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FERPA, Custody, and Access to Education Records

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The Family Educational Rights and Privacy Act of 1974 (20 USC § 1232g), more commonly referred to as FERPA, is a federal law that protects the privacy of student education records. FERPA applies to all schools that receive public funding.

FERPA's terms contradict the commonly held belief that a non-custodial parent's right to a child's education record is defined only by the text of the stipulation of settlement or court order. FERPA guarantees a parent's right of access to, and control of, the education record related to the child. While custody or other residential arrangements for a child can determine where a child will live, and, often, the duties and responsibilities of the residential parent, a parent's designation as a non-custodial parent does not extinguish that parent's FERPA rights.

In the case of divorce or separation, a school district must provide access to the child's education record to both natural parents, custodial and non-custodial, unless the school has evidence of a court order or other legal document removing a parent's right to such information.

Rights Guaranteed by FERPA

"Parent" is defined by FERPA as a "natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." FERPA rights apply to either or both parents, unless the school has been provided with evidence that a court order, state statute, or legally binding divorce, separation or custody document specifically revokes a parent's FERPA rights. An "eligible student" is one who is 18 or older, or who attends a school beyond high school. At that juncture, the FERPA rights transfer from the parent to the child.

Generally speaking, there are several rights guaranteed to parents and eligible students under FERPA. First, a parent or eligible student has the right to inspect and review the student's education records. Second, a parent or eligible student has the right to request that the school correct records that the parent or eligible student believes to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student has the right to a hearing. If, after hearing, the school determines not to amend the record, the parent or eligible student has the right to place a statement on the record that sets forth their view of the contested information. Finally, a parent or eligible student generally has the right to require the school to receive written permission before any information is released from the student's education record. There are circumstances, however, where consent is not required. For example, the school does not need consent to transfer a student's records to a different school, or to comply with a court order or lawfully issued subpoena. Further, a school does not need consent to disclose "directory information," *ie*, a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, prior to releasing the directory information, the school

must notify the parent or eligible student of the directory information and provide a reasonable time for objection to the disclosure.

Practical Application of the Rules

In the context of custody litigation, parents are often confused and misinformed about their respective rights with respect to their child's education records. A review of FERPA will assist attorneys in clarifying the rights and obligations of both the custodial and non-custodial parent. An understanding of the statute will be helpful in allaying some of a non-custodial parent's fears of exclusion from a child's school life.

In general, FERPA guarantees *any parent*, whether custodial or non-custodial, the right to *request access* to their child's education record. Either parent, upon providing proper identification, may ask the school for the opportunity to review the child's record. Review of school records may be conducted by visiting the site where the record is maintained or by reviewing copies provided by the school. A school is not required to honor a parent's "standing request" for access to copies, however. Therefore, the best practice is to submit requests periodically. A school must respond to the written request within 45 days.

According to FERPA, however, a school is not required to take the initiative in keeping a parent informed of a child's school progress, whether the parents are divorced or not. The same applies even if one parent is living at a significant distance from the school. Moreover, in most circumstances, FERPA does not require a school to provide parents with copies of the child's school record. However, if a parent lives so far from the school that it is impractical to visit the school to review the record, then the school must make a copy of the record and send it to the parent upon the parent's request for access. The school may charge a reasonable copying fee for that service.

A school is not required to provide the non-custodial parent with the same general notices it provides to the custodial parent. General notices — lunch menus, PTA information, announcements of teacher conferences, notices of school pictures — are not "education records" under FERPA, and therefore a school is not obligated to provide them to both parents.

FERPA does not address whether a school must inform a non-custodial parent about teacher conferences. Consequently, there is no FERPA obligation for a school to arrange a conference to accommodate a non-custodial parent. If records of teacher conferences are maintained, however, both parents have the right to see those records.

The custodial parent cannot prevent the non-custodial parent from exercising his or her FERPA rights. FERPA rights are given to both parents and the school must presume that a parent has those rights unless it has evidence to the contrary. The school does *not* need the permission of the custodial parent before providing the non-custodial parent with access to the child's education record, nor is it required, in the absence of a court order, to honor the wishes of the custodial parent. (This point is illustrated in *Page v. Rotterdam-Mohonasen Central School District*, 109 Misc.2d 1049 (Sup. Ct., Albany Cty.1981), in which the father of a 5th grader brought an Article 78 proceeding against his son's school district and the school superintendent. The father sought an order allowing him to see his son's education

records and compelling school personnel to confer with him regarding his son's education. The parents were living apart under the terms of a separation agreement that gave physical custody of the child to the mother and visitation rights to the father. There was no court order affecting legal custody or addressing access to school records, but the mother had specifically requested in writing that the school not disclose the child's education records to the father. The school followed her wishes and would not discuss the boy's school record with his father, nor would they make it available for the father's review. The Supreme Court granted the father's petition, noting that FERPA specifically provides that government funds will be withheld from schools that deny "to *parents* the right to inspect and review the education records of their children. The regulations implementing the act (34 C.F.R. 99.11) allow inspection by either parent, without regard to custody, unless such access is barred by state law, court order or legally binding instrument." As there was no such bar in this case, the father was entitled to inspect and review his son's records.)

FERPA requires schools to provide annual notice to parents and eligible students of their rights with respect to a child's education records. The notice may be in a newspaper article, a PTA letter, a student handbook, or some other similar form. A school is considered to be compliant with FERPA if it notifies the custodial parent of his or her FERPA rights. The school need not so notify the non-custodial parent. Therefore, attorneys representing parties in custody litigation, particularly those representing the non-custodial parent, need to be aware of the rights that FERPA does and does not guarantee so that the stipulation of settlement or order of custody can be properly crafted.

For example, if the parties wish to ensure that the non-custodial parent will receive school notices, they can include a provision that the custodial parent will request that both parties receive such mailings. However, as it is apparent that FERPA does not require dual notification, it may be necessary to direct the custodial parent to promptly forward notices to the non-custodial parent.

On the other hand, if a history of violent, abusive, or excessively intrusive behavior by the non-custodial parent renders access to the school records inimical to the child's best interests, the custody stipulation or order should preclude such access. According to FERPA, the school must honor such a limitation. (An argument that state law should not be allowed to abrogate the federally granted rights of parents under FERPA failed in *Taylor v. Vermont Dept. of Education*, 313 F.3d 768 (2d Cir. 2002). The U.S. Court of Appeals for the Second Circuit held that the passage of FERPA did not federalize the law of domestic relations, and that state courts, therefore, retained their traditional authority to determine who may make educational decisions on behalf of a child.)

Conclusion

The bottom line is that practitioners and parents need not be concerned with including the oft-used clause that "the non-custodial parent shall have access to the child's education records" because FERPA requires such access, and the clause is superfluous. The relevant task for the attorney is to create language that addresses the specific circumstances of the family by supplementing the FERPA guarantees and supplanting them where necessary.