POLICYALERT

July, 2015 Forethought Consulting, Inc.

POLICY UPDATE: 2015

STUDENT PERSONALLY IDENTIFIABLE INFORMATION SPECIAL UPDATE - PART 2

Recently, Forethought Consulting, Inc. sent a draft of the revised *Student Records* policy based on Act 837 of 2014, which enacted La. Rev. Stat. Ann. §17:3914 (hereafter the "Statute"), and Act 228 of 2015, which further amended the Statute. The Statute includes restrictive measures for the sharing or release of personally identifiable information contained in a student's educational records.

Most of the guidance provided in the June 2015 POLICY*Alert* newsletter remains intact. However, alteration of provisions of one subsection of the Statute has created considerable confusion. This newsletter concentrates mostly on interpretation of subsection H of La. Rev. Stat. Ann. §17:3914 as amended by Act 228.

Act 228's revisions to subsection H may appear to significantly alter the Statute's original language; however much remains open to interpretation. When originally enacted, the Statute permitted an employee of the school or school system, authorized by the Superintendent, to have access to a student's records *as may be necessary to perform his/her duties.* This part of the Statute was seemingly necessary, because otherwise subsection C(2) of La. Rev. Stat. Ann. §17:3914 took away such access rights for employees of the school system who maintain student records, unless permission of the parents was obtained.

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Since its original enactment, the Statute, particularly subsection H, was modified by Act 228 to read as follows:

> Nothing in this Section [refers to complete Statute] shall prohibit a person employed in a public school or other person authorized by the Superintendent … from being provided or having access to a student's records in accordance with a policy adopted by the School Board for such purpose.

The changes in the language of subsection H are far from clear. For instance, "Nothing in this Section shall prohibit" indicates that the other provisions of this Statute have no effect on subsection H, such that conceivably, **anyone**, or **any entity**, may be allowed to access a student's records without first obtaining parental permission, so long as the access is *authorized by the Superintendent*. Furthermore, Act 228 removed the original qualification that the allowed access be *necessary for the employee or other person to perform his or her duties*, implying that the Superintendent's discretion has been broadened by the revision.

Lastly, the revisions to subsection H allow access to education records by authorized persons, as long as such access is *in accordance with a policy adopted by the School Board*. This language seems to suggest unfettered access may be allowed to the extent that any adopted policy may serve as the purported basis for such access.

It must be remembered however, that while states may enact more restrictive provisions in certain aspects of federal law, the unaffected provisions of federal law still apply. So it is with Act 837 of 2014 and Act 228 of 2015. The *Family Educational Rights and Privacy Act* (FERPA) established standards for handling *personally identifiable information* in student records which are to be followed nationwide. Act 837 of 2014 and Act 228 of 2015 have now enacted more restrictive provisions which apply in Louisiana; nevertheless School Boards must still abide by other provisions of FERPA not affected by the Acts.

One directive included in FERPA that we feel **must** still be considered is that the school employee or other person or entity that may be authorized by the Superintendent to be provided or having access to a student's records, as now stated in the Statute, is required to first have a *legitimate educational interest* in those records. Therefore, it is reasonable to conclude that the Superintendent's grant of access, even after the revisions made by Act 228, must be based on a *legitimate educational interest*.

Another implication of this new statutory language is that, under a strict or conservative reading of the Statute, the person authorized by the Superintendent is limited to *being provided* or *accessing* the records of a student. Thus, being allowed access means disclosure of those records to only that person granted access. It does not mean that person can further disclose or release any information in the student records to another person. Since the word *access* is not defined in the newly revised Statute, its general meaning is that the person is "being admitted to view" a student's records. FERPA further restricts this viewing of records to only those records in which the person has *a legitimate educational interest.*

In fact, under the *General Education Provisions Act*, a part of the *Elementary and Secondary Education Amendments Act* of 1967, the original regulations that were implemented only used the terms *access* and *release* to "distinguish between *disclosure to a parent or student* and *disclosure to a third party*, respectively." It was not until the *Family Educational Rights and Privacy Act* of 1974 that the federal regulations were amended to include the word *disclosure*. *See,* Federal Register, Vol. 41, No. 118, p. 24663 (June, 1976).

If the intent of subsection H was to allow disclosure or release of information to a third party, it seems that the words *disclosure* or *release* would have been used. A close inspection of La. Rev. Stat. Ann. §17:3914 reveals that the term *disclosure* is only used three times, and only in subsection K, regarding post-secondary applications and financial aid. The term *release* appears only twice in the Statute, and only in subsection F, regarding private contracts. In contrast, the term *access* appears nineteen times throughout the

Statute. This appears to further support the interpretation that the Statute's original focus was to control access to personally identifiable information, and that the Louisiana Legislature seems to acknowledge a distinction between *access* and *disclosure/release*.

One additional caveat that comes into play when records are accessed is that the federal regulations that support FERPA require the School Board to keep a record of each request for access to **and** each disclosure of personally identifiable information from the education records of each student, with a few exceptions. *See*, 34 CFR §99.32. Information which must be maintained for each request or disclosure includes:

1. The parties who have requested or been granted authorization or received personally identifiable information from the education records; and,

2. The legitimate interest the parties had in requesting or obtaining the information.

Thus, we come to the reason for this updated revision of the policy *Student Records* being sent on the heels of another. The revised version contains language that addresses the implications discussed in this newsletter, as well as other provisions out of state or federal law and regulations which we deem important to include in the draft policy.

Of note in the revision of the policy *Student Records* is the removal of the section entitled *Directory Information*. This previously recommended section was based on *permissive* language of FERPA which allows School Boards to release, without parental consent, certain *personally identifiable information* as published by the School Board, giving the parents the right to opt out of such release. A strict reading of La. Rev. Stat. Ann. §17:3914, which does not address the use of directory information, seems to prohibit such use, because of the explicit limitations in the Statute for sharing and/or releasing *personally identifiable information.*

The ambiguous language in subsection H of Act 228 of 2015 is open to interpretation. Until the courts scrutinize the language of subsection H, this subsection will likely be subject to varying interpretations. Indeed, it may be suggested that a more liberal interpretation of this subsection allows the release of personally identifiable information as long as it is within the stated policy adopted by the School Board. We recommend a more conservative approach, however, so as not to expand the authority of the Superintendent through policy in a manner that makes the rest of La. Rev. Stat. Ann. §17:3914 superfluous. Traditional statute interpretation as applied by several courts require that the statute must be read so that **all** parts of the statute are given effect. Besides, there are clear criminal penalties associated with violations of the Statute. That is reason enough to take a conservative approach in revising the *Student Records* policy. Should the School Board desire to adopt a policy that takes a more liberal view of subsection H, we recommend that the School Board consult with its attorney prior to adopting any policy.

We regret not waiting until Act 228 of 2015 actually took effect to send you the revision to the *Student Records* policy. Our first attempt was motivated by a sense of urgency from Act 837 provisions which have been looming for almost a year, and an awareness that systems need to have these provisions in place for the fast-approaching school year.

In the works - Changes of several policies based on BESE Bulletin revisions; followed by the annual Legislative Update Series!