

# Research Guide: Privacy Safeguards for Student Records in Criminal Cases

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## **I. Introduction**

Three sets of state and federal laws establish policies discouraging or prohibiting the release of student records. This memorandum will outline the extent to which these provisions, and their implementing regulations, can be used to prevent disclosure of a criminal defendant's school records to the Commonwealth. It ultimately concludes that these provisions offer little to no protection of the records against the Commonwealth's subpoena.

The relevant laws are (in descending order of the strength of their protection):

1. The Family Educational Rights and Privacy Act of 1974 (FERPA), codified at 20 U.S.C. § 1232g, implementing regulations at 34 C.F.R. §§ 99 et seq., which requires educational institutions, with some exceptions, to obtain written parental consent (or consent of the former student if over 18 years of age), prior to releasing student records.
2. Virginia Code Ann. § 22.1-287, which provides that “[n]o teacher, principal, or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process . . .”
3. The Virginia Freedom of Information Act (VAFOIA), codified at Va. Code Ann. §§ 2.2-3700 et seq., which provides that “scholastic records” are exempt from the Virginia Freedom of Information Act's presumption that “all public records shall be available for inspection and copying upon request.” Va. Code Ann. §§ 2.2-3700, 2.2-3705.4.

## **II. The Federal Educational Rights and Privacy Act**

The Federal Educational Rights and Privacy Act (FERPA) declares in pertinent part that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization”

with certain exceptions. 20 U.S.C. § 1232g(b)(1). As the First Circuit has summarized the policy behind FERPA, “[t]he statute takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of any such funding to any educational institution [with records disclosure policies in violation of FERPA].” *Frazier v. Fairhaven Sch. Cmte.*, 276 F.3d 52, 58 (1st Cir. 2002).

### **A. Scope of FERPA Protection**

There are several exceptions to FERPA’s policy of punishing educational institutions that disclose student records without parental or student consent.<sup>1</sup> One such express exception is for where the records “[are] furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena...” 20 U.S.C. § 1232g(b)(2)(B). If the Commonwealth takes advantage of this exception and files a subpoena duces tecum for disclosure of a defendant’s student records, the defendant (or his parents, if under the age of eighteen), must be notified in advance of the school’s compliance with the subpoena. *Id.* (conditioning exception from consent requirement on “[notification] of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.”); *see also* 34 C.F.R. § 99.31(a)(9)(i) (implementing regulation for subpoena exception).<sup>2</sup>

Some courts have found the presence of the subpoena exception indicates that FERPA was “designed to ‘address *systematic, not individual*, violations of students’ privacy by unauthorized releases of sensitive information in their educational records.’” *See Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023–24 (N.D. Ohio 2004) (quoting *Jensen v.*

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<sup>1</sup> The consent right of parents transfers to the current or former pupil once the pupil attends a post-secondary educational institution or reaches 18 years of age. *See* 99 C.F.R. §§ 99.2, 99.5 (defining the term “eligible student” and the rights of such persons).

<sup>2</sup> However, if the Attorney General of the United States, or his designee, seeks educational records pursuant to the investigation or prosecution of an act of terrorism, he or she may seek an ex parte order requiring the educational agency or institution in possession of the records to collect, retain, disseminate, or use the records. *See* 20 U.S.C. § 1232g(j)(1).

*Reeves*, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999)) (emphasis added). Indeed, all state and federal cases found that address the issue of whether FERPA creates an evidentiary privilege hold that it does not. *See Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (“It is obvious, however, that the 1974 Act does not provide a privilege against disclosure of student records. The statute says nothing about the existence of a school-student privilege analogous to a doctor-patient or attorney-client privilege.”); *Reeg v. Fetzer*, 78 F.R.D. 34, 36 (W.D. Okla. 1976) (finding defendants failed to meet burden of establishing existence of privilege in educational records); *Garza v. Scott & White Mem. Hosp.*, 234 F.R.D. 617, 624 (W.D. Tex. 2005) (“By its plain terms, FERPA does not create an evidentiary privilege . . . .”); *People v. Bachofer*, 192 P.3d 454, 460 (“Neither the federal nor the state statute erects an absolute privilege against disclosure [of educational records].”). Courts in Virginia have likewise rejected that a FERPA privilege exists. *See Bunch v. Artz*, No. 04-2330, 71 Va. Cir. 358, 2006 WL 2411428, at \*6 (Va. Cir. Ct. Aug. 15, 2006) (“[T]his court must conclude that FERPA does not create a privilege that protects the educational records from disclosure during discovery.”); *cf. Abrams v. Mary Washington Coll.*, No. #CH93-193, 33 Va. Cir. 449, 1994 WL 1031166, at \*4 (Va. Cir. Ct. Apr. 27, 1994) (“An isolated instance of alleged disclosure of information which may be a part of student records does not, without more, constitute a violation of FERPA.”).

In a Comment to recently revised regulations in the Federal Register, the Department of Education indicated the utility of the subpoena exception in discovery is not as straightforward as the cases cited above would indicate. The comment states: “[Section] 99.31(a)(9) does not *authorize* a court or Federal grand jury to issue an order or subpoena; *it allows an educational agency or institution to comply with* a facially valid order or subpoena, without consent.” 73 Fed. Reg. 74,822 (Dec. 9, 2008) (emphasis added). The subpoena exception was cited as one of

many examples of where “FERPA allows educational agencies and institutions to disclose . . . education records without consent . . . [but] does not . . . provide the underlying authority for individuals and organizations to conduct the various activities that may allow them to receive education records without consent . . . .” *Id.* This apparently means that while a third party may obtain a subpoena to compel disclosure of a student’s educational records, merely invoking the statutory exception itself cannot provide the basis upon which a subpoena can be granted. No civil or criminal cases have been found that have considered this Comment in addressing a request for discovery of student records, nor have any of the above cited cases discussed what constitutes a “facially valid” subpoena for school records. A criminal defendant thus might point to the Comment in order to persuade the court to review thoroughly the prosecution’s request for a subpoena duces tecum.

While FERPA does not insulate relevant school records from discovery, it does require a party seeking disclosure of school records to meet a higher burden than for the discovery of other types of records. *See Rios*, 73 F.R.D. at 598; *Ellis*, 309 F. Supp. 2d at 1023. Thus courts have required that the party seeking disclosure has demonstrated a genuine need for disclosure that outweighs the student’s privacy interest in the records. *See Bunch*, 2006 WL 2411428, at \*6 (citing *Rios*). Virginia courts have been careful to note that a heightened relevance standard need not be satisfied before the court applies this balancing test. *See id.* at \*9 (noting that some decisions in other jurisdictions require satisfying a heightened relevance at the threshold, but concluding that “a heightened standard of relevance is not the appropriate method of protecting such privacy concerns”).

To obtain pretrial production of documents in federal criminal cases under Fed. R. Crim. P. 17(c), the government “must show that: (1) that the documents are evidentiary and relevant;

(2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’” *United States v. Nixon*, 418 U.S. 683, 699–700 (1974). Few state or federal criminal cases address the protection from disclosure of a defendant’s school records under FERPA. In *United States v. Hunter*, 13 F. Supp. 2d 586 (D. Vt. 1998), a defendant charged with bankruptcy and mail fraud moved to quash the government’s subpoena duces tecum requiring the registrar of Yale University (defendant’s alma mater) to appear at trial and bring all records concerning the defendant. *Id.* at 594. The court reasoned that because the defendant had notified the government that he would offer in defense that he suffered from Attention Deficit Disorder, “his undergraduate records *may* be relevant to the government’s rebuttal case . . . .” *Id.* (emphasis added). Since the government satisfied the remaining *Nixon* factors of procurability, need for trial, and good faith, the court denied defendant’s motion to quash. *Id.* However, because the records were not yet relevant, the court ordered the records be deposited with the Court rather than with the United States Attorney’s Office. *Id.*

Most criminal cases that involve that raise FERPA non-disclosure issues concern the attempt of a criminal defendant to obtain the victim’s school records. For example, in *Croxton v. Commonwealth*, No. 0382-04-02, 2005 WL 950645, (Va. Ct. App. Apr. 26, 2005), appellant Croxton claimed that the trial court had erred in quashing his requests for a subpoena duces tecum, in which he requested the school records of the alleged minor victim of his various sexual offenses. *Id.* at \*3–4. Croxton alleged that without these records, he could not adequately

cross-examine the alleged victim at trial regarding past false accusations she might have made. *Id.* at \*4. The court of appeals found his motions were properly quashed, because the alleged incidents did not take place at school, nor was there evidence that the victim had spoken with any teachers or school employees regarding these other alleged false accusations. *Id.* at \*5 (“Croxtton’s speculative assertions therefore failed to establish a link between the school records and the charges against him”).

### **B. Options Available to a Criminal Defendant under FERPA**

Even if a criminal defendant can demonstrate that the Commonwealth’s acquisition of defendant’s school records violates FERPA, it is not clear what remedy is available to the defendant. The Supreme Court has held that a violation of FERPA’s non-disclosure provisions cannot form the basis for a suit under 42 U.S.C. § 1983, because FERPA creates no personal rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287–90 (2002); *cf. Bunch*, No. 04-2330, 2006 WL 2411428 at \*6 (“[T]his statute provides even less support for a privilege argument than the Virginia statute because it does not prohibit the disclosure of the covered information—it simply states that the federal government will not make funds available to responsible entities that fail to comply with the statute’s privacy provisions); *People v. Owens*, 727 N.Y.S.2d. 266, 267 n.1 (N.Y. Sup. Ct. 2001) (“While the defendant may have a claim to file with the overseers of federal educational funds regarding lack of notice [given to defendant before schools’ complied with government’s subpoena], any failure by the educational to give notice to Defendant does not effect the validity of the subpoena.”).

In sum, courts have cast doubt on whether any remedies are available to a party claiming a violation of FERPA’s non-disclosure provisions. A defendant should therefore file a motion for a protective order, *see, e.g., DeFeo v. McAboy*, 260 F.Supp.2d 790, (E.D. Mo. 2003) (“The

limitations FERPA places on educational institutions can be enforced by defendant by his motion for an order protecting him from the discovery sought by plaintiff.”), or a motion to quash the government’s subpoena, *e.g. Hunter*, 13 F. Supp. 2d. at 594 (denying the motion to quash but modifying the government’s subpoena in order to prevent disclosure to government until the information became relevant).

### **III. Virginia Code Ann. § 22.1-287**

This statute provides that “[n]o teacher, principal, or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process . . .” Few cases have examined this statute. In *Bunch*, the court determined that because the statute “does not limit disclosure in court-supervised discovery proceedings, it does not create an evidentiary privilege.” No. 04-2330, 71 Va. Cir. 358, 2006 WL 2411428 at \*5. The court emphasized, however, that the statute would be useful in determining the manner in which discovery of educational records should be conducted, such as through an in camera review of the records. *Id.* at \*12. In *Bunch*, the court’s in camera review revealed that the educational records subpoenaed by the defendant contained medical information in addition to relevant educational information about the plaintiff. *Id.* Because disclosure of plaintiff’s medical records posed a potential risk of harm that would outweigh the defendant’s need for the records, the court modified the subpoena to exclude those records from discovery. *Id.*

### **IV. VAFOIA**

VAFOIA provides that “scholastic records” are exempt from the Virginia Freedom of Information Act’s presumption that “all public records shall be available for inspection and copying upon request.” Va. Code Ann. §§ 2.2-3700, 2.2-3705.4. But while scholastic records

need not automatically be disclosed under VAFOIA, the custodian of the records has discretion to release the records. Va. Code Ann. § 2.2-3705.4. The parent or legal guardians of a student may prohibit by written request the publication of the student's records, "until the student reaches the age of 18 years." Va. Code Ann. § 2.2-3705.4(1). No such mechanism exists for students over the age of 18. *Id.*

The Virginia Freedom of Information Advisory Council releases advisory opinions on whether certain requested documents must, may, or may not be disclosed. One such opinion notes that FERPA's provisions are more restrictive than VAFOIA in the release of scholastic records, because under FERPA, "the decision as to whether to release education records is not left to the discretion of the public body. Any educational institution that receives public funding is prohibited from releasing any educational records without the written consent of the parents." Miaria J.K. Everett, Virginia Freedom of Information Council, Advisory Opinion issued to Mike Mather, AO-7-01 (Jan. 31, 2001).

The only protection an adult criminal defendant in Virginia might have against a VAFOIA request by the Commonwealth is that it is not clear from the text of the statute that government officials may make requests for documents under the statute. The stated purpose of the act is to ensure "the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted . . . ." Va. Code. Ann. § 2.2-3700. Given that exemptions are narrowly construed to promote public access, and the general public can access scholastic records under FOIA,<sup>3</sup> it is difficult to see how the Commonwealth would not be able to obtain the scholastic records of a criminal defendant anyway.

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<sup>3</sup> Leaving aside the issue of whether FERPA would permit disclosure.

## V. Conclusions

None of the statutes cited provide much protection for a criminal defendant seeking to prevent disclosure of his educational records. While FERPA generally requires that a party seeking discovery of educational records meet a higher burden before a court will order disclosure, that burden is almost always met. A capital defendant can point to *Hunter* to modify a subpoena duces tecum so that his educational records are only disclosed to the prosecution once they have become relevant, as deemed by the court. This would give the defendant a modicum of control over the discovery of his school records to the extent that the defense can limit which facts it puts in issue that might relate to information within the records. The relevant Virginia statutes provide virtually no protection to school records sought in a criminal prosecution. Both the Virginia Freedom of Information Act and § 22.1-487 contemplate the disclosure of educational records in court-supervised discovery.