

Bringing Photos and Video into Focus under FERPA

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Given the increasing focus on school safety and security issues, there has been renewed attention surrounding what schools may and may not do with photographic and video information captured in school facilities and during student transportation.

Schools often grapple with how to properly navigate the circumstances under which information they create and maintain actually constitutes an "education record" subject to the provisions of the Family Educational Rights and Privacy Act (FERPA). These questions become even more complex when dealing with pictures and video containing images of one or several students. Last month the Family Policy Compliance Office of the United States Department of Education issued updated guidance to assist in determining when photos or video information is "directly related to" a specific student and thereby subject to privacy and access restrictions under FERPA.

Under FERPA, parents and eligible students have the right to inspect all education records that schools maintain for the student. An "eligible student" is a student who has turned 18 years of age or is attending an institution of postsecondary education at any age. FERPA defines education records to include information that is directly related to a student, and that is maintained by a school or a third party acting on behalf of the school. If education records contain information on more than one student, the parent or eligible student may inspect and review or "be informed of" only the specific information about that student. Parents or eligible students typically must provide informed consent prior to the release of records containing personally identifiable information to individuals or agencies outside specifically designated categories or when particular exceptions to the consent provision to FERPA apply.

Prior to the recent issuance of the ["FAQs on Photos and Videos under FERPA,"](#) the issue of surveillance video as an education record was addressed in the [December 7 "Letter to Wachter."](#) The new guidance does not deviate substantially from the information provided in the letter, but it does offer a more detailed and comprehensive analysis applicable to determining when a photo or video of a student is deemed an education record under FERPA. It also address what steps schools need to take in handling requests for such information.

Determining when a visual representation of a student is directly, rather than incidentally, related to a particular student is a very context-specific analysis. However, the FAQ offers the following factors to guide schools of when it is related:

- The educational agency or institution uses the photo or video for disciplinary action or other official purposes involving the student (including the victim of any such disciplinary incident).
- The photo or video contains a depiction of an activity that resulted in an educational agency or institution's use of the photo or video for official purposes or disciplinary action, pending or active, showing a student in violation of local,

state, or federal law, or that shows a student getting injured, attacked, victimized, ill, or having a health emergency.

- The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (such as ID photos, or a recording of a student presentation).
- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.

The guidance confirms that to be considered an education record, the photo or video must actually be maintained by the educational agency. It does not include media held by a third party not acting on behalf of the school. However, copies of photos or videos captured by a third party but maintained by the educational agency would constitute an educational record if directly related to specific students.

The guidance also provides a list of examples of the types of situations that may result in a visual representation of a student being deemed an education record subject to FERPA.

If you have any additional questions regarding this most recent FERPA guidance, or if we can provide any assistance as you review your current policies and practices, please do not hesitate to contact any of the attorneys in Barley Snyder's [Education Practice Group](#).