, public or private, K-12 or higher education, which receives federal education funds. FERPA makes student records and the information in them confidential. FERPA does not provide for a right of access to student records, except a right of access by the parent/adult student to the student's own records, and a right of access by the military to certain information about non-objecting high school students for recruiting purposes. Beyond this, FERPA has a long list of exceptions which permit but do not require schools to release student information without consent. FERPA contains no specific exception permitting nonconsensual disclosure to police. However, several of FERPA disclosure provisions may allow schools to share information with police in specific circumstances.

1. The emergency exception. Under the emergency exception, recently broadened by new regulations,[9] if a school perceives a "articulable and significant threat" under the "totality of the circumstances" and documents this in a student's records access log, it can share records as appropriate without parent or student consent. Under the new regulation, FPCO (the enforcing agency for FERPA) defers to a school's judgment about whether there is an emergency so long as

---

[8] 20 U.S.C. § 1232g.

[9] 34 C.F.R. § 99.36. The prior FERPA regulation on sharing "in connection with an emergency" "if necessary to protect the health or safety of the student or other individuals" explicitly provided that it was to be "strictly construed." Id. The new FERPA regulation removes the "strictly construed" language and substitutes a standard of an "articulable and significant threat" under the "totality of the circumstances." It further provides that FPCO will defer to a school's judgment applying this standard whenever that judgment is supported by a rational basis. *Id.* Schools which release a student's records under the emergency exception must record the disclosure, its basis, and to whom records were disclosed in the student's records log. *Id.*

Another "emergent" scenario recently the subject of much public concern is a pandemic involving H1N1 flu or another condition. On September 1, 2009, the Department of Education issued guidance on these issues generally, and the application of FERPA's emergency exception specifically. While the document notes extensive FERPA guidance will be issued at a later date, it notes that schools facing a flu pandemic may appropriately decide there is an emergency and share relevant information (presumable names and contact information of infected students) with law enforcement and health authorities under the emergency exception. The document cautions that wholesale sharing of affected students' education records would not be appropriate. Guidance on flexibility and waivers for SEAs, LEAs, postsecondary institutions, and other grantee and program participants in responding to pandemic influenza (H1N1 virus), *available at* http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/flexibility-and-waivers.doc (Sept. 1, 2009).

that judgment is supported by a rational basis. A recent FPCO opinion illustrates how broadly that agency now construes this exception. FPCO found no FERPA violation by a school which shared student records with the doctor who had performed hand surgery on the student as part of a discussion of post-surgical care. FPCO deferred to the school's judgment that an emergency existed, permitting nonconsensual disclosure.[10] It is unclear that a court would take a similar approach. An earlier decision held that nonconsensual disclosure to a diabetic student's physician falls outside the emergency exception.[11]

2. Law enforcement unit records. Schools may have a law enforcement unit which at (including but not limited to campus security at a university). To the extent members of that law enforcement unit create and maintain records which at least in part concern possible illegal activity (i.e., not mere violations of school rules) those records are excluded from FERPA protection.[12] Thus FERPA would not prohibit sharing them with police, or other outsiders.

3. Sharing when police are agents of the school. In some schools, police act as agents of a school. Perhaps, for example, a school has a threat assessment team or other group of professionals to sort out issues involving at-risk students, and invites a local police officer to serve on the team. FERPA permits nonconsensual internal sharing for legitimate educational reasons as defined in a school's FERPA policy.[13] While this exception traditionally involves teachers and other educational employees, to the extent "police" are actually agents of the school, they could fall under this exception. However, police which learn information about students in their capacity as school agents could not then use it in their capacity as police officers.

4. Sharing with police as outsourced security services. A new FERPA regulation permits nonconsensual sharing with persons performing outsourced services on behalf of a school.[14] A school might outsource security services to police officers.[15] The regulation requires

---

[10]Letter to Anonymous, 111 LRP 19105 (FPCO 2010) (repeatedly referring to FERPA's so-called "health and safety exception" without reference to "emergency").

[11]See, e.g., Irvine (CA) Unified Sch. Dist., 23 IDELR 1077, 1078 (FPCO Feb. 20, 1996) (explaining that a student's non-urgent medical condition and associated safety concerns are not emergencies justifying sharing records with student's doctor without parental consent).

[12]34 C.F.R. § 99.8.

[13]34 C.F.R. § 99.31.

[14]*Id*.

[15]The school's definition of "school officials" referenced above should include any such persons.

that such persons be under the school's control with regard to education records, and provides that may only redisclose information as permitted by FERPA. Hence, just as with police serving as school agents, police receiving student information in their capacity as outsourced school security could not then use the information in their capacity as police officers.

5. Sharing directory information information with police. FERPA provides that a school's FERPA policy may designate certain not-too-private information such as addresses and phone numbers as directory information.[16] Students must have an opportunity to object to release of this information. Schools are permitted to release directory information of nonobjecting student without consent to any person, including police.

Recent FERPA regulations ban nonconsensual release of directory information about a specific student when the request includes the student's SSN or other nondirectory information (e.g. date of birth) to help identify the student.[17] For example, a police officer might supply a school with a name and SSN and ask the school to verify dates of attendance and degrees received. In such a case, written consent is required if the school uses the SSN to locate release or confirm the information (hopefully in such a case the police request includes such written consent). The theory is that to do so implicitly confirms the accuracy of the SSN, which amounts to a disclosure of an education record for which consent is required. The school receiving such a request could choose to supply the requested information, while also clarifying that it did not use and is not confirming the student's SSN. Alternatively, if the same request listed only the student's name without SSN, the school could nonconsensually release the requested directory information unless the student had filed a directory information objection.

The regulations also provide that when a school reasonably believes the requester knows the identity of the student about whom records are requested, the records are protected by FERPA. This new provision is intended to deal with targeted requests. For example, if a police officer knew student Chris Jones had been expelled on a specific date, and asks a school for records of all students expelled on that date with names redacted, the records would be protected from disclosure.

6. Sharing which does not involve personally identifying information,[18] such as disclosure of campus crime data under the Clery Act.[19] The Clery Act has long required reporting of campus crime data. It was modified after Virginia Tech to require colleges to make emergency warnings to the campus community of specific threats to campus safety.[20] In

---

[16] 34 C.F.R. §§ 99.3; 99.37.

[17] *Id.*

[18] 34 C.F.R. §99.31(b).

[19] 20 U.S.C. § 1092(f).

[20] *Id.* at § (f)(1)(j).

conjunction with FERPA's emergency exception, these warnings might include some student information. Colleges must also create a public log of crimes reported to them.[21] The Clery Act also requires a statement of

> the law enforcement authority of campus security personnel; [and] (ii) the working relationship of campus security personnel with State and local law enforcement agencies, including whether the institution has agreements with such agencies, such as written memoranda of understanding, for the investigation of alleged criminal offenses; and (iii) policies which encourage accurate and prompt reporting of all crimes to the campus police and the appropriate law enforcement agencies.[22]

The federal Department of Education (DOE) may investigate Clery Act violations and impose civil penalties.[23] DOE is currently investigating Penn State in connection with the sexual assault of children on campus by former assistant football coach Jerry Sandusky.[24]

7. Sharing information in response to a subpoena.[25] FERPA does not establish a privilege for student information. FERPA does not extent blanket protection of covered records from subpoena, nor does FERPA set out any substantive standard for schools or courts to apply in deciding whether to enforce or to comply with a subpoena of student information.[26] What FERPA does do is establish procedural requirements for schools served with subpoenas of student records. First, while a request for student records (via subpoena, public records request, parent request for access, or otherwise) is pending, the requested records may not be destroyed. The other procedural requirements (advance notice to the parents before compliance and recording of the request in an access log) vary depending on which of FERPA's three types of subpoenas are involved. .

In general, FERPA requires schools to give make a "reasonable effort" to provide pre-

---

[21] *Id.* at § (f)(4).

[22] *Id.* at § (f)(1)(c).

[23] *Id.* at § (f)(13).

[24] "U.S. Department of Education to Investigate Penn State's Handling of Sexual Misconduct Allegations," http://www.ed.gov/news/press-releases/us-department-education-investigate-penn-states-handling-sexual-misconduct-alleg.

[25] 20 U.S.C. § 1232g(j); 34 C.F.R. § 99.31(a)(9).

[26] However, for subpoenas other than those for law enforcement purposes, the advance notice requirement, and its purpose of providing families with an opportunity to quash or modify subpoenas does indicate an intent to provide some protection of student information from the subpoena power.

compliance notice to the parent/adult student whose records have been subpoenaed[27] (such subpoenas are hereinafter referred to as "general FERPA subpoenas").[28] FERPA also provides that courts (and federal grand juries) may issue subpoenas of student records for law enforcement purposes, and that these law enforcement subpoenas may direct the school to keep them confidential even as to the involved student/parents (such subpoenas are hereinafter referred to as "confidential law enforcement FERPA subpoenas").[29] A third type of FERPA subpoena was created by a provision of the USA Patriot Act.[30] This makes it easier for federal law enforcement authorities to obtain ex parte secret subpoenas of student records relevant to terrorism investigations. Like the pre-existing law enforcement subpoena language, these subpoenas must be issued by courts (such subpoenas are hereinafter referred to as "confidential terrorism investigation-related FERPA subpoenas").[31]

---

[27]For general subpoenas, FERPA requires schools to make a "reasonable effort" to provide notice to parents/adult students in advance of compliance, in order to afford an opportunity to ask a court to quash or modify the subpoena. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9); *id.* at 99.31(a)(9)(ii) (noting that advance notice is "so that the parent or eligible student may seek protective action"). For good cause, subpoenas or court orders issued by federal courts or grand juries for law enforcement or anti-terrorism purposes may require the school to comply without disclosing the issuance of the subpoena to the parent/adult student. 20 U.S.C. at § 1232g(b)(1)(J) (federal law enforcement subpoenas); *id.* at § 1232g(j) (ex parte court orders to investigate and prosecute terrorism).

For discussions of FERPA's approach to subpoenas generally, as well as earlier reported decisions, see Dixie Snow Huefner and Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469, 480-481 (2001); Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. R. 617, 634-635 (1997).

[28]*Id.* at §1232g(b)(2)(B).

[29]*Id.* at §1232g(b)(1)(J).

[30]20 U.S.C. § 1232g(j). Recent regulations track the statutory language and would not appear to add new substance. Family Education Rights and Privacy, 73 Fed. Reg. 15582 (proposed March 24, 2008) (to be codified at 34 C.F.R. § 99.31(a)(9)).

[31]Normally the application to the court for the subpoena will be by the U.S. Attorney General's Office, but the Attorney General's Office does not have the power to access student records on its own; a court-issued subpoena must be obtained. The statute provides that some other federal employees may apply for confidential terrorism-investigation related subpoenas. The section refers specifically to "the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General)." *Id.*

Schools[32] presented with FERPA subpoenas sometimes go to court to ask that the subpoena be quashed[33] or modified.[34] In a case decided soon after FERPA's enactment, a federal district court adopted a balancing test to decide a motion to quash a subpoena of student records, reviewing the records in camera and weighing the need for the information contained in any relevant subpoenaed records against the intrusion on the student' s privacy.[35] Most courts reviewing subpoenas of student records continue this in camera review of the subpoenaed records and balancing of interests in deciding to what extent (if any) to enforce the subpoena.

8. Sharing with juvenile justice authorities as permitted under pre-1974 state law.[36] State law in existence prior to FERPA's enactment which permits schools to share student information with juvenile justice authorities is unaffected by FERPA.

9. Sharing by institutions of higher education of the results of certain school discipline.[37] Higher education institutions may inform the public at large of the outcomes of certain disciplinary proceedings in which students are found to have engaged in behavior which violates the school rules and also amounts to a crime of violence or a nonforcible sex offense.[38] Disclosure is limited to the name of the guilty student, the violation committed and the sanction imposed.[39] Thus, for example, if a college found after a disciplinary hearing that student Pat Smith stole a classmate's laptop, and was suspended for a semester by the school for this behavior, the college could share Pat Smith's name, the determination of laptop theft, and the suspension with the police as part of the public generally. The police might then decide to purse larceny charges against Smith.

---

[32]In the case of general FERPA subpoenas, the family of the student whose records were subpoenaed could also go to court.

[33]*See, e.g.,* Fed. R. Civ. Proc 45 (c)(3)(A)(iii) (motion to quash civil subpoena may be made if the subpoena "requires disclosure of privileged or other protected matters"). Some courts require an attempt to confer with the subpoena-er's attorney before filing such a motion.

[34]At least for some civil subpoenas, schools can serve timely written objections to the subpoena, which eliminates their obligation to comply unless and until the subpoena-er makes a successful motion to a court to compel compliance.

[35]Rios v. Read, 73 F.R.D. 589, 598 (E.D.N.Y. 1977).

[36]20 U.S.C. §1232g(b)(1)(E).

[37]20 U.S.C. §1232g(b)(6)(B).

[38]*Id.*

[39]*Id*.

10. Sharing observed behavior with personal knowledge. According to FPCO, the federal agency which enforces FERPA, sharing personal knowledge of observed behavior rather than information taken from student records does not violate FERPA.[40]

11. Enforcement of FERPA. FERPA violations generally are not enforceable through private lawsuits. FERPA has no private cause of action, and has been found to be not actionable under Section 1983.[41] There is an administrative complaint process through the FPCO which does not involve a hearing nor any private remedies.[42] Courts have not been receptive to the argument that student information obtained or shared in violation of FERPA is fruit of the poisonous tree and inadmissible in criminal proceedings.[43]

B. Other privacy laws may protect student information to a greater extent than FERPA

When (mental) health records are involved, HIPAA and other health records laws may limit disclosure beyond FERPA's protections. School nurses, counselors, and other health care workers in schools may create or maintain records. Confidentiality provisions in health records

---

[40]*See, e.g.,* Letter to Anonymous 107 LRP 48036 (FPCO 2007) (school aide's report to police of student's observed behavior ("Student had pulled her hair,' 'behaviors were escalating,' 'Student was out of control at home and school,' Student was 'very strong' and a 'big kid that continues to hurt people'") did not violate FERPA; "FERPA does not protect the confidentiality of information in general. FERPA does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge, personal observation, or hearsay, and not specifically obtained from an education record, is not protected from disclosure under FERPA; . . . .These statements appear to be observational or the speaker's opinion."). This carve-out for observed behavior is not explicit in the statute or regulations, nor in case law. It is unclear if courts will defer to it as a reasonable interpretation by an enforcing agency.

[41]Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

[42]34 C.F.R. §§ 99.63 - .65.

[43]For example, in one case, a public university called police when it appeared that an adult student was using school computers to access child pornography. The student claimed he was doing so as research for a class. The student also claimed that informing the police about his school computer work violated his FERPA rights, and the search warrants and search results obtained by the police as a result of the school's tip should be voided as fruit of the poisonous tree. A federal court suggested that even if FERPA was violated, it would not void the resulting searches. United States v. Bunnell, 2002 Westlaw 981457, *1 (D.Me. 2002) (also noting that the school gave the police access to the recycling bin in its computer facility).

laws may limit sharing those records with police to a greater extent than does FERPA.[44] In November 2008, FPCO and HHS issued joint guidance on FERPA and HIPAA and student health records, available from the FPCO website.[45] Briefly, the joint guidance paper clarifies that FERPA and not HIPAA applies to student health records in most cases; when HIPAA does apply, it would largely be in post secondary education.

II. Disability law

A. IDEA and criminal referrals of special education students

The IDEA, the federal special education statute applicable to public K-12 schools, specifically permits criminal referrals of special education students;[46] regulations limit related school records disclosures to the extent FERPA permits.[47] The IDEA does not require disclosure of records in connection with a criminal referral. One court has suggested that failure to turn over an IDEA student's records in connection with her criminal referral would not invalidate the criminal proceedings.[48]

B. IDEA confidentiality requirements

---

[44]*See generally* Mary H. B. Gelfman and Nadine C. Schwab, *School Health Services and Educational Records: Conflicts in the Law*, 64 ED. LAW REP. 319 (1991).

[45]U.S. Department of Health and Human Services and U.S. Department of Education, Joint Guidance on the Application of theFamily Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability andAccountability Act of 1996 (HIPAA) to Student Health Records, November 2008, available at http://www.ed.gov/policy/gen/guid/fpco/index.html.

[46]20 U.S.C. § 1415(k)(6).

[47]34 C.F.R. §300.535(b)(2). "Circumstances will determine whether records may be transmitted generally will determine whether a specific request from a law enforcement official would need to be made, to whom the records would be transmitted, and the extent of the information provided." 64 Fed. Reg. 12362 (1999). See, e.g., Northside Independent School District, 28 IDELR 1118 (SEA TX 1998).

[48]A court held that an alleged violation of IDEA requirements regarding sharing of special education records when a criminal referral is made for an IDEA student did not justify dismissal of the criminal conviction. In that case, an IDEA student was referred to police for drug possession. The student challenged his criminal conviction on several grounds, including the school's failure to share his FERPA records with the police. The court held that any IDEA violation did not justify dismissal of the criminal conviction. Commonwealth v. Nathaniel N., 764 N.E.2d 883,888 (Mass. App. 2002) (also noting that the IDEA did not specify when during the criminal process the records were to be shared, that in fact the student had provided some records to the court).

The IDEA incorporates FERPA's confidentiality requirements and adds others not especially relevant to information sharing with police.[49] Note, however, that IDEA confidentiality violations, including violations of incorporated FERPA requirements, may be actionable through the IDEA.[50] These claims begin with a formal administrative hearing resulting in a written decision that may be appealed to a court.[51]

C. Criminal referrals and substantive IDEA obligations

While IDEA explicitly permits criminal referrals and its confidentiality provisions do not limit information sharing with police to a greater extent than does FERPA, sharing information about a special education student with the police may violate the IDEA and/or other disability law.

One scenario in which criminal referral may violate the IDEA involve's the school's motive for referring the student to the police. A state appellate court has noted that a school may not file a juvenile court petition with the intent of interfering with a student's IDEA rights.[52] For example, making a false report to police to avoid IDEA evaluation or services obligations would violate disability and other law.[53] Similarly, offering to forego a criminal referral if parents of a

---

[49]20 U.S.C. § 1415 (b)(1); 34 C.F.R. § 300.501.

[50]*See, e.g.*, C.M. v. Bd. of Educ. of Union County Reg'l High Sch. Dist., 128 F. App'x 876, 880 (3d Cir. 2005) (determining that if the plaintiff had not been provided access to certain information in her school records, injunctive relief under IDEA may be appropriate although the plaintiff had graduated); J.P.E.H. v. Hooksett Sch. Dist., No. 07-CV-276-SM, 2007 WL 4893334, at *4-7 (D.N.H. Dec. 18, 2007) (holding that claims by a parent of a disabled student that the school improperly shared information about her child may proceed as a violation of IDEA records confidentiality, but dismissing parent's FERPA claims); cf. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 (2d Cir. 2005) (holding that a failure to provide a parent with class profiles that the school district has not yet created does not violate IDEA); K.C. v. Fulton County Sch. Dist., No. 1:03-CV-3501-TWT, 2006 WL 1868348, at *9-11 (N.D. Ga. June 30, 2006) (alleging that the school denied parents access to their child's records; the court found that this was a very limited denial of access which did not limit the parents' ability to participate in their child's education and therefore did not violate IDEA); Combier v. Biegelson, No. 03 CV 10304 (GBD), 2005 WL 477628, *1, *4-5 (S.D.N.Y. Feb. 28, 2005) (finding that an IDEA parent lacked standing to claim a FERPA violation resulting from a school's disclosure to her of records that contained information about other students), *aff'd sub nom*. Combier-Kapel v. Biegelson, 242 F. App'x 714 (2d Cir. 2007).

[51]*See* 20 U.S.C. § 1415 (f), (g), (i).

[52]State of Wisconsin v. Trent N 26 IDELR 434 (Wis. Ct. App. 1997).

[53]*Cf.* Camac v. Long Beach City Sch. Dist., 57 IDELR 35 (E.D.N.Y, 2011) (school personnel who allegedly falsely reported student was suicidal to emergency personnel, resulting

special education student kept the student at home and the school did not have to provide FAPE would violate disability law.[54] Special education programs are costly for some students. Some special education students have behavioral or other issues which a school may find difficult to deal with. Schools cannot attempt to avoid unwanted costs, or difficult student issues, or retaliate against parents of special education students,[55] by referring the student to the police.

With these concerns in mind, if an IDEA student is at risk to engage in criminal behavior, is it appropriate to include the possibility of criminal referrals in the student's IEP? If the possibility is not included in an IEP, can the school still make a criminal referral for that student? One court found that where an IDEA student's BIP did not prohibit the principal from calling the police, doing so was not disability discrimination nor a violation of the student's constitutional rights.[56] If a child's behavior makes police involvement foreseeable, perhaps the possibility of criminal referral should be written into the IEP. If such a referral results in arrest it likely is not a change in placement for stay put purposes,[57] Once again, however, schools cannot make criminal referrals of special education students which are motivated by the school's desire to avoid its special education obligations to those students.[58]

D. Criminal referrals and disability discrimination

All students, K-12 and higher education, public and private, are protected by federal statute (Section 504 and/or the ADA Titles II and III) from disability discrimination.[59] Making criminal referrals for students with disabilities can amount to illegal discrimination. Most obviously, schools must refer students with disabilities to police on the same basis as students

---

in student's psychiatric hospitalization; court finds triable issues under disability and civil rights laws; it is not clear if it is claimed school did so in order to avoid evaluation obligations under special education law).

[54] *See* Lake Pend Oreille (ID) Sch. Dist. 84, 51 IDELR 22 (OCR 2008) (so holding).

[55]*See infra* note 63 and accompanying text.

[56]B.L. v. Boyertown Area Sch. Dist.52 IDELR 247 (E.D. Pa. 2009).

[57]*See* Poteet Independent Sch. Dist.,29 IDELR 423 (SEA TX 1998) (a student's learning disability did not immunize him from truancy charges nor require a manifestation determination prior to referral). *See also* Jonesboro Public Schools 26 IDELR 1073 (SEA AR 1997) (also so holding).

[58]*Cf.* Osseo Sch. Dist., Independent Sch. Dist. 279-01, 53 IDELR 35 (SEA MN 2009) (no FAPE violation where an ED student was referred for fighting, resulting in juvenile charges, pursuant to school policy. The referral did not lessen access to special education services or supports).

[59]*See* 29 U.S.C. § 794 (Section 504); 42 U.S.C. §§ 12131 - 12134 (ADA Title II –state and local government including public schools) *Id.* at §§ 12181 -121289 (ADA Title III for places of public accommodation explicitly including private schools).

without disabilities. In some circumstances, reporting suspected abuse or neglect to police or other authorities may be actionable as disability discrimination.[60]

> The Education Department has noted that while the IDEA does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student," schools should "take care not to exercise their responsibilities in a discriminatory manner.[61]

On the other hand, criminal referrals for legitimate nondiscriminatory reasons are valid. For example, OCR found no discrimination by a school which called the police about a student's rude/disruptive behavior, verbal abuse and profanity. After first trying to use the student's BIP strategies unsuccessfully and out of concern for danger to other students, the principal suspended the student for three days and contacted the police. OCR decided the district had a legitimate, nondiscriminatory reason for its actions.[62] In this case retaliation for advocacy under disability law was also claimed as a basis for the criminal referral. OCR found the school did not retaliate against the student for his parent's advocacy.[63]

Criminal referral practices which have a disparate impact on students with disabilities may violate disability law. There has not been data collection and analysis of criminal referral rates for students with disabilities. However, data patterns for school suspensions, which logically would be predicted to be similar to those for criminal referrals, are of some help in examining this issue. In fact, recent multi-state data concerning school suspension rates for students with disabilities is troubling. The IDEA limits exclusion from school for conduct which is caused by a student's disability,[64] which suggests suspensions from school should be lower for special education students. In fact, the suspension rate for students with disabilities (13%) is almost double that for general education students.[65] The disparity is even starker for

---

[60]*Cf.* Vernon v. Bethel Sch. Dist., 112 LRP 43437 (Wash App. 2012) (rejecting disability discrimination claim by parent asserting school abuse of her child where school cooperated with resulting police investigation and no evidence of abuse in connection with IEP implementation occurred).

[61]64 Fed. Reg. 12631 (1999). *See also* In re Student with a Disability v. Sch. Bd. of Palm Beach County, 31 IDELR 209 (S.D. Fla. 1999) (claims that the district's behavioral support practices and criminal referral policy caused a disparate impact on students with disabilities).

[62]Robinson (TX) Indep. Sch. Dist. 45 IDELR 128 (OCR 2005).

[63]*Id*.

[64]20 U.S.C. § 1415(k).

[65]Center for Civil Rights Remedies, "Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School," 2012 (using data from OCR's Civil Rights Data Collection), available at http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-pris

black students with disabilities, whose suspension rate is over 25%.[66] It thus seems likely that criminal referrals of students are disproportionately students with disabilities and students of color.

Schools can establish policies and practices concerning criminal referrals of students to minimize impact on students with disabilities. A school district can enact a policy which sets out the district's general approach to police involvement, identifies underlying policy reasons (e.g. school safety, training students to become responsible citizens), limits who has authority to talk with police about students, and identifies behaviors which will result in criminal referral. Centralized decision makers (for example, the principal of each school is the designated person for any communication with police) promotes consistency. To protect students with disabilities and comply with any relevant IEP provisions, perhaps the policy would require consultation with a special education professional before criminally referring a special education student. Identifying behaviors which will result in criminal referral (drug possession? drug use? property crime above a certain value? violent crime?) and perhaps including the age of the student (as appropriate for various stages of child development) and the student's state of mind (e.g. willful behavior only?) as considerations helps ensure referral decisions are made in a nondiscriminatory way. Schools should always identify a nondiscriminatory reason for deciding to make a referral, assuming not every student suspected of criminal activity is referred to the police.

Keeping records on criminal referrals and other communications with police about students can help schools identify and respond to any patterns which indicate students with disabilities are being treated differently. These records should include demographic information such as disability status, race, religion, and gender, to be sure that referrals are made in a nondiscriminatory manner. These records should also include incidents for which the school decided not to make a criminal referral, to help ensure that students in certain demographic groups (for example girls, or white students) are not being treated differently.

E. Disability law enforcement

IDEA violations are of course actionable through IDEA due process hearings and appeals to court.[67] Section 504 and ADA disability discrimination claims may prompt lawsuits.[68]

III. Retaliation for exercise of rights/discriminatory reporting

As discussed above, disability law forbids decisions about criminal referrals of students

---

on-folder/federal-reports/upcoming-ccrr-research.

[66] *Id.* Black general education students have a 17% suspension rate compared with 5% for white general education students.

[67] *See* 20 U.S.C. § 1415 (f), (g), (i).

[68] *See* 42 U.S.C. § 12133 (ADA Title II); *id.* at § 12188 (ADA Title III).

based on their disability, or in order to avoid obligations under disability law.[69] Similarly, schools cannot make criminal referrals of students in retaliation for their exercise of First Amendment free speech or other constitutional rights. Schools also need to take care that criminal referrals are made without regard to protected status such as race, national origin, gender, or religion. OCR is now collecting data, disaggregated by race and gender, on student discipline.[70] Recently released data concerning discipline rates are troubling.[71] For example, "African-American students are over 3½ times more likely to be suspended or expelled than their peers who are white."[72] With regard to criminal referrals specifically, "Over 70% of students involved in school-related arrests or referred to law enforcement are Hispanic or African-American."[73] The policy and record keeping practices described in Section II.D *supra* should help schools avoid illegal retaliation or discrimination on these bases.

Schools must on the other hand be careful not to interfere with reporting decisions by employees who are victims of student crimes against them. A recent federal appeals court held that school employees who report criminal activity against them to the police engaged in constitutionally protected speech and cannot be retaliated against for doing so.[74]

IV. Laws requiring reporting of crime and child abuse

Sharing student information with police is sometimes required by laws requiring reporting of suspected child abuse, or by laws requiring reporting of crimes.

As to child abuse, K-12 schools are well familiar with statutory requirements to report suspected child abuse or neglect.[75] The reporting obligation may include suspected abuse not only by adults but also at the hands of a peer.[76] Child abuse reporting statutes may permit

---

[69]*See supra* Sections IIC and IID.

[70]Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Datam Arch 2012, available at Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Data.

[71]Civil Rights Data Collection, March 2012, available at http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf.

[72]*Id*.

[73]*Id*.

[74]Gschwind v. Heiden, No. 12-1755 (7th Cir. Aug. 31, 2012)

[75]*See, e.g.,* R.C.W.§§ 26.44.010 - .900.

[76]*See, e.g.,* Office of the Attorney General, State of Washington, Letter to Honorable Marcus S. Gaspard, AGO 1987 No. 9 so holding).

reporting to police.[77] These laws may require schools to cooperate in investigations.[78]

In the wake of events at Pennsylvania State University, in which an assistant football coach was convicted of multiple counts of on-campus sexual assault of children, some states have amended their child abuse reporting laws to add certain employees of colleges and universities as mandatory reporters.[79]

More generally, in some states witnesses to certain crimes are required to call 911 or otherwise make a report.[80] Failure to report suspected crimes[81] or child abuse[82] may result in

---

[77]*See, e.g.,* R.C.W.§§ 26.44.030(1).

[78]For example, in Washington, a statute specifically requires schools to cooperate with law enforcement authorities when issued a valid subpoena and to the extent permitted by FERPA. R.C.W. §28A.600.475 (emphasis added). At CPS interviews with children suspected of abuse or neglect, the child must be asked whether she wants a third party (such as a school employee) to be present. If the child wants a third party present, CPS or the police must make reasonable efforts to include that third party in the interview, unless it would jeopardize the investigation. *See* R.C.W. §26.44.030(12). Under state law, CPS has access to all records of the reporter and the reporter's employer. *Id.*; W.A.C. §388-15-132(3)(d)(I). CPS may also interview the reporter and any collateral sources. R.C.W. §26.44.030(17).

[79]*See, e.g.,* Wash. Sen. Bill 5991 (2012), *to be codified at* Rev. Code. Wash. §§ 26.44.030(1)(f) (mandatory reporters include "administrative and academic or athletic department employees, including student employees, of [public] institutions of higher education, . . . and of private institutions of "); *id.* at § 28B.10.___ (for public institutions of higher education, adding requirements that 1) employees who are not mandatory reporters themselves must report suspected abuse or neglect to a supervisor or designated administrator, and 2) such institutions must act to educate employees about the new reporting responsibilities.

[80] For example, Washington statute requires reporting by eyewitnesses to certain crimes. R.C.W. §9.69.100. The statute is limited to eyewitnesses to the commission of certain crimes ("violent offenses" or preparation for a violent offense, felony sex offenses, or attempts to commit such offenses, against children, or an assault of a child "that appears reasonably likely to cause substantial bodily harm to a child"). Such eyewitnesses must report what they have seen "as soon as reasonably possible" to prosecutors, police, medical assistance, or "other public officials." A report, or attempt to report, by phone or other means is sufficient. The reporting obligation does NOT trump a legal privilege such as that between attorneys and clients. Reporting is also not required where the eyewitness reasonably thinks making a report would place the victim or a household member in immediate physical harm.

[81]*See, e.g.*, R.C.W. § 9.69.100 (Not making a report of witnessed crime when one is required is a gross misdemeanor);

[82]*See, e.g.,* R.C.W. §26.44.030 (liability for failing to report suspected child abuse).

criminal or civil liability. There may be immunity for good faith reporting.[83]

V. Tort liability

As a matter of state tort law, a school may have an obligation to warn or to take other steps if a student poses a threat to herself or others.[84] Presecondary schools have an affirmative legal duty to reasonably supervise students, which may require taking reasonable steps to prevent harm to students, and harm caused by students.[85] This tort liability based obligation does not specifically require reports to the police; it is "reasonable" steps to protect that are required. In some cases, for example, the duty to take reasonable steps might be fulfilled by informing parents, or by initiating a mental health evaluation. Nor is informing the police necessarily sufficient to fulfill the duty; more may be required.[86]

In some circumstances, reasonable steps may involve notifying the police. In fact, the seminal case on this issue involved a university therapist to whom a student patient articulated a credible and specific threat to one Tatiana Tarasoff. The therapist informed campus police but not outside law enforcement. The student patient followed through on the threat and killed Tarasoff. The court found a triable issue on whether the school had fulfilled its duty to take

---

[83]*See, e.g., id.* at 26.44.060(1). ADD 4.24

[84]*See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 41 (Proposed Final Draft No. 1, 2005). Courts have held schools to a duty to intervene with regard to a disabled student making suicidal statements, who carried out a murder-suicide pact. See, e.g., Eisel v. Board of Educ., 18 IDELR 402 (Md. 1991) (duty to intervene arises when school has notice of student's suicidal intent, reasonable intervention may consist of notifying the parent).

The Clery Act as recently amended requires timely warnings to the school community of certain threats. 20 U.S.C. § 1092(f)(1)(J).

[85]This obligation includes taking reasonable intervention steps to prevent foreseeable harm to students from others in the school community, including classmates. *See, e.g.,* J.N. v. Bellingham Sch. Dist., 74 Wash. App. 49 (1994) (school owes reasonable care to prevent assault of a 1st grader by another student at school); Peck v. Siau, 65 Wash. App. 285 (1985) (school owes duty to protect student from assault by librarian, if it is foreseeable).

[86]For example, in a recent tragic case involving Morgan State student Alex Kinyua who murdered and cannibalized a family friend, the school had reported concerns to the police. The student had an earlier outburst which resulted in his expulsion from ROTC. An instructor told the police that Kinyua was "Virginia Tech waiting to happen." Another student who was beaten by Kinyua, who had been arrested for the assault, and was free on bond when the murder occurred, is considering litigation against Morgan State. Sarah Brumfield, "Morgan State University Evaluated Alex Kinyua Before Attack," June 8, 2012, available at http://www.huffingtonpost.com/2012/06/09/morgan-state-university-e_n_1583302.html.

reasonable steps to protect the eventual victim.[87]

Failure to take reasonable steps which causes injury from the threat posed to or by the student may result in tort liability, and in some cases civil rights liability.[88]

Conversely, a false report to police or other outsiders of a student threat to self or others may result in liability.[89]

State anti-bullying statutes, and school policies regarding bullying, may set out procedures for schools to follow. A school's violation of these obligations may amount to breach of the legal duty of reasonable supervision. Available data suggests bullying is hardly a rare occurrence in K-12 schools.[90]

VI. SROs and other police arrangements involving schools

A. The variety of school-police arrangements

At the K-12 level, schools and police traditionally were separate entities. Many schools did not have designated security personnel and those that did hired their own non-police security employees. At the university level some campus police forces were comprised of nonpolice university employees and others of commissioned law enforcement officers.

More recently, schools and police have entered into a variety of cooperative arrangements to ensure school safety. In some cases, police have assigned officer(s) to a school. Officers in this arrangement are often referred to as "school resource officers" ("SROs"). SROs remain

---

[87]Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425 (1976).

[88]*Cf.* Doe v. Big Walnut Local Sch. Dist., 111 LRP 5176 (S.D. Oh. 2011) (school avoids civil rights liability for peer bullying of student because school had made reasonable efforts to prevent the bullying). In another recent case, a student sexually assaulted a classmate, and later raped another classmate whom he had dated in the past. The second victim claimed the school had a legal duty to warn her of the danger this student presented, and also claimed that failure to warn her amounted to deliberate indifference, triggering liability under Title IX. Doe v. Ohio St. Univ., 2006 WL 2813190 (S.D. Oh. 2006). The court rejected the Title IX claim, noting that at the time of the plaintiff's rape the first complaint had been filed and the school was processing it but there had been no adjudication, and declined to decide the duty to warn claim, but did take the time to include a lengthy and graphic description of the rape from the victim's deposition. *Id.* at *2-3.

[89]*Cf.* Camac v. Long Beach City Sch. Dist., 57 IDELR 35 (E.D.N.Y, 2011) (school personnel who allegedly falsely reported student was suicidal to emergency personnel, resulting in student's psychiatric hospitalization; court finds triable issues under disability and civil rights laws).

[90]A recent NCES study suggests 25% of students experienced bullying during a school year. NCES, Student Reports of Bullying and Cyber-Bullying: Results From the 2009 School Crime Supplement to the National Crime Victimization Survey (2011).

employees of the police. They may have education and counseling as well as law enforcement responsibilities, and their salaries are often paid for with federal COPS funds.[91] Some schools have hired off duty officers to provide security and/or hired full-time police officers. As discussed above, campus police at public universities may have some law enforcement powers. Police officers may serve on school multidisciplinary crisis management or threat assessment teams.[92]

B. Police as school agents: nonconsensual sharing and redisclosure

These different arrangements affect who is the "school" and who is the "police" and thus alter legal requirements governing information sharing. There are two issues. First, under what if any circumstances is an SRO or other school security official a person acting for a school with whom information can be nonconsensually shared under FERPA? Second, what if any limits exist on redisclosure of information learned in this way? For example can a police officer who learns information by participating in a school threat assessment team share and act on that information as a police officer?

Cases involving student searches by SROs offer some guidance on these issues, at least by analogy. Under the Fourth Amendment, police searches generally require probable cause and a warrant, while school searches of students do not require warrants and are governed by a lower reasonable suspicion standard.[93] Courts have been asked to decide whether a student search at school by an SRO is governed by the police or school standard. Most recently, the Washington Supreme Court held in *State v. Meneese* that an SRO's search of a student's backpack had to meet the higher police standard.[94] Because that standard was not met, the evidence (air pistol) found in the backpack was inadmissible in criminal proceedings against the student.[95] The majority reasoned that the lower standard for school searches had been created at least in part because school officials do not have the search and seizure expertise of law enforcement officials, and school searches are not performed for law enforcement purposes; their actual

---

[91]United States Department of Justice, Cops in Schools (CIS), http://www.cops.usdoj.gov/default.asp?Item=54.

[92]Mary Beth Marklein, "Students' Rights Weighed as Colleges Attempt to Assess Threats," http://www.usatoday.com/news/education/2011-01-13-colleges-keep-watch-for-violent-students_N.htm (noting a "growing majority" of colleges now use such teams and that some states now require them).

[93]New Jersey v. T.L.O., 469 U.S. 325 (1985).

[94]State v. Meneese, 2012 WESTLAW 3131439 (Wash. 2012).

[95]*Id.* at *2, *5.

purpose (school discipline) requires swift action.[96]

The reach of the *Meneese* decision is unclear and may be limited. The search in question occurred after the student had been arrested and handcuffed by the SRO[97] strongly suggesting the search was for law enforcement purposes. The opinion reserves the question of what standard would apply to a search made at least in part for school purposes.[98] The agreement between the school and police department stated SROs were school officials[99] but did not provide for any school discipline authority for the SRO;[100] in fact the SRO remained on call while assigned to the school to respond to other police matters.[101] The decision was made under the state constitution.[102] The court was not unanimous.[103] Even the dissent, however, would apply the police standard to some SRO searches such as those which are a "subterfuge for unrelated law enforcement activities."[104] Nationally the courts are split, with many allowing SRO searches which have a school purpose under the lower school standard.[105]

---

[96]*Id.* at *3.

[97]*Id.* at *1.

[98]*Id.* at *5 n. 4.

[99]*Id.* at *8 (Stephens, J., dissenting, joined by Johnson, J.)

[100]*Id.* at *1.

[101]*Id.* Although not mentioned in the opinion, state statute limits authority for school searches to certain school officials. Rev. Code Wash. §28A.600.230 (limiting authority for student searches to "school principal, vice principal, or principal's designee").

[102]*Id*. at *4.

[103]*See id.* at *5 (Stephens, J., dissenting, joined by Johnson, J.)

[104]*Id.*

[105]*See, e.g.,* Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006) (lower school search standard applies); Cason v. Cook, 801 F.2d 188 (8th Cir. 1987) (school search standard); Martens v. Dist. No. 220 Bd. of Educ., 620 F.Supp. 29 (N.D. Ill. 1985) (school search standard); In re D.D. 554 S.E.2d 346 (N.C. App. 2001) (school search standard); People v. Dilworth, 661 N.E.2d 310 (Ill. 1996) (school search standard); People v. William V., 4 Cal. Rptr.3rd 695 (Cal. App. 2003) (school search standard); R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008) (school search standard); Commonwealth v. J.B., 719 A.2d 1058 (Penn. Super. 1998) (school search standard) In Re Randy G., 110 Cal. Rptr.2d 516 (2001) (school search standard); State v. Alaniz, 815 N.W.2d 234 (N.D. 2012) (school search standard); M.D. v. State, 65 So.3d 563 (Fla. Dist. Ct. App. 2011); Wilson v. Cahokia Sch. Dist., 470 F.Supp.2d 897 (S.D. Ill. 2007) (school search standard); Patman v. State, 537 S.E.2d 118 (Ga. 2000) (probable cause required); In re Josue T.,

Applying the reasoning of these cases, key to sorting out these matters is agency, which depends on many factors such as who the officer reports to and who pays her salary, what title and duties within the school the officer has, and what purpose(s) the information sharing serves. It would seem that an officer who has official duties at a school is a person acting for the school when performing those duties. For example, a police officer may be a full-time employee of a police department but also serve some role within a school such as membership on the school threat assessment team. In such a situation, the school may share some information with the police officer in her capacity as an agent of the school.

This does not mean, however, that the police officer can take this information gleaned in her school role and use it in her law enforcement capacity. Similarly, teachers who learn student information at school about kids in their neighborhood cannot use it in their capacity as neighbors. However, a police officer on site may observe student behavior of interest.[106] Or a police officer at a school may be a part of a school's enforcement unit, creating records which are not protected by FERPA.[107]

---

989 P.2d 431 (N.M. App. 1999) (probable cause standard); Pacheco v. Hopmeier, 770 F.Supp. 2d 1174 (school standard not applicable to search for nonschool purposes).

[106] *See supra* Section I.A.10.

[107] *See supra* Section I.A.2.