



# EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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## When Do Videos Become Student Records, and May School Administrators Release Them to Parents and/or Law Enforcement?

School division attorneys may receive these questions more than any others. For at least the last decade, the United States Department of Education (USDOE) has promised more detailed guidance on issues surrounding the maintenance and release of videos, such as building and bus surveillance. In April 2018, USDOE posted on its website a new "FAQs on Photos and Videos under FERPA," referencing the Family Educational Rights & Privacy Act, the federal student records law.

The FAQs answer seven questions that address recurring issues regarding often competing rights of various parties, including students, families and law enforcement agencies, for access to photos and videos. Below we summarize answers as offered by USDOE.

### 1. When is a photo or video of a student an education record under FERPA?

Subject to certain exceptions in the regulations, a photo or video is a student record when it is (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. The FERPA regulations do not define "directly related," and the USDOE FAQs document states that "determining if a visual representation of a student is directly related to a student (rather than just incidentally related to him or her) is often context-specific." School divisions should examine videos on a case-by-case basis, considering a number of factors:

(a) is the division using the images for disciplinary action (or other official purposes) involving the student, including the victim, (b) does the video/photo contain a depiction of an activity that resulted in its use by the division for disciplinary action (or other official purposes) show a student in violation of local, state or federal law, show a student getting injured, attacked, victimized, ill, or having a health emergency, (c) did the person/entity taking the photo/video intend to make a specific student its focus, or (d) does the video otherwise contain personally identifiable information contained in the student's record?

***"...determining if a visual representation of a student is directly related to a student (rather than just incidentally related to him or her) is often context-specific."***

*United States Department of Education, FAQs on Photos and Videos under FERPA*

If the student's image is incidental or captured only as part of the background, or if the student is shown participating in school activities that are open to the public and without a specific focus on the individual, the video/photo is not considered "directly related" to the student. In contrast, the following circumstances likely cause a video to be an education record: (a) a surveillance video showing two students fighting in a hallway, used as part of a disciplinary action; (b) a classroom video that shows a student having a seizure; (c) a close-up photo of two or three students playing basketball with a general view of student spectators in the background – the photo would be directly related to those captured in the close up, but not the others. (Note that many divisions designate photos or videos of students participating in public events as directory information and/or obtain consent from parents of such students to publicly disclose them.)

The FAQs document provides only a brief discussion of what constitutes "maintaining" a video/photo and only by providing examples. If a parent takes a picture of a student at a football game, it would not be considered a student record; however, if the parent's photo shows two students fighting at the game and provides a copy to the school, which in turn maintains it in the students' disciplinary records, then it would be considered a student record. Additionally, FERPA and its regulations specifically exclude from the definition of student records those created and maintained by law enforcement for law enforcement purposes. As with the parent photo referenced above, if law enforcement provides the school a copy of its photo/video for student disciplinary purposes, it may become a student record.

**2. Can the same recorded image be the education record of more than one student under FERPA?**

Yes.

**3. If a video is an education record for multiple students, can a parent of one of the students or the eligible student view the video?**

And,

**4. If a video is an education record for multiple students, can the parent of one of the students (or the eligible student) receive a copy of the video?**

Generally, the division must allow the parents of the students to *view* the video, but FERPA does not require that they receive a copy of the video. If the division reasonably can redact or segregate portions of the video directly related to other students, without destroying the meaning of the record, then it would be required to do so before providing the parents access. If such redaction cannot be reasonably accomplished, the parents have a right to access the entire record even though it also directly relates to other students. Although FERPA does not generally require divisions to provide copies of

education records to parents and eligible students, it would not violate FERPA for a division to non-consensually disclose copies of the records, which parents would have the right to inspect and view.

**5. If redaction or segregation of an education record of multiple students can be reasonably accomplished without destroying the meaning of the education record, can educational agencies and institutions charge parents or eligible students for the costs of the redaction or segregation?**

No. FERPA does not permit divisions to charge parents and eligible students for the right to inspect and review records. If the school elects to provide copies of records, it may charge for the costs required to copy them - but not to search and retrieve the records. USDOE treats the redaction process as akin to search and retrieval, for which no charge may be assessed.

**6. Does FERPA permit legal representatives of parents or eligible students to inspect and review videos with the parent or eligible student?**

Yes. FERPA does not *require* divisions to allow counsel to accompany the parent, but neither does it prohibit counsel from so doing.

**7. Does FERPA permit educational agencies and institutions to turn over videos to the police upon request or following an incident that may warrant police involvement?**

If the videos are truly education records (as opposed to being law enforcement records maintained by the law enforcement unit), divisions may not turn them over without having first either obtained the written consent of the parent/eligible student or determined that the conditions of an exception to the general consent requirement have been met, such as: for a health or safety emergency, or the law enforcement officer has presented the division with a judicial order or a lawfully issued subpoena.

**“Generally, the division must allow the parents of the students [for both of whom the video is a student record] to view the video, but FERPA does not require that they receive a copy of the video.”**