Student Services Legal Symposium – 2024-2025 School Year

Dear Colleague:

Welcome to F3's Student Services Legal Symposium! We recognize that student learning is at the heart of your work. From classroom teachers to principals, counselors, support staff and district administrators, everyone shares the goal of optimizing learning for all students. We know that students learn best when they feel safe, welcome, respected and comfortable in their learning environments.

We begin today's session with our Legal Update. This presentation highlights recent developments in education law—and why they matter to educators. We will cover hot topics such as First Amendment rights and cell phone bans; recent rules and guidance from the U.S. and California Departments of Education, including student-on-student bullying and Title IX; new cases; new legislation; and any late-developing news affecting students in California.

Next is "Fourth Amendment Searches and Seizures in the Schools." The Fourth Amendment to the U.S. Constitution guarantees the rights of individuals against unreasonable searches and seizures. This session examines, through legal analysis and practical pointers, the unique rules that govern how the Fourth Amendment applies to searches and seizures in public schools. We will cover the definition of "search and seizure"; the constitutional standard applied to school districts; searches of student notebooks, cars, lockers, and cell phones; off-campus searches; and much more.

We continue with "Student Records and Confidentiality." The legal obligation of school districts to maintain and preserve the confidentiality of student education records is established in both federal and state statutes and regulations. In this presentation, we will explore the requirements of both the federal Family Educational Rights and Privacy Act ("FERPA") and the California Education Code. Specifically, we will explain the definition of an "education record," the rights of parents to access their child's records, the right of parents to prevent nonconsensual disclosure of records to third parties, rules governing electronic records, and other key essentials of this important and often controversial topic..

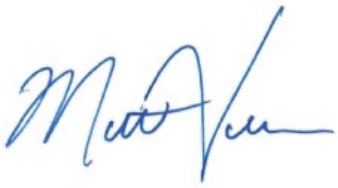
The day closes with "Targeted Questions and Answers," where F3 education attorneys field your inquiries on a variety of topics in an expanded Q&A session.

We designed this this Symposium to provide you with the most current legal information and case law analysis—combined with "practice pointers"—in selected important topic areas relevant to the provision of student services in California.

As always, we thank you for taking time from your demanding schedules to be with us. Thank you for your time, for your trust, and for your friendship. It is our sincere honor to work with so many dedicated and fierce advocates for children's education.

Respectfully,

Fagen Friedman & Fulfrost LLP



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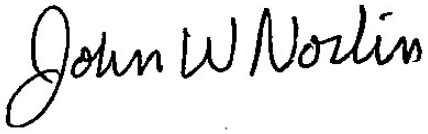
Co-Coordinator, F3 Student Services Legal Symposium



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STUDENT SERVICES LEGAL SYMPOSIUM
2024
AGENDA

Introductions and Opening Remarks 8:30 a.m. – 8:45 a.m.

Legal Update. **8:45 a.m. – 10:00 a.m.**
Our 2024 Legal Update highlights recent developments in education law—and why they matter to educators. We will cover hot topics such as First Amendment rights and cell phone bans; recent rules and guidance from the U.S. and California Departments of Education, including student-on-student bullying and Title IX; new cases; new legislation; and any late-developing news affecting students in California.

Break 10:00 a.m. – 10:10 a.m.

Fourth Amendment Search and Seizures in the Schools. **10:10 a.m. – 11:25 a.m.**
The Fourth Amendment to the U.S. Constitution guarantees the rights of individuals against unreasonable searches and seizures. This session examines, through legal analysis and practical pointers, the unique rules that govern how the Fourth Amendment applies to searches and seizures in public schools. We will cover the definition of "search and seizure"; the constitutional standard applied to school districts; searches of student notebooks, cars, lockers, and cell phones; off-campus searches; and much more.

Break 11:25 a.m. – 11:35 a.m.

<u>Student Records and Confidentiality</u>. **11:35 a.m. – 12:35 p.m.**

The legal obligation of school districts to maintain and preserve the confidentiality of student education records is established in both federal and state statutes and regulations. In this presentation, we will explore the requirements of both the federal Family Educational Rights and Privacy Act ("FERPA") and the California Education Code. Specifically, we will explain the definition of an "education record," the rights of parents to access their child's records, the right of parents to prevent nonconsensual disclosure of records to third parties, rules governing electronic records, and other key essentials of this important and often controversial topic.

<u>Targeted Questions and Answers</u>. **12:35 p.m. – 1:00 p.m.**

To wrap up the workshop, F3 attorneys field your inquiries on a variety of topics in a Q&A session.

Adjourn **1:00 p.m.**

STUDENT SERVICES LEGAL SYMPOSIUM
2024

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Legal Update

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What We'll Cover . . .

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  - Negligence/Immunity
- Recent Guidance from the U.S. Department of Education ("USDOE")
- Updated Guidance from the California Department of Education ("CDE")
- Recent Developments Affecting Students and Education
  - New California Laws and Proposed Legislation
  - New and Proposed Federal Regulations

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Current Emerging Issues

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Student First Amendment Rights in an Election Year

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Introduction and Overview

- Students generally have same First Amendment rights to freedom of speech as everyone else while they are at school and during school activities, but there are certain limitations
- Historically, courts will evaluate two aspects of student speech when deciding whether to impose limitations: content and location
- These two factors have been defined and interpreted differently by courts across the nation
- If speech takes place on campus or while student is subject to school supervision, schools are given more governing authority to regulate speech
- If speech takes place off campus, school's effort to regulate or punish speech is more limited and complex because school must first be shown to have jurisdiction over speech in question
- Social media has exacerbated this complexity by introducing new and unique forms of communication and expression

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Where Does Free Speech Come From?

- First Amendment to U.S. Constitution: "Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
- California Constitution, Art. I, § 2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

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Student Speech and the Supreme Court: Key Legal Precedents

- Tinker v. Des Moines Indep. Community School Dist. (1969): Protected non-disruptive political speech in schools
- Bethel School Dist. v. Fraser (1986): Allowed regulation of lewd, vulgar, or plainly offensive speech
- Hazelwood School Dist. v. Kuhlmeier (1988): Gave schools editorial control over school-sponsored speech
- Morse v. Frederick (2007): Permitted regulation of speech promoting illegal drug use

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Education Code § 48907

- Public school students have right to exercise freedom of speech and of the press, including:
  - Use of bulletin boards
  - Distribution of printed materials or petitions
  - Wearing of buttons, badges, and other insignia
  - Expression in publications (whether or not school-sponsored)
- Prohibits speech that:
  - Is obscene, libelous, or slanderous; OR
  - Creates a clear and present danger that unlawful acts will be committed on school premises, school regulations will be violated, or school operations will be disrupted

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Education Code § 48950

- School district operating one or more high schools, or charter school, shall not make or enforce any rule subjecting high school student to disciplinary sanctions solely on the basis of speech or other communication that, when engaged in outside of campus, is protected by U.S. or California Constitution
- Authorizes high school students to file civil lawsuit to obtain appropriate injunctive and declaratory relief
- Does not prohibit imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected
- Does not supersede, or otherwise limit or modify, provisions of Section 48907

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Student Discipline

- Education Code § 48900: Allows suspension or expulsion of students for bullying related to school activity or school attendance
  - Physical, verbal, written, or electronic acts directed at students
- Education Code § 48900.3: Can suspend or expel students in grades 4 to 12 if student has caused, attempted to cause, threatened to cause, or participated in act of, hate violence
- Education Code § 48900.4: Can suspend or expel student in grades 4 to 12 if student has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have actual and reasonably expected effect of:
  - Materially disrupting classwork; creating substantial disorder; invading rights of either school personnel or students by creating intimidating or hostile educational environment

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Regulating On-Campus Speech

U.S. Supreme Court has delineated three types of student speech:

- Pure Speech: Generally accepted and protected
- Plainly Offensive Speech: School has the right to censor and/or discipline students
- Speech Conducted During School-Sponsored Activity: Content and style may be regulated if reasonably related to educational concern

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Pure Speech (Tinker)

- Speech that is silent, passive expression of opinion, unaccompanied by any disorder or disturbance
  - Non-disruptive, political speech
  - Does not extend to plainly offensive speech
- Entitled to comprehensive protection under First Amendment regardless of whether it occurs in or out of school
- Schools are permitted to restrict student speech if:
  - Speech might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities; or alternatively,
  - If speech collides with the rights of other students to be secure and to be let alone

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Plainly Offensive Speech and School-Sponsored Speech

- Plainly Offensive Speech:
  - Expressions that are vulgar, lewd, obscene, or otherwise inappropriate for the school environment
  - Students can be censored and/or disciplined
- School-Sponsored Speech:
  - Expression that a school explicitly or implicitly endorses
  - E.g., content in school newspapers, yearbooks, theatrical productions, or other activities that are part of school's curriculum or programs
  - Subject to greater regulation by the school administration compared to student-initiated speech
  - Districts may regulate style and content of student speech provided their actions are reasonably related to educational concerns

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Examples of Regulated On-Campus Speech

- **Speech That Causes a Disruption**: Student leads a protest in the middle of a class, interrupting the lesson (Tinker and substantial disruption)
- **Lewd or Obscene Speech**: Student gives a speech filled with vulgar language during a school assembly (Fraser)
- **Speech Promoting Illegal Drug Use:** Student displays a banner promoting drug use at a school event (Frederick)
- **Bullying or Harassment:** Student repeatedly insults and threatens another student online or in person (Education Code § 48900)
- **Speech That Violates the Rights of Others:** Student spreads false rumors about teacher, damaging teacher's reputation
- **Hate Speech or Incitement to Violence:** Student delivers a speech advocating violence against a specific group

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Regulating Off-Campus Speech

- Ability of school district to regulate speech when student is not on campus requires more intricate legal analysis than circumstances when student is on campus
- Courts have held that strict tests of location of speech are not compatible with online methods of communication
- Generally, courts, including 9th Circuit, have applied two-part analysis to determine school's ability to regulate off-campus speech
- 1st step: Jurisdiction
  - Nexus test: Whether student's off-campus speech was tied closely enough to school to permit its regulation; and/or
  - Reasonably foreseeable test: Whether it was "reasonably foreseeable" that off-campus speech would reach school
- 2nd step: If school has jurisdiction, apply same standard as "pure speech" under Tinker (regulate if material/substantial disruption)

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Examples of Regulated Off-Campus Speech

- **Threats of Violence:** Speech that includes threats of violence other students, staff, or school
- **Bullying or Harassment:** Cyberbullying, harassment, or speech targeting specific individuals in way that could affect their ability to feel safe or participate in school activities
- **Substantial Disruption:** Speech that leads to, or is expected to lead to, a substantial disruption of school activities, including protests, or other activities that interfere with school operations
- **Cheating or Academic Dishonesty:** Speech related to academic dishonesty, such as sharing test answers or encouraging cheating, even if done off-campus
- **Speech that Violates School Policies:** Any off-campus speech that violates specific school policies (e.g., promoting drug use, hate speech, etc.) and has clear connection to school environment
- **Defamation or False Information:** Spreading false information or defamatory statements about school staff or students that causes harm to their reputation or school functioning
- **Speech Encouraging Illegal Activities:** Off-campus speech that encourages illegal activities, such as drug use or vandalism, and can potentially influence students on campus
- **Hate Speech:** Speech that involves hate speech targeting specific groups, especially when it can lead to a hostile environment or disrupt the school community

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Hot Topic: School (Student) Newspapers

Ed. Code, § 48907

- "Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section [discussing freedom of speech."
- "There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section."

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Key Points on School Newspapers

- **Not a Public Forum:** Generally, a school newspaper is not considered a public forum
- **Administrative Control:** Administration can edit as long as edits are reasonably related to legitimate pedagogical concerns
- **Examples of Legitimate Edits:** Sensitive topics: discussion of topics like birth control and sexual activity may be removed
- **Expansion of Student Rights/Policy and Practice:** Student rights may be expanded if school authorities, by policy or practice, have opened school facilities for indiscriminate use by the general public or student organizations
- **Review Policies:** Each site should review its policies and practices concerning limit to which students may speak

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Hot Topic: Student Demonstrations

- Evaluating nature of speech involved in any demonstration is essential in to determining whether it needs to be censored
  - If it is "pure speech" it will generally be found to be acceptable
  - If demonstration involves "plainly offensive" speech, school has the right to censor and/or discipline students
  - If demonstration is conducted during school-sponsored activity, its content and style may be regulated if reasonably related to educational concerns.
- With respect to off-campus demonstrations, remember to first determine if school has jurisdiction ("nexus" test or "reasonably foreseeable test)
- Then, if the school has jurisdiction, apply same standard as "pure speech" under Tinker (regulate if the speech is a material/substantial disruption).

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Key Points on Student Demonstrations

- **Equal Expression:** Ensure that all perspectives are allowed to be expressed; avoid permitting the expression of one viewpoint while prohibiting another to prevent potential issues
- **Faculty Alignment:** Get all faculty on same page when enforcing rules regarding demonstrations
- **Mitigating Disruptions:** Emphasize to students that class time is limited and demonstrations may affect school operations; remind students that administrative actions such as suspensions or expulsions can occur if there are excessive disruptions
- **Communication:** Students should be reminded that while they are not prohibited from demonstrating, administrative actions such as suspensions or expulsions can occur if excessive disruptions to school operations happen

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Scenarios: What Would You Do If . . . ?

- Student wears a Pro-Palestinian or Pro-Israeli pin as a silent form of advocacy amidst the Palestinian-Israeli conflict and causes no additional disruptions
- Student gives speech during school assembly that contains numerous sexual metaphors
- Students on a school newspaper publish article referring to birth control and sexual activity
- Students hold up banner across the street of a school reading "Weed Tokes 4 Jesus"
- Student who doesn't make soccer team goes on private Instagram Live and posts a video where student holds up middle finger and says "F*** school f*** soccer f*** Coach Johnson f*** everything"
- Student creates private Instagram account and invites classmates to follow; on this account student posts racist/derogatory comments about other students and teachers

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Cell Phone Restrictions

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Current Law

Education Code Section 48901.7

- District may adopt policy to limit or prohibit use by its students of smartphones while students are at schoolsite or while they are under supervision and control of employee or employees of district
- However, student cannot be prohibited from possessing or using a smartphone under any of the following circumstances:
  - In case of emergency, or in response to perceived threat of danger
  - When teacher or administrator grants permission to a student to possess or use a smartphone, subject to any reasonable limitation imposed by that teacher or administrator
  - When licensed physician and surgeon determines that possession or use of a smartphone is necessary for the health or well-being of student; or
  - When possession or use of smartphone is required in student's IEP

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Phone-Free Schools Act

Amending Education Code Section 48901.7

- Assembly Bill 3216 signed into law by Governor Newson on September 23, 2024
- Not later than July 1, 2026, governing body of school district must adopt policy (to be updated every five years) to limit or prohibit use by its students of smartphones while students are at a schoolsite or while they are under supervision and control of employee or employees of district
- Development of policies must involve significant stakeholder participation in order to ensure that policies are responsive to the unique needs and desires of students, parents, and educators in each community
- Policy may also include enforcement mechanisms that limit access to smartphones
- Same exceptions under current law allowing student use of the smartphone apply
- Law explicitly does not authorize monitoring, collecting, or otherwise accessing any information related to student's online activities

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Practical Implications

- Following passage of the Phone-Free Schools Act, districts must put in place an actual policy, which means they need to plan now for mechanisms of how they want to limit or prohibit cell phone use
- Will there be court challenges asserting that law attempts to regulate what students can say (and when they can say it) on their smartphones in violation of First Amendment? Will court's apply Tinker's material and substantial disruption test as starting point for student speech analysis?
- Will there be issues related to conflicts between those students who are able to access cell phones (under one of the exceptions) and other students who are denied access

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Practical Implications (cont'd)

- Districts must decide how much autonomy to give schools to make their own cellphone policies
- Options might include using cellphone pouches that remained locked until a student opens them using a magnetic device; phones also could be collected at the start of a class or placed in cellphone lockers; technology also could be deployed to make cellphones unusable for phoning, texting and internet access even if the devices remains in student's possession
- Also, students will be allowed to access to phones during emergencies, but new law does not define this term
- It is up to school districts to decide what constitutes an emergency and how phones can be used in such an event

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Recent Judicial Decisions

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Title IX Discrimination

Myles v. West Contra Costa Unified School District

Facts:

- High-school Student with undisclosed disability reported two incidents of sexual harassment and assault by male student
- During meeting between assistant principal and Parents, after incidents, assistant principal informed Parents that police department was already investigating prior students' reports that male student sexually assaulted them
- Student claimed that she suffered severe emotional distress, was subject to bullying by other students in retaliation for reporting male student, and that her grades "dropped significantly"
- Student sued asserting federal civil rights claims, discrimination claims, and California state law claims

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Title IX Discrimination

Myles v. West Contra Costa Unified School District

Decision:

- Court determined that Student asserted sufficient allegations to state claim under Title IX
  - Sexual assault and harassment occurred at school and totality of alleged sexual harassment was sufficiently severe, pervasive, and offensive to undermine Student's educational experience
  - Facts alleged in the complaint were sufficient to show Student had been denied equal access to school's educational resources and learning opportunities
  - Based on Student's allegations that, at minimum, District was "aware of pervasive sexual harassment of female students on the . . . campus"
  - Pre-incident allegations were sufficient to plausibly show deliberate indifference
- Court dismissed Section 504 disability discrimination claims as well as claims against individual District staff

(Myles v. West Contra Costa Unified School Dist. (N.D. Cal. 2024) 124 LRP 10384)

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Title IX Discrimination

Why Does This Case Matter to Us?

- School that receives federal funding can be liable for individual claim of student-on-student sex-based harassment under Title IX, but only if:
  - School had substantial control over harasser and context of harassment
  - Plaintiff suffered harassment so severe that it deprived plaintiff of access to educational opportunities or benefits
  - School official who had authority to address issue and institute corrective measures had actual knowledge of the harassment; and
  - School acted with deliberate indifference to harassment such that indifference subjected plaintiff to harassment

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Negligence/Immunity

Elie v. Los Angeles Unified School District

Facts:

- In February 2019, high-school acted out during Spanish class
- Teacher called Parent, who said he would deal with Student when he came home
- Student later appeared distressed at school and spoke to psychologist
- Student then left school, followed by psychologist and school police
- After watching Student enter courtyard of his apartment complex, police returned to campus and informed psychologist that Student had arrived at home
- Later that evening, Student left home and committed suicide by jumping from roof of nearby building
- Parent sued District, school psychologist, principal and assistant principal

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Negligence/Immunity

Elie v. Los Angeles Unified School District

Decision:

- Appellate court dismissed claim
- Education Code section 44808 immunizes public schools and employees from liability for student safety off school grounds, unless they fail to exercise reasonable care while transporting student to or from school; while student is off campus on a school-sponsored activity; or (3) when school specifically assumes responsibility or liability for the student
- No liability under negligence theory because duty to prevent suicide arises only where defendant has physical custody and substantial control over student
- Parent did not contend that District staff engaged in any outrageous conduct

(Elie v. Los Angeles Unified School Dist. (Cal. Ct. App. 2024, unpublished) Case No. B328539)

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Negligence/Immunity

Why Does This Case Matter to Us?

- Concerning duty to prevent suicide, court in this case explained that requirement of "custody and control" is consistent with rule that special relationship doctrine can impose no greater duty of protection on school districts for off-school-grounds hazards than what legislature has authorized by statute
- Legislature has limited school district liability for student safety to circumstances listed in Education Code section 44808 (i.e., during transport, school-sponsored activities, while the student is under the direct supervision of school employees)
- Duty to supervise pupils who are not on school property is not covered by section 44808

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Recent Guidance from the U.S. Department of Education ("USDOE")

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Absenteeism

Letter to Chief State School Officers

- USDOE urged SEA and districts to address issue of chronic absenteeism in public schools
- As of 2021-22 school year, over 14 million students nationwide were chronically absent, missing valuable instructional time and posing serious implications for students' overall academic success and wellbeing
- Although chronic absence derives from multiple, often interconnected factors, research points to student disengagement, lack of access to student and family supports, and student and family health challenges as significant drivers
- USDOE urged identifying schools for improvement under ESEA based on absentee rates
- Also urged accessing USDOE resources and training to promote school attendance, as well as accessing remaining COVID-relief funds to implement evidence-based strategies for improving regular school attendance

(Letter to Chief State School Officers (USDOE 2024), 124 LRP 9401)

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Updated Guidance from the California Department of Education ("CDE")

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Bullying
Frequently Asked Questions

Background

- With the 2018 passage of Assembly Bill 2291, all districts are required to adopt procedures for preventing acts of bullying and cyberbullying
- Subsequently, to assist districts in meeting this requirement, CDE provided guidance to state school districts in addressing student-on-student bullying by means of Frequently Asked Questions ("FAQ") document updated in August 2023
- California School Boards Association ("CSBA") also issued a Research and Policy Governance Brief in October 2023, "School Safety: Bullying and Cyberbullying," to assist districts in "building safe and inclusive schools so all students can learn and thrive"

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Bullying
Frequently Asked Questions

- In its updated guidance, CDE explained that bullying is exposing a person to abusive actions repeatedly over time
- Bullying becomes a concern when hurtful or aggressive behavior toward an individual or group appears to be unprovoked, intentional, and (usually) repeated
- "Bullying is a form of violence. It involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful"
- Bullying may be physical (hitting, kicking, spitting, pushing), verbal (taunting, malicious teasing, name calling, threatening), or emotional (spreading rumors, manipulating social relationships, extorting, or intimidating)
- Bullying is also one or more acts by student(s) directed against another student that constitutes sexual harassment, hate violence, or severe or pervasive intentional harassment, threats, or intimidation that is disruptive, causes disorder, and invades the rights of others by creating an intimidating or hostile educational environment

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Bullying
Frequently Asked Questions (cont'd)

- CDE: Bullying actions may be direct or indirect
- Direct bullying or identifiable bullying actions may include: "hitting, tripping, shoving, pinching, and excessive tickling; verbal threats, name calling, racial slurs, and insults; demanding money, property, or some service to be performed; and/or stabbing, choking, burning, and shooting"
- Indirect bullying may be more difficult to detect and may include: "rejecting, excluding, or isolating target(s); humiliating target(s) in front of friends; manipulating friends and relationships; sending hurtful or threatening e-mail or writing notes; blackmailing, terrorizing, or posing dangerous dares; and/or developing a website site devoted to taunting, ranking, or degrading a target and inviting others to join in posting humiliating notes or messages"

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Bullying
Frequently Asked Questions (cont'd)

- CDE: Interventions to address bullying should take place at different levels
- Schoolwide intervention strategies include implementing schoolwide antibullying policy, survey of bullying problems at each school, increased supervision, schoolwide assemblies, and teacher in-service training to raise the awareness of children and school staff
- Classroom intervention strategies include establishing classroom rules against bullying, holding regular class meetings to discuss bullying at school, and scheduling meetings with all parents
- Individual intervention strategies consist of having individual discussions with each student identified as either a bully or a target

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Bullying
Frequently Asked Questions (cont'd)

- CDE provided list of other practices for schools to follow that include:
  - Take immediate action when bullying is observed
  - Respond in a timely manner to all reports of bullying
  - Provide protection for students who are bullied
  - Establish support programs and resources for both the target and bully
  - Develop policies that define bullying and provide appropriate responses to the problem
  - Apply school rules, policies, and sanctions fairly and consistently
  - Establish effective system for reporting bullying
  - Teach parents to understand bullying and the consequences
  - Partner with law enforcement and mental health agencies to identify and address cases of serious bullying
  - Promote norm for bully-free school throughout the entire school community
  - Engage students to help promote the norm of a bully-free school.

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Recent Legislative Developments Affecting Students and Education

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New California Laws

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New California Laws

AB 2268—English Learners

- Expressly states that requirement for students in kindergarten to be assessed in English listening and speaking does not include students in transitional kindergarten

AB 2711—Suspensions and Expulsions: Voluntary Disclosures

- Prohibits suspension of student for controlled substances, alcohol, intoxicants or tobacco products if student voluntarily discloses, in order to seek help through services or supports, their use of a controlled substance, alcohol, intoxicants of any kind, or a tobacco product, solely for that disclosure

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New California Laws

SB 483—Restraints

- Prohibits use of prone restraint, defined to include prone containment, by educational provider
- Prohibits use of prone restraint, including prone containment, on student with disabilities in a public school program

SB 691—Truancy Notifications

- As of July 1, 2025, updates/revises truancy notification requirements, including requirement to advise that mental health and supportive services may be available to student/family

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New and Proposed Federal Regulations

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New and Proposed Federal Regulations

Recent Development Concerning 2024 Title IX Regulations

- On April 19, 2024, the USDOE released revised regulations under Title IX, which prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance
- 2024 amendment regulations marked a shift in policy and approach from the previous regulations issued in 2020
- New rules broadened definition of discrimination based on sex to include not only discrimination based on sex stereotypes, sex characteristics, and pregnancy or related conditions, but also sexual orientation and gender identity
- Term "sex-based harassment" also has been defined more broadly to include harassment based on sexual orientation and gender identity

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New and Proposed Federal Regulations

Recent Development Concerning 2024 Title IX Regulations (cont'd)

- Regulations also simplified components of the grievance process each recipient must establish to address complaints of sex discrimination, expanded privacy protections for students and others involved in sex discrimination claims and investigations, and expanded the duties of schools' Title IX Coordinator
- Federal courts have barred USDOE from enforcing the 2024 Title IX regulations in 26 states (not including California) or in any schools attended by students with ties to Young America's Foundation, Female Athletes United and Moms for Liberty (includes approximately 100 K-12 schools in California)
- Those lawsuits challenged three specific Title IX regulations that expanded protections for students on basis of gender identity
- Office for Civil Rights has advised districts and schools in the affected states to follow 2020 Title IX regulations in the meantime

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New and Proposed Federal Regulations

Recent Development Concerning 2024 Title IX Regulations (cont'd)

- In unsigned order in late August 2024, U.S. Supreme Court denied request by USDOE to narrow two District Court rulings (State of Louisiana v. U.S. Department of Education and State of Tennessee v. Cardona) so that they would only prevent enforcement of certain challenged regulations
- Supreme Court reasoned that a complete ban on enforcement was necessary because the challenged provisions were "intertwined with and affect[ed] many other provisions of the new rule"
- This means that USDOE cannot enforce any of the 2024 amended Title IX regulations in affected states while its appeals of the two District Court decisions are pending

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New and Proposed Federal Regulations

Section 504

- Long-anticipated update to federal regulations implementing Section 504 of the Rehabilitation Act now has been delayed until at least November 2024
- Proposed new regulations were originally supposed to be released in August 2023, and were subsequently pushed back to November 2023
- USDOE will propose to update regulations to include advancing equity for students with disabilities, addressing persistent barriers to access, updating outdated language, and aligning current regulations with ADA and ADA Amendments Act

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New and Proposed Federal Regulations

FERPA and PPRA

- USDOE anticipates releasing amendments to FERPA regulations in November 2024, after previously announcing proposed changes would be issued in early 2024
- USDOE will propose to amend FERPA to update and improve current regulations by addressing outstanding policy issues, such as refining the definition of "education records" and clarifying provisions regarding disclosures to comply with a judicial order or subpoena
- Proposed regulations will also address statutory amendments to FERPA to reflect change in the name of the office designated to administer FERPA (now Student Privacy Policy Office), as well as to make changes related to the enforcement responsibilities
- By May 2025, the USDOE will also propose to amend the Protection of Pupil Rights Amendment ("PPRA") to update, clarify, and improve current regulations by addressing outstanding policy issues.

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Note: Enforcement of Federal Regulations

- Case involving fishing industry could impact school law with regard to interpretations of federal regulations by courts
- On June 28 20024, U.S. Supreme Court ruling in Loper Bright Enterprises v. Raimondo overruled Court's prior holding in Chevron v. Natural Resources Defense Council Inc. 467 U.S. 837 (1984), which held that federal judges must defer to federal regulations in certain prescribed circumstances
- Under Loper Bright Enterprises, decisions about whether to defer to federal regulations will now be left to individual judges
- This means that judges, including those hearing education cases, now have discretion to decide whether they will follow federal regulations or stick to plain language of statute
- Biggest impact could be Section 504, since only regulations and not statute establish FAPE standard and requirements for Section 504 plans

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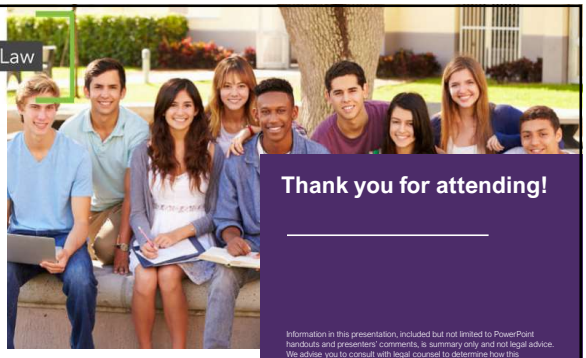

Thank you for attending!

Information in this presentation, included but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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Business
Communications & Media Relations
Education Technology
Employment Law
Facilities & Construction
Governance & Leadership
Government Affairs & Public Policy
Interscholastic Activities
Investigations

Labor Relations & Negotiations
Litigation
Next Level Client Services
Real Estate & Property
Special Education
Student Rights & Discipline
Title IX
Virtual Learning

Inland Empire
Fresno
Los Angeles
Midwest
Oakland
Pacific Northwest
Sacramento
San Diego

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Legal Update

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LEGAL UPDATE

Introduction. Our 2024 Legal Update highlights recent developments in education law—and why they matter to educators. We will cover hot topics such as First Amendment rights and cell phone bans; recent rules and guidance from the U.S. and California Departments of Education, including student-on-student bullying and Title IX; new cases; new and pending legislation; and any late-developing news affecting students in California.

- **Current Emerging Issues (Student First Amendment Rights in an Election Year; Cell Phone Restrictions).**
- **Recent Judicial Decisions (Title IX Discrimination; Negligence/Immunity).**
- **Recent Guidance from the U.S. Department of Education ("USDOE") (Absenteeism).**
- **Updated Guidance from the California Department of Education ("CDE") (Bullying).**
- **Recent Developments Affecting Students and Education (New California Laws; New and Proposed Federal Regulations).**

I. Current Emerging Issues.

A. Student First Amendment Rights in an Election Year. While public "school" students generally have the same First Amendment rights to freedom of speech as everyone else when they are at school and during school activities, there are certain limitations. Historically, there are two aspects by which student speech is evaluated by courts when deciding whether to impose limitations: content and location. These two factors have been defined and interpreted differently by various courts across the nation. Typically, the content of student speech and expression is protected provided that it does not cause a substantial disruption at school or interfere

with the rights of others. But courts have held that schools can also prohibit speech that is lewd, vulgar, offensive or even "inappropriate." If speech takes place on campus or while a student is subject to school supervision, schools are given more governing authority to regulate the speech. If the speech, however, takes place off campus, a school's effort to regulate or discipline a student for such speech is more limited and complex because the school must be shown to have jurisdiction over the speech in question. Social media has exacerbated this complexity for the courts by introducing new and unique forms of communication and expression.

1. Overview of Parameters of Free Speech in Schools.

(a) First Amendment to U.S. Constitution. "Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(b) California Constitution, Article I, Section 2. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

(c) Student Speech and the Supreme Court: Key Legal Precedents.

(i) Tinker v. Des Moines Independent Community School District (1969): Protected non-disruptive political speech in schools.

(ii) Bethel School District No. 403 v. Fraser (1986): Allowed regulation of lewd, vulgar, or plainly offensive speech.

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(iii) Hazelwood School District v. Kuhlmeier (1988): Gave schools editorial control over school-sponsored speech.

(iv) Morse v. Frederick (2007): Permitted regulation of speech promoting illegal drug use.

(d) California Education Code.

(i) Education Code Section 48907. This section of the Education Code provides that "[p]upils of the public schools . . . have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities. . . ." Section 48907 contains two clear exceptions to its broad pronouncement. First, it provides that speech must be prohibited when it is obscene, libelous or slanderous. Second, it allows districts to prohibit materials that "so incite[] pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." (Ed. Code, § 48907.)

(ii) Education Code Section 48950. This section of the Education Code, which applies only to high schools and secondary schools, provides that districts may not make or enforce a rule subjecting a high school student to disciplinary sanctions solely on the basis of conduct that is

speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the U.S. Constitution or Section 2 of Article I of the California Constitution. A student who is enrolled in a school at the time that the school has made or enforced a rule in violation of the above may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. This section of the Education Code, however, does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected. Nor does it supersede, or otherwise limit or modify, the provisions of Section 48907, described above. In enacting section 48950, the legislature "finds and declares that free speech rights are subject to reasonable time, place, and manner regulations." (Educ. Code § 48950.)

(iii) Education Code Provisions Regarding Student Discipline. Education Code section 48900 allows suspension or expulsion of students for bullying related to school activity or school attendance, specifically physical, verbal, written, or electronic acts directed at students. Education Code section 48900.3 allows schools to suspend or expel a student in grades 4 to 12 if the student has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence. Education Code section 48900.4 allows for the suspension or expulsion of a student in grades 4 to 12 if the student has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or other students, that is sufficiently severe or pervasive to

have actual and reasonably expected effect of: materially disrupting classwork; creating substantial disorder; and invading rights of either school personnel or students by creating intimidating or hostile educational environment.

2. **Regulating On-Campus Speech.** The U.S. Supreme Court has delineated three categories of student speech, providing a separate legal standard for each category.

(a) **"Pure" Speech.** Under Tinker, speech that is characterized as "pure speech" is a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. This type of speech is entitled to comprehensive protection under the First Amendment regardless of whether it occurs in or out of school.

(b) **Speech Deemed "Plainly Offensive."** Pursuant to Fraser, courts must balance an individual's freedom to advocate unpopular and controversial views in schools against society's interest in teaching students the boundaries of socially appropriate behavior.

(c) **School-Sponsored Speech.** Under Kuhlmeier, districts may regulate the style and content of student speech in such activities (e.g., content in school newspapers, yearbooks, theatrical productions, or other activities that are part of the school's curriculum or programs) as long as their actions are reasonably related to educational concerns. This type of speech is subject to greater regulation by the school administration compared to student-initiated speech.

(d) **Examples of Regulated On-Campus Speech.** These include:

- **Speech That Causes a Disruption**: A student leads a protest in the middle of a class, interrupting the lesson (Tinker and substantial disruption).

- **Lewd or Obscene Speech**: A student gives a speech filled with vulgar language during a school assembly (Fraser).

- **Speech Promoting Illegal Drug Use:** A student displays a banner reading "Bong Hits 4 Jesus" at a school event (Frederick).

- **Bullying or Harassment:** A student repeatedly insults and threatens another student online or in person (Education Code § 48900).

- **Speech That Violates the Rights of Others:** A student spreads false rumors about teacher(s), damaging their reputation.

- **Hate Speech or Incitement to Violence:** A student delivers a speech advocating violence against a specific group.

3. **Regulating Off-Campus Speech.** The ability of a school district to regulate speech when a student is not on campus requires a more intricate legal analysis than circumstances when the student is on campus. Courts have held that strict tests of the location of the speech are not compatible with the online methods of communication in our digital age. In response to our internet world, where today's students are particularly comfortable residents, the courts have developed updated approaches to analyzing school speech issues. Generally, most courts, including the Ninth Circuit, have applied a two-part analysis to determine a school's ability to regulate off-campus speech. The first component requires a

finding of whether the school has jurisdiction over the speech. To determine this, courts have applied the "nexus" test or the "reasonably foreseeable" test, or a combination of both. (Wynar v. Douglas County School Dist. (9th Cir. 2013) 728 F.3d 1062, 113 LRP 35121.) Under the "nexus" test, the school has jurisdiction over the speech if the student's off-campus speech is tied closely enough to the school to permit its regulation. Under the "reasonably foreseeable" test, courts will find the school has jurisdiction over the speech if it is "reasonably foreseeable" that the off-campus speech will reach the school. Under the second component of the analysis, if it is determined that the school has jurisdiction over the speech, courts then generally apply the "pure speech" rationale under Tinker. That is, the school may regulate the off-campus speech if the speech causes, or is reasonably likely to cause, a material and substantial disruption of school activities.

Courts are sympathetic to the fact that the internet is now the new "meeting space" for students—and the acts and discourse that occur there will impact the acts and discourse of the days to follow in school. Courts also are aware that, with the advent and growth of social media, districts will face many questions about when it is appropriate to suspend (or even expel) students for their actions in cyberspace.

(a) Examples of Regulated Off-Campus Speech. These include:

- **Threats of Violence:** Speech that includes threats of violence or harm towards other students, staff, or the school, especially if it creates a sense of fear or disruption within the school community.

- **Bullying or Harassment:** Cyberbullying, harassment, or speech targeting specific

individuals in a way that could affect their ability to feel safe or participate in school activities.

- **Substantial Disruption:** Speech that leads to, or is reasonably expected to lead to, a substantial disruption of school activities. This includes actions like organizing walkouts, protests, or other activities that interfere with school operations.

- **Cheating or Academic Dishonesty:** Speech related to academic dishonesty, such as sharing test answers or encouraging cheating, even if done off-campus.

- **Speech that Violates School Policies:** Any off-campus speech that violates specific school policies (e.g., promoting drug use, hate speech, etc.) and has a clear connection to the school environment can be regulated.

- **Defamation or False Information:** Spreading false information or defamatory statements about school staff or students that causes harm to their reputation or school functioning.

- **Speech Encouraging Illegal Activities:** Off-campus speech that encourages illegal activities, such as drug use or vandalism, and can potentially influence students on campus.

- **Hate Speech:** Speech that involves hate speech targeting specific groups, especially when it can lead to a hostile environment or disrupt the school community.

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4. **Hot Topic: School (Student) Newspapers.** Education Code section 48907 provides as follows: "Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section [discussing freedom of speech] . . . There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section."

   With respect to regulating the content of school newspapers, keep in mind the following key points:

   (a) **Not a Public Forum:** Generally, a school newspaper is not considered a public forum.

   (b) **Administrative Control:** Administration can edit as long as edits are reasonably related to legitimate pedagogical concerns.

   (c) **Examples of Legitimate Edits:** Sensitive topics: discussion of topics like birth control and sexual activity may be removed.

   (d) **Expansion of Student Rights/Policy and Practice:** Student rights may be expanded if school authorities, by policy or practice, have opened school facilities for indiscriminate use by the general public or student organizations.

(e) **Review Policies:** Each site should review its policies and practices concerning the limit to which students may speak.

5. **Hot Topic: Student Demonstrations.** Evaluating the nature of the speech involved in any demonstration is essential in determining whether it needs to be censored. If it is "pure speech," it will generally be found to be acceptable. If the demonstration involves "plainly offensive" speech, the school has the right to censor and/or discipline students. If the speech is conducted during a school-sponsored activity, its content and style may be regulated if reasonably related to educational concerns.

With respect to off-campus demonstrations, first determine if the school has jurisdiction ("nexus" test or "reasonably foreseeable test). Then, if the school has jurisdiction, apply same standard as "pure speech" under Tinker (regulate if the speech is a material/substantial disruption).

With respect to regulating student demonstrations, keep in mind the following key points:

(a) **Equal Expression:** Ensure that all perspectives are allowed to be expressed. Avoid permitting the expression of one viewpoint while prohibiting another to prevent potential issues.

(b) **Faculty Alignment:** Get all faculty on the same page when enforcing rules regarding demonstrations.

(c) **Mitigating Disruptions:** Emphasize to students that class time is limited and demonstrations may affect school operations. Remind students that administrative actions such as suspensions or expulsions can occur if there are excessive disruptions.

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(d) **<u>Communication</u>:** Students should be reminded that while they are not prohibited from demonstrating, administrative actions such as suspensions or expulsions can occur if excessive disruptions to school operations happen.

6. **<u>Scenarios: What Would You Do If . . . ?</u>**

- Student wears a Pro-Palestinian or Pro-Israeli pin as a silent form of advocacy amidst the Palestinian-Israeli conflict and causes no additional disruptions.

- Student gives speech during assembly that contains numerous sexual metaphors.

- Students on a school newspaper publish article referring to birth control and sexual activity.

- Students hold up banner across the street of a school reading “Weed Tokes 4 Jesus.”

- Student who does not make soccer team goes on private Instagram Live and posts a video where she holds her middle finger up and says “F*** school f*** soccer f*** Coach Johnson f*** everything.”

- Student creates private Instagram account and invites classmates to follow. On this account he posts racist/derogatory comments about students and teachers.

B. **<u>Cell Phone Restrictions</u>.**

1. **<u>Current Law</u>.**

(a) **Education Code Section 48901.7.** Education Code section 48901.7, which became effective in 2020, provides that "the governing body of a school district, a county office of education, or a charter school may adopt a policy to limit or prohibit the use by its pupils of smartphones while the pupils are at a schoolsite or while the pupils are under the supervision and control of an employee or employees of that school district, county office of education, or charter school." However, a student cannot be prohibited from possessing or using a smartphone under any of the following circumstances: (1) In the case of an emergency, or in response to a perceived threat of danger; (2) When a teacher or administrator of the school district, county office of education, or charter school grants permission to a student to possess or use a smartphone, subject to any reasonable limitation imposed by that teacher or administrator; (3) When a licensed physician and surgeon determines that the possession or use of a smartphone is necessary for the health or well-being of the student; or (4) When the possession or use of a smartphone is required in a student's IEP.

(b) **Phone-Free Schools Act.** The California Phone-Free Schools Act (Assembly Bill 3216), signed by Governor Newson on September 23, 2024, amended Education Code section 48901.7 to require that, not later than July 1, 2026, the governing body of a school district, a county office of education, or a charter school must adopt a policy (to be updated every five years) to limit or prohibit the use by its students of smartphones while the students are at a schoolsite or while they are under the supervision and control of an employee or employees of that school district, county office of education, or charter school. The goal of the policy is to promote evidence-based

use of smartphone practices to support student learning and well-being. The development of the policy must involve significant stakeholder participation in order to ensure that the policies are responsive to the unique needs and desires of students, parents, and educators in each community. The policy may also include enforcement mechanisms that limit access to smartphones.

The same exceptions allowing student use of the smartphone, as detailed above, continue to apply. Further, the law explicitly does not authorize monitoring, collecting, or otherwise accessing any information related to a student's online activities.

2. **Practical Implications.** Following the passage of the Phone-Free Schools Act, districts must put in place an actual policy, which means they need to plan now for the mechanisms of how they want to limit or prohibit cell phone use—rather than leaving it up to individual teachers. Districts must decide how much autonomy to give schools to make their own cellphone policies. Options might include using cellphone pouches that remained locked until a student opens them using a magnetic device. Phones also could be collected at the start of a class or placed in cellphone lockers. Technology also could be deployed to make cellphones unusable for phoning, texting and internet access even if the devices remains in a student's possession.

   Also, under the legislation, students will be allowed to access to phones during emergencies, but the law does not define this term. It is up to school districts to decide what constitutes an emergency and how phones can be used in such an event.

II. Recent Judicial Decisions.

A. Title IX Discrimination.

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1. **Allegations of Harassment Based on Sex Are Sufficient to Allow Title IX Claim to Proceed—Myles v. West Contra Costa Unified School District (N.D. Cal. 2024) 124 LRP 10384.** High-school Student reported two incidents of sexual harassment and assault by a male student. During one of the incidents, Student struggled with the male student, eventually breaking free from his grasp and running into the school's Student Health Center. District acknowledged that it had received prior reports of sexual assault involving the male student. Student stated that District staff interviewed her approximately one day after she reported the harassment and assault, during which she provided further details regarding "bullying, sexual harassment and assaults" by the male student. During a meeting between the assistant principal and Parents, after the incidents, the assistant principal informed Parents that the police department was already investigating prior students' reports that the male student had sexually assaulted them on campus. Student claimed that she "suffered severe emotional distress which has required psychological care." Additionally, Student was allegedly "subjected to taunting and bullying by other [] students in direct retaliation for reporting [the male student's] conduct," and "was forced to change her class schedule." Student also asserted that "her grades dropped significantly." Student sued in federal district court, asserting federal civil rights claims, discrimination claims, and California state law claims.

   Addressing the sexual discrimination claim against District, the district court determined that the allegations based on sex were sufficient to state a claim. The court noted that Student had alleged violations of Section 220 of the California Education Code for "intentional discrimination on the basis of sex, which includes sexual harassment," and of Title IX for sex-based discrimination by District. Section 220 provides that no person shall be subjected to discrimination on the basis of gender. Title IX includes similar prohibitions on sex discrimination. (20 U.S.C. §§ 1681, et seq.) The court

considered both sex-based discrimination claims under the same framework.

The court observed that a school that receives federal funding can be liable for an individual claim of student-on-student sex-based harassment under Title IX, but only if: (1) the school had substantial control over the harasser and the context of the harassment; (2) the plaintiff suffered harassment so severe that it deprived the plaintiff of access to educational opportunities or benefits; (3) a school official who had authority to address the issue and institute corrective measures for the school had actual knowledge of the harassment; and (4) the school acted with deliberate indifference to the harassment such that the indifference subjected the plaintiff to harassment."

With respect to the first element of the complaint, Student alleged that the sexual assault and harassment occurred at school, during a "school-sponsored tutoring program" and at a time the Student Health Center was staffed. Finding that Student sufficiently alleged this element, the court noted that misconduct that "occurs during school hours and on school grounds... is taking place 'under' an 'operation' of the funding recipient." Student also sufficiently alleged the second element of her Title IX complaint. At the initial stage of the proceeding, the court found that the totality of the alleged sexual harassment to be sufficiently severe, pervasive, and offensive to undermine Student's educational experience. The court also found that the assault and harassment by the male student were motivated by sex, as was the taunting and bullying for reporting the male student's misconduct "because it is plausible female students would more likely be the victims of the male student." The court also found it reasonable to conclude that Student's declining grades and psychological health issues were an indication of her educational experience. It found that the facts alleged in the complaint were sufficient to show that Student had been denied equal

access to the school's educational resources and learning opportunities.

Addressing the third element of the action—whether District staff had actual knowledge of the harassment—the court noted that District allegedly received multiple reports from female students during the 2021-2022 school year reporting the male student's sexual harassment and assault. Although Student did not allege that District personnel were aware of harassment of her by the male student before either incident occurred, her allegations included references to assaults and harassment of other female students by the male student, which presented a risk to Student, occurring before the events involving her. Based on Student's allegations that, at minimum, District was "aware of pervasive sexual harassment of female students on the . . . campus" and "that [the police department] was already investigating prior student reports that [the male student] sexually assaulted them on campus," the court found that Student sufficiently alleged actual knowledge on the part of District.

Finally, the court addressed the deliberate indifference allegation as the fourth element of Student's Title IX complaint. The court found that in the period before Student was sexually harassed and assaulted, the pre-incident allegations were sufficient to plausibly show deliberate indifference at that point in time. District's only action in response to the multiple allegations was to report the male student to the police department. But this notification failed to warn potential victims such as Student about the male student's alleged predatory conduct or otherwise protect the potential victims. "[Student] and other female students were left vulnerable to an assault." As to the conduct after the incidents involving Student, the court found that it was plausible that District acted with deliberate indifference when it failed to take proper action in response to the reports of harassment. "Indeed, the District took no 'corrective action' and did not limit, secure, or monitor the source of the known threat—[the male student]." That

failure to do more caused Student to "undergo harassment" and made her "vulnerable to it." District's failure to prevent the assault and harassment as part of protecting female victim-students could be reasonably found to be discrimination, the court concluded. "All of the corrective action seems focused on changing the condition of the school environment of the victim with the intention of keeping her safe. [Student] had to change her class schedule, and allegedly to her detriment." In summary, the court determined that the allegations of deliberate indifference based on sex were sufficient to state a claim, and it denied District's motion to dismiss as to the Title IX and Section 220 claims.

Note: The district court dismissed Student's Section 504 disability discrimination claims against District, as well as Section 1983 claims against the school's principal and assistant principal

What Does This Case Mean to Us? The U.S. Supreme Court has explicitly stated that sexual harassment is "discrimination" in the school context under Title IX, and that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute. (Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629.

B. Negligence/Immunity.

1. District, Staff Did Not Owe a Duty to Prevent Student's Off-Campus Suicide—Elie v. Los Angeles Unified School District (Cal. Ct. App. 2024, unpublished) Case No. B328539. When Student enrolled at North Hollywood High School in the fall of 2017, he had emotional issues, including impulsivity, posttraumatic stress disorder, depression, and anxiety. District implemented an IEP for him. In April 2018, Student walked to a freeway, where he was intercepted by police. He agreed to a psychiatric hospitalization. A safety plan was drafted when Student resumed his studies, but no one was assigned to oversee or implement it. District had the

names of Student's health care providers but did not request his mental health records or interact with his care providers. Student completed the semester, enrolled in summer school, then began the fall 2018 school year. He was supposed to have 90 minutes of counseling per month; sometimes an intern did the counseling. Student began to show signs of depression and had difficulty coping.

On February 7, 2019, Student acted out during an afternoon Spanish class. After class, the teacher had Student call Parent on his cell phone to discuss his behavior. Parent told the teacher that he would deal with any punishment when he saw Student at home. Afterward, Student appeared upset, hit lockers in the hallway, and left campus. His sixth period teacher learned that he left campus and called the school psychologist, who notified school police, but did not alert the principal, a crisis team, or Parent.

Student returned to campus during the class period. He was agitated, appeared to have been crying, and asked for the psychologist. The two spoke for about 20 minutes. The psychologist did not perform an assessment risk, move Student to a contained location, call 911, or contact a crisis or suicide risk assessment team. Student again left campus. The school psychologist followed, but could not catch up to him. He then alerted District police. It was unclear if officers were aware of Student's history or that he needed a mental health evaluation. The psychologist then called Parent, after the principal reminded him to contact Student's family.

Student walked home from school. District police officers who followed him said they were not advised that he was at risk for suicide or needed to go for a psychiatric evaluation. After watching Student enter the courtyard of his apartment complex, they returned to campus and informed the psychologist that Student had arrived at home. Student then walked to the door of his home. His stepmother saw him

through the window but was unaware that he needed help. He had an afternoon appointment that day. She believes he put his backpack by the door and left, to avoid waking his baby sister. Student's stepmother later called 911 and reported him missing. He was located in the early evening on top of a building. Before his parents arrived, he committed suicide.

Parent sued District, the school psychologist, principal and assistant principal. The trial court dismissed the claim and Parent appealed. The appellate court affirmed the dismissal. First, the court pointed out that Education Code section 44808 immunizes public schools and employees from liability for student safety off school grounds, unless they fail to exercise reasonable care: (1) while transporting the student to or from school; (2) while the student is off campus on a school-sponsored activity; or (3) when the school specifically assumes responsibility or liability for the student, who is under the immediate and direct supervision of an employee. Here, Parent did not claim that Student was injured on school property, while being transported by school bus, or while engaged in a school-sponsored activity. Parent also did not allege facts showing that District or staff "specifically assumed . . . responsibility or liability" for Student after school. Parent theorized that defendants were liable "not only when the student is within the school's physical control but also when he should have been," adding that District's "failure to keep [Student] on campus did not cloak it with immunity." But the appellate court stated that it was untenable to argue that defendants could force Student to remain on campus involuntarily at the end of the school day. Xavier had returned home and was not under the supervision of District employees when he died. Parent also pointed to suicide prevention policies promulgated by District in 2018, alleging that the bulletin outlining these policies lists steps that "should be carried out" if a student is at risk of suicide, including notifying police, speaking to the student, and communicating with the parent. But the court noted that these steps were all taken

and, further, that the existence of the bulletin does not nullify the immunity provided by section 44808 for student conduct after school hours.

Additionally, the appellate court found that Parent could not state a claim for negligence, which requires a duty of care and breach of the duty that proximately causes the claimed injury. The court noted that California imposes no duty to prevent suicide absent a "special relationship" between the defendant and the decedent. It added that a special relationship exists between schools and students, though that relationship, "by itself, does not create liability." The court stated that even with a special relationship, a duty to prevent suicide arises "only where the defendant has physical custody and substantial control over a person or where the defendant has special training or expertise in mental illness and has sufficient control over a person to prevent the suicide." No facts were alleged showing that District employees "had physical custody or substantial control over Student after he left school for the day, went home, walked to an office building, and jumped from it that evening. With or without special training or expertise in mental illness, [District] employees lacked control to prevent [Student's] off-campus, after-hours suicide. Finally, the court noted that Parent did not contend that District staff engaged in any outrageous conduct that caused Student to commit suicide.

What Does This Case Mean to Us? Concerning the duty to prevent suicide, the court in this case explained that requirement of "custody and control" is consistent with the rule that the special relationship doctrine can impose no greater duty of protection on school districts for off-school-grounds hazards than the legislature has authorized by statute. The legislature limits school district liability for student safety to the circumstances listed in Education Code section 44808; i.e., during transport, school-sponsored activities, while the student is under the direct supervision of school employees.

The duty to supervise pupils who are not on school property is not covered in section 44808.

III. Recent Guidance from the U.S. Department of Education ("USDOE").

A. Absenteeism—Letter to Chief State School Officers (USDOE 2024), 124 LRP 9401.

In guidance released in March 2024, the USDOE focused on the issue of chronic absenteeism in public schools. It stated that chronic absenteeism is typically defined as missing at least 10 percent of school days, or 18 days in a year, for any reason, excused or unexcused. Chronic absenteeism increased during the COVID-19 pandemic at troubling rates, nearly doubling between 2018 and 2022. As of the 2021-22 school year, over 14 million students nationwide were chronically absent, missing valuable instructional time and posing serious implications for students' overall academic success and wellbeing, the USDOE stated. "Research suggests that children who are chronically absent for multiple years between preschool and second grade are much less likely to read at grade level by the third grade. This has been shown elsewhere to make students four times more likely to not graduate from high school. Chronic absenteeism can also further disengage students from their learning and connections with their peers and with other caring adults. The USDOE stated that although chronic absence derives from multiple, often interconnected factors, research points to student disengagement, lack of access to student and family supports, and student and family health challenges as significant drivers. "These challenges may present differently by school type for example, high school-age students are more likely to cite competing demands such as staying home to be caregivers to younger siblings or a sick family member or working outside the home to financially support themselves or their families."

The USDOE continued by noting that while any effort to address chronic absenteeism must begin with an

understanding of the factors contributing to it, urgent actions by state and LEAs can set the foundation for strong local responses. Actions that states and districts can take include the following:

First, support schools in increasing regular school attendance through the state's Elementary and Secondary Education Act of 1965 ("ESEA") Consolidated State plan. Identifying schools for support and improvement using their accountability systems, and awarding federal school improvement funds to identified schools is one of a state's most important obligations under the ESEA. While states have significant discretion in operationalizing these requirements, states must include at least one School Quality or Student Success ("SQSS") indicator as part of their accountability systems to promote and reflect a well-rounded, positive learning environment. Currently, more than 75 percent of states use a measure of chronic absenteeism in their accountability systems used to identify schools for support and improvement. States can enhance their accountability systems by partnering with local universities or their Department Regional Educational Lab to analyze data and ensure that a chronic absenteeism or related measure is playing a meaningful role in school identification.

Second, access USDOE resources and training to promote regular school attendance and encourage LEAs to do the same. The USDOE's Student Engagement and Attendance Center ("SEAC") can help support states, districts and schools in designing and implementing evidence-based strategies to improve student attendance and engagement, including by connecting education leaders with critical resources on multi-tiered systems of support, home visiting practices, and parent and family communications that reinforce the importance of routine, in-person attendance. Also, the USDOE's National Center on Safe Supportive Learning Environments ("NCSSLE") provides resources and offers technical assistance to LEAs, schools, and teachers on how to improve school climate. And The National Partnership for Student

Success ("NPSS") can help states, schools, and community-based organizations improve, expand, and scale high-quality programs that increase student engagement and attendance through the use of tutors and mentors in schools.

Third, redouble efforts to urgently invest remaining ARP funds in evidence-based strategies for improving regular school attendance. According to the most recent data on state and local use of COVID-relief funds, more than 80 percent of LEAs invested in at least one strategy to re-engage students and increase student attendance. When planning for a new school year, LEAs should be aware of the USDOE's guidance on use of ARP funds. And because students experiencing homelessness face particular challenges in attending school regularly, it is important that districts are on-track to exhaust funds this fall [2024]. "These critical resources can support reliable transportation to school, robust wraparound services, and contracting with community-based organizations to help families navigate housing."

IV. Updated Guidance from the California Department of Education ("CDE").

A. Bullying—Frequently Asked Questions (CDE, last revied/updated August 30, 2023).

By way of background, with the 2018 passage of Assembly Bill 2291, all districts are required to adopt procedures for preventing acts of bullying and cyberbullying. Subsequently, to assist districts in meeting this requirement, CDE provided guidance to state school districts in addressing student-on-student bullying by means of a Frequently Asked Questions ("FAQ") document updated in August 2023. (The California School Boards Association ("CSBA") also issued a Research and Policy Governance Brief in October 2023, "School Safety: Bullying and Cyberbullying," to assist LEAs in the work of "building safe and inclusive schools so all students can learn and thrive.")

In its updated guidance, CDE explained that bullying is exposing a person to abusive actions repeatedly over time. Being aware of

children's teasing and acknowledging injured feelings are always important. Bullying becomes a concern when hurtful or aggressive behavior toward an individual or group appears to be unprovoked, intentional, and (usually) repeated. "Bullying is a form of violence. It involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful. Bullying may be physical (hitting, kicking, spitting, pushing), verbal (taunting, malicious teasing, name calling, threatening), or emotional (spreading rumors, manipulating social relationships, extorting, or intimidating). Bullying can occur face-to-face or in the online world. Bullying is also one or more acts by a pupil or group of pupils directed against another pupil that constitutes sexual harassment, hate violence, or severe or pervasive intentional harassment, threats, or intimidation that is disruptive, causes disorder, and invades the rights of others by creating an intimidating or hostile educational environment, and includes acts that are committed personally or by means of an electronic act."

CDE further stated that bullying actions may be direct or indirect. Direct bullying or identifiable bullying actions may include: hitting, tripping, shoving, pinching, and excessive tickling; verbal threats, name calling, racial slurs, and insults; demanding money, property, or some service to be performed; and/or stabbing, choking, burning, and shooting. Indirect bullying may be more difficult to detect and may include: rejecting, excluding, or isolating target(s); humiliating target(s) in front of friends; manipulating friends and relationships; sending hurtful or threatening e-mail or writing notes; blackmailing, terrorizing, or posing dangerous dares; and/or developing a website site devoted to taunting, ranking, or degrading a target and inviting others to join in posting humiliating notes or messages."

CDE's FAQ also stated that bullying among children often leads to greater and prolonged violence. Not only does bullying harm the targets, it also negatively affects students' ability to learn and achieve in school. "Students who are the target of a bully experience negative emotions. Feelings of persecution prevail over feelings of safety and confidence. Fear, anger, frustration, and anxiety may lead to ongoing illness, mood swings, withdrawal from friends and family,

an inability to concentrate, and loss of interest in school. . . . Without support or intervention, students who bully will continue to bully and may engage in other types of antisocial behavior and crime. Although some students who bully are less likely to be trusted and may be seen as mean and manipulative, a bully who learns aggression toward others garners power and may find the behavior a difficult habit to break.

CDE observed that preventing and responding to school bullying is the responsibility of every school administrator, teacher, school staff member, student, and parent. "The entire school community must recognize the responsibility to create a climate in which bullying is not tolerated." Interventions should take place at different levels. Schoolwide intervention strategies include implementing a schoolwide antibullying policy, a survey of bullying problems at each school, increased supervision, schoolwide assemblies, and teacher in-service training to raise the awareness of children and school staff regarding bullying. Classroom intervention strategies include establishing classroom rules against bullying, holding regular class meetings to discuss bullying at school, and scheduling meetings with all parents. Individual intervention strategies consist of having individual discussions with each student identified as either a bully or a target.

CDE provided a further list of other practices for schools to follow that included the following: (1) take immediate action when bullying is observed; (2) respond in a timely manner to all reports of bullying; (3) provide protection for students who are bullied; (4) establish support programs and resources for both the target and bully; (5) develop policies that define bullying and provide appropriate responses to the problem; (6) apply school rules, policies, and sanctions fairly and consistently; (7) establish an effective system for reporting bullying, including adults who can be relied on to respond responsibly and sensitively; (8) teach parents to understand bullying and the consequences; (9) partner with law enforcement and mental health agencies to identify and address cases of serious bullying; (10) promote the norm for a bully-free school throughout the entire

school community; and (11) engage students to help promote the norm of a bully-free school.

V. Recent Legislative Developments Affecting Students and Education.

A. New California Laws.

1. AB 2268—English Learners. Existing law requires each school district that has one or more students who are English learners to assess the English language development of each student in order to determine the student's level of proficiency, as specified. The law requires the State Department of Education, with the approval of the State Board of Education, to establish procedures for conducting the assessment and for the reclassification of a student from English learner to English proficient. Existing law further requires those reclassification procedures to utilize multiple criteria in determining whether to reclassify a student as proficient in English, including, among other things, an assessment of language proficiency using the English language development test that is developed or acquired by the Superintendent of Public Instruction. The law requires the assessment for initial identification to be conducted upon the initial enrollment of a student. It requires the English language development test to assess students in kindergarten and grade 1 in English listening and speaking. AB 2268 defines "initial enrollment" for the purposes of the above-described provision regarding initial identification to exclude enrollment in a transitional kindergarten program. It expressly states that the above-described requirement for students in kindergarten to be assessed in English listening and speaking does not include students in transitional kindergarten.

2. AB 2711—Suspensions and Expulsions: Voluntary Disclosures. Existing law prohibits a student from being suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the

student has committed a specified act, including, among other acts, that the student (1) unlawfully possessed, used, sold, or otherwise furnished, or had been under the influence of, a controlled substance, an alcoholic beverage, or an intoxicant of any kind, or (2) possessed or used tobacco, or products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel. This new law prohibits the suspension of a student who voluntarily discloses, in order to seek help through services or supports, their use of a controlled substance, alcohol, intoxicants of any kind, or a tobacco product, solely for that disclosure.

3. **SB 483—Restraints.** Existing law prohibits a person employed by or engaged in a public school from inflicting, or causing to be inflicted, corporal punishment upon a student. The law prohibits the use of certain restraint and seclusion techniques. Existing law also authorizes staff trained in prone containment to use the procedure on a student with disabilities in a public school program as an emergency intervention. If prone restraint techniques are used, existing law requires a staff member to observe the student for any signs of distress throughout the use of prone restraint. ("Prone restraint," which includes "prone containment," is defined as "the application of a behavioral restraint on a pupil in a facedown position." Ed Code 49005.1(g).) SB 483 instead prohibits the use of prone restraint, defined to include prone containment, by an educational provider. It prohibits the use of prone restraint, including prone containment, on a student with disabilities in a public school program

4. **SB 691—Truancy Notifications.** Existing law requires a student subject to compulsory full-time education or to compulsory continuation education who is absent from school without a valid excuse 3 full days in one school year, or tardy or absent for more than a 30-minute period during the school day without a valid excuse on 3 occasions in one school year,

or any combination thereof, to be classified as a truant. Existing law also requires, upon a student's initial classification as a truant, a school district to notify the student's parent or guardian of specified information, including, among other information, that the student and parent or guardian of the student may be subject to prosecution, as specified, and that it is recommended that the parent or guardian accompany the student to school and attend classes with the pupil for one day. This new law, commencing July 1, 2025, would remove those specific pieces of information from that notification and would require that notification include additional information, including, among other information, that mental health and supportive services may be available to the student and the family and that school personnel are available to meet with the student and family to develop strategies to support the student's attendance at school.

B. <u>New and Proposed Federal Regulations</u>.

1. <u>Recent Development Concerning 2024 Title IX Regulations</u>. On April 19, 2024, the USDOE released its Final Rule under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The 2024 amendment regulations marked a shift in policy and approach from the previous regulations issued in 2020. The new rules broadened the definition of discrimination based on sex to include not only discrimination based on sex stereotypes, sex characteristics, and pregnancy or related conditions, but also sexual orientation and gender identity. The term "sex-based harassment" also has been defined more broadly to include harassment based on sexual orientation and gender identity. Sex-based harassment creates a "hostile environment" in more situations, as well. A hostile environment exists when "unwelcome sex-based conduct … is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate

in or benefit from the recipient's education program or activity." The USDOE also simplified the components of the grievance process each recipient must establish to address complaints of sex discrimination. Additionally, the new regulations expanded privacy protections for students and others involved in sex discrimination claims and investigations. The 2024 regulations also expanded the duties of schools' Title IX Coordinator.

A full analysis of the 2024 Title IX regulations is beyond the scope of this presentation. Other F3 workshops explore Title IX in greater detail.

To date, federal courts have barred the USDOE from enforcing the 2024 Title IX regulations in 26 states (not including California) or in any schools attended by students with ties to Young America's Foundation, Female Athletes United and Moms for Liberty, such organizations listed as plaintiffs in the lawsuits. (This includes approximately 100 K-12 schools in California.) Those lawsuits challenged three specific Title IX regulations that expanded protections for students on the basis of gender identity. The Office for Civil Rights has advised districts and schools in the affected states to follow the 2020 Title IX regulations in the meantime.

In an unsigned order in late August 2024, the U.S. Supreme Court denied a request by the USDOE to narrow two District Court rulings (State of Louisiana v. U.S. Department of Education and State of Tennessee v. Cardona) so that they would only prevent enforcement of certain challenged regulations. The Supreme Court reasoned that a complete ban on enforcement was necessary because the challenged provisions were "intertwined with and affect[ed] many other provisions of the new rule." This means that USDOE cannot enforce any of the Title IX regulations in the affected states while its appeals of the two District Court decisions are pending.

2. **Updated Section 504 Regulations Delayed Until November 2024, at Earliest.** The long-anticipated update to the federal regulations implementing Section 504 of the Rehabilitation Act has been delayed until at least November 2024. The proposed regulations were originally supposed to be released in August 2023, and were subsequently pushed back to November 2023. The USDOE will propose to update the regulations to include advancing equity for students with disabilities, addressing persistent barriers to access, updating outdated language, and aligning the current regulations with the ADA and the ADA Amendments Act.

3. **Revisions to FERPA and Protection of Pupil Rights Amendment ("PPRA") Are Also Delayed.** The USDOE anticipates releasing amendments for FERPA in October or November 2024, after previously announcing proposed changes would be issued in early 2024. The USDOE will propose to amend FERPA to update and improve the current regulations by addressing outstanding policy issues, such as refining the definition of "education records" and clarifying provisions regarding disclosures to comply with a judicial order or subpoena. The USDOE stated that the proposed regulations will also address statutory amendments to FERPA to reflect a change in the name of the office designated to administer FERPA, as well as to make changes related to the enforcement responsibilities. By May 2025, the USDOE will also propose to amend the Protection of Pupil Rights Amendment ("PPRA") to update, clarify, and improve the current regulations by addressing outstanding policy issues. The proposed regulations are also needed to implement statutory amendments to PPRA contained in the Goals 2000: Educate America Act of 1994 and the No Child Left Behind Act of 2001, to reflect a change in the name of the office designated to administer PPRA and to make changes related to the enforcement responsibilities of the office concerning PPRA

F3 Law

Note: A recent U.S. Supreme Court decision could limit the deference that federal courts must provide to federal agency regulations. In Loper Bright Enterprises v. Raimondo (06/28/24), the High Court stated that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. It overturned the previous deference standard established in Chevron v. Natural Resources Defense Council Inc.(1984) 467 U.S. 837, which required federal judges to answer two questions: (1) Is the underlying statute silent or ambiguous on the matter at issue? And (2) Is the agency's interpretation based on a permissible construction of the statute? If the answer to both of those questions is yes, the judge was required to defer to the agency's interpretation as set forth in the federal regulation. Now, under the Loper Bright Enterprises decision, if a case turns on the regulations themselves, the outcome could depend on how a particular judge interprets the statute.

[Any additional late-breaking legal news and other new developments after the publication date of these materials will be discussed during the Legal Update session.]

F3 Law

The Fourth Amendment: Searches and Seizures in the Schools

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What We'll Cover . . .

- Fourth Amendment Overview
- U.S. Supreme Court Decisions: Suspicion-Based Searches
- U.S. Supreme Court Decisions: Random, Suspicionless Searches
- Application of Fourth Amendment Standards to Specific Searches and Seizures of Students and/or Their Property in California Public Schools
- Practical Pointers

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Fourth Amendment Overview

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Fourth Amendment Overview

Fourth Amendment to U.S. Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause . . . . "

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Fourth Amendment Overview (cont'd)

- Fourth Amendment rights of public school students are more limited than those guaranteed to adults and minors outside of school environment
- U.S. Supreme Court and California courts have delineated standards for school searches, seizures and detentions by applying "reasonableness" balancing test, which weighs governmental interest against intrusiveness of privacy invasion guaranteed by Fourth Amendment

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Fourth Amendment Overview (cont'd)

- Specifically, courts have balanced schools' legitimate need to maintain safe and secure learning environment against students' reasonable expectations of privacy in their persons and belongings
- These expectations are less than those of adults and minors in non-school settings because students are necessarily subject to supervision and control while on K-12 school campuses

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U.S. Supreme Court Decisions: Suspicion-Based Searches

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Suspicion-Based Searches

New Jersey v. T.L.O.

- In this landmark case, Supreme Court ruled that Fourth Amendment's prohibition against unreasonable searches applies to searches by public school officials
- In conducting searches, school officials act as representatives of the state, not merely as surrogates for parents, and, hence, cannot claim Fourth Amendment immunity
- But Court also concluded that neither warrant nor probable cause is required for on-campus search of student or student's personal property by school officials; reasonable suspicion is sufficient

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Suspicion-Based Searches

New Jersey v. T.L.O.

Facts:

- In 1980, teacher found two high school girls smoking in the restroom
- Students were sent to principal's office.
- One student admitted smoking, other student (T.L.O.) did not
- Assistant principal took T.L.O. into his office and told her to hand over her purse, where he found pack of cigarettes and rolling paper

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Suspicion-Based Searches

New Jersey v. T.L.O.

Facts (cont'd):

- Assistant principal searched further and found small amount of marijuana, pipe, empty plastic bags, significant amount of money in dollar bills, list of students owing T.L.O. money, and letters implicating T.L.O. as drug dealer
- Assistant principal called T.L.O.'s mother and police
- T.L.O.'s purse was turned over to police
- T.L.O. tried to have evidence from her purse suppressed because it was obtained in violation of Fourth Amendment

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Suspicion-Based Searches

New Jersey v. T.L.O.

Decision:

- Court held that Fourth Amendment's prohibition on unreasonable searches and seizures is not limited solely to actions of law enforcement personnel; it also applies to conduct of public school officials
- Public school officials act as agents of the state, and not merely agents of the student's parents; accordingly, Fourth Amendment applies to their actions
- Students have some legitimate expectation of privacy at school; however, student's expectation of privacy must be balanced against needs of school authorities to maintain an educational environment
- As such, school authorities do not need to obtain warrant or have probable cause that crime occurred before searching a student; rather, reasonableness of search, under all circumstances, will determine its legality

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Suspicion-Based Searches

New Jersey v. T.L.O.

Decision:

- Court established the following test to determine reasonableness of a search: (1) whether search was **justified at its inception**; and (2) as search was conducted, was it **reasonably related in scope to the circumstances** that justified interference
- Search of student by school official will be **justified at inception** where there are reasonable grounds for suspecting that search will turn up evidence that student has violated or is violating either the law or school rules
- Search will be **permissible in scope** when measures adopted for search are reasonably related to objectives of search and not excessively intrusive in light of the student's age and sex and nature of infraction
- In this case, Court found search was justified at inception (report of smoking and discovery of rolling papers) and permissible in scope

(New Jersey v. T.L.O. (1985) 469 U.S. 325)

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Suspicion-Based Searches

Safford Unified School Dist. #1 v. Redding

- In this case, decided more than two decades after T.L.O., Supreme Court was asked to decide whether Fourth Amendment prohibited school officials from strip searching middle school student suspected of possessing drugs in violation of school policy
- Applying standards established by T.L.O. decision, Court ruled that strip search violated Fourth Amendment

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Suspicion-Based Searches

Safford Unified School Dist. #1 v. Redding

Facts:

- Middle-school vice principal discovered that students were giving out prescription-strength ibuprofen and over-the-counter naproxen
- One student told vice principal that she had received the pills from 13-year-old Savana Redding
- Vice principal confronted Savana, who denied having any knowledge of the pills
- Vice principal then had female administrative assistant take Savana into office of female school nurse to perform strip search
- Savana was directed to undress down to her underwear and then pull her bra and underwear away from her body and shake them, exposing her breasts and pelvic area to the two employees
- No pills were discovered
- Parents sued district and administrators for violating Savana's Fourth Amendment rights

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Suspicion-Based Searches

Safford Unified School Dist. #1 v. Redding

Decision:

- High Court ruled that the search of Savana's undergarments violated Fourth Amendment
- Based on other student's statement that pills came from Savana, assistant principal had sufficient reasonable suspicion to justify searching Savana's backpack and outer clothing
- But because suspected facts pointing to Savana did not indicate that drugs presented danger to students or were concealed in her undergarments, assistant principal did not have sufficient suspicion to justify extending search to the point of making Savana undress
- "When suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, [a] general belief that students hide contraband in their clothing falls short; a reasonable search [under T.L.O. standard] that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school . . . ."

(Safford Unified School Dist. #1 v. Redding (2009) 557 U.S. 364)

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Suspicion-Based Searches
Unanswered Questions

- What are circumstances that constitute "reasonable suspicion"? For example, to what extent can tips from other students create such reasonable suspicion? T.L.O. did not delineate the various factors
- Would analysis in T.L.O. change if search was carried out by school resource officers rather than school administrators?

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U.S. Supreme Court Decisions: Random, Suspicionless Searches

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Random, Suspicionless Searches
Vernonia School District 47J v. Acton

- This was first case to reach the U.S. Supreme Court regarding random and suspicionless searches of students in public schools
- T.L.O. left open the question of whether individualized suspicion would always be necessary to satisfy a student search that would not violate Fourth Amendment
- Vernonia presented the Court with that issue to resolve

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Random, Suspicionless Searches

Vernonia School District 47J v. Acton

Facts:

- Motivated by discovery that athletes were leaders in student drug culture and concern that drug use increases the risk of sports-related injury, district adopted "Student Athlete Drug Policy" ("Policy"), which authorized random urinalysis drug testing of students who participate in its athletics programs
- Student, James Acton, seventh-grader, was denied participation in his school's football program when he and his parents refused to consent to the testing
- James and his parents then sued, seeking declaratory and injunctive relief on the grounds that Policy violated Fourth and Fourteenth Amendments (and Oregon Constitution)
- District court denied the claims, but Ninth Circuit reversed, holding that Policy violated both federal and state constitutions

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Random, Suspicionless Searches

Vernonia School District 47J v. Acton

Decision:

- Supreme Court, by 6-3 vote, ruled that district's random drug-testing policy for student athletes was reasonable under Fourth Amendment
- District's collection and testing of urine constituted "search" under Fourth Amendment and "reasonableness" of search should be judged by balancing intrusion on individual's Fourth Amendment interests against the promotion of legitimate governmental (school district) interests
- Policy was directed narrowly to drug use by athletes, where risk of physical harm to user and other players was high
- Privacy interests compromised by obtaining urine samples under Policy were negligible, since conditions of collection were nearly identical to those typically encountered in public restrooms and tests looked only for standard drugs, with results released only to limited group
- Nature and immediacy of governmental concern at issue favored finding of reasonableness

(Vernonia School District 47J v. Acton (1995) 515 U.S. 646)

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Random, Suspicionless Searches

Board of Education of Independent School District No. 92 v. Earls

- This case involved Oklahoma school district that adopted very similar drug-testing to policy at issue in Vernonia, except that policy applied to all students participating in competitive extracurricular activities
- Unlike in Vernonia, where drug policy was adopted in response to serious drug problem that already existed in school, policy at issue here was adopted largely from preventative standpoint in order to respond to limited instances of drug use

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Random, Suspicionless Searches

Board of Education of Independent School District No. 92 v. Earls

Facts:

- Student Activities Drug Testing Policy ("Policy") adopted by district required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity
- In practice, Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association ("OSSAA")
- Several high school students and their parents sued, alleging that Policy violated Fourth Amendment
- Applying Vernonia, district court granted summary judgment to the district.
- Tenth Circuit, however, reversed, holding that Policy violated Fourth Amendment, concluding that, before imposing suspicionless drug testing program, school must demonstrate some identifiable drug abuse problem among sufficient number of those tested, such that testing that group will actually redress its drug problem.

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Random, Suspicionless Searches

Board of Education of Independent School District No. 92 v. Earls

Decision:

- Supreme Court reversed Tenth Circuit's decision, holding that Policy was reasonable means of furthering district's important interest in preventing and deterring drug use among its schoolchildren and did not violate Fourth Amendment
- Applying Vernonia, Court concluded that students affected by Policy had limited expectation of privacy, noting that "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes"
- Court concluded that invasion of students' privacy was not significant, given minimally intrusive nature of sample collection and limited uses to which test results were put, which was virtually identical to the "negligible" intrusion approved in Vernonia
- Considering immediacy of district's concerns and efficacy of Policy in meeting them, Court determined that Policy effectively served district's interest in protecting students' safety and health

(Board of Education of Independent School District No. 92 v. Earls (2002) 536 U.S. 822)

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Random, Suspicionless Searches

Unanswered Questions

- Can district adopt random drug-testing policy that applies to all students?
  - Note: While the Supreme Court, in Vernonia, expressly reserved question of whether districts can extend suspicionless searches to all students, lower courts generally have found that drug testing of student body violates Fourth Amendment where there is no individualized suspicion that student was (or is) using illegal substances
- Would outcome of Vernonia and Earls have been different if drug test results had been handed over to law enforcement rather than being kept within school district?

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Application of Fourth Amendment Standards to Specific Searches and Seizures of Students and/or Their Property in California Public Schools

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The Reasonable Suspicion Standard

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The Reasonable Suspicion Standard

- California courts have consistently applied T.L.O. standard to determine reasonableness of any search
- Remember:
  - Search of student by school official will be justified at inception where there are reasonable grounds for suspecting that search will turn up evidence that student has violated or is violating either law or school rules
  - Search will be permissible in scope when measures adopted for search are reasonably related to objectives of search and not excessively intrusive in light of student's age, sex and nature of infraction

(In re William G. (1985) 40 Cal.3d 550)

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The Reasonable Suspicion Standard

In re: Lisa G.

Facts:

- Student ("Lisa G.") became very irritated by fact her teacher would not let her go the restroom, so she got up and walked to the classroom door, which teacher blocked
- Lisa G. proceeded to move teacher's hand from handle and walked past her out of classroom
- Teacher noticed Lisa G. had left her purse behind, so she kept purse at her desk for safe-keeping
- Class period ended and Lisa G. never came back
- Teacher dismissed other students and decided to write disciplinary referral for Lisa G.'s behavior and disruption, but, because she was not the regular teacher, she did not know Lisa G.'s name or student ID number
- Teacher looked through Lisa G.'s purse for her ID; instead, she found switchblade knife.
- Teacher took Lisa G.'s purse and knife to principal's office, whereupon police were called and Lisa G. was arrested

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The Reasonable Suspicion Standard

In re: Lisa G.

Decision:

- Court: Because search was not justified at its inception under T.L.O. standard, knife in Lisa G's purse was seized in violation of her Fourth Amendment rights
- Search of Lisa G.'s purse would be justified only if teacher reasonably suspected that search would disclose evidence that Lisa G. had violated law or school rules
- Teacher lacked such reasonable suspicion, since there were no facts suggesting that teacher suspected that Lisa G. had engaged in proscribed activity justifying search or that she was carrying a knife or another prohibited item
- Although Lisa G. engaged in disruptive behavior in class, court stated that "mere disruptive behavior does not authorize a school official to rummage through [student's] personal belongings"
- Note: Although knife could not be used as evidence against Lisa G. in juvenile criminal proceeding, district was not precluded from using it as evidence in expulsion proceeding

(In re: Lisa G. (Cal. Ct. App. 2004) 125 Cal. App. 4th 801)

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Suspicionless Searches

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Suspicionless Searches

- In limited circumstances, some searches may not require reasonable suspicion if privacy invasion is minimal and important school interest is served
- Any such suspicionless searches should be based upon clear policy
- California courts have been reluctant to sanction suspicionless searches in school environment, yet have done so in a few cases, relying on the principles of U.S. Supreme Court's decision in Vernonia

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Suspicionless Searches

In re: Sean A.

Facts:

- Student ("Sean A."), was observed by an attendance clerk as he was returning to campus in middle of school day
- Assistant principal reviewed Sean A.'s attendance record for the day and noticed that he had been absent from his period 1 and 2 classes, present for his period 3 class, and then absent from his period 4 class
- School's written policy stated that "students who return to campus after being 'out-of-bounds' were subject to a search of their person, their possessions, and vehicle when appropriate"
- Sean A. told assistant principal that he went home to retrieve a notebook
- Assistant principal asked Sean A. to empty out contents of his pockets, one of which held plastic bag containing 44 pills of Ecstasy
- In juvenile court, Sean A. sought to suppress the evidence, contending that search was unlawful

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Suspicionless Searches

In re: Sean A.

Decision:

- Court of Appeal's majority opinion held that search of Sean A. pursuant to school policy but without any individualized suspicion, was permissible "special needs" search
- Policy authorizing searches of all students who leave and then return to campus served same purpose as suspicionless drug testing for student athletes approved in Vernonia, which was to prevent students from possessing and using drugs
- Court concluded that significant government interest (need to prevent students who left and returned to school from bringing in harmful objects such as weapons or drugs) motivated policy
- Search of Sean A. was minimally intrusive, as administrator did not touch Sean A. but merely ordered him to empty his pockets and open his backpack; this was even less intimate intrusion than drug testing policy approved by U.S. Supreme Court in Vernonia
- Given the special needs promoted by school policy, individualized suspicion was not required

(In re: Sean A. (Cal. Ct. App. 2010) 191 Cal. App. 4th 182)

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Specific Examples

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Searches of Student Lockers

- Generally, locker searches are not searches for purpose of Fourth Amendment since most districts have established policies clearly stating that all student lockers are property of school district and subject to search
- However, locker searches for purpose of establishing criminal liability must be motivated by individualized suspicion
  - But notable exception was decision in In re: J.D. . . .

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Searches of Student Lockers

In re: J.D.

Facts:

- School security officer was approached by female student who reported that classmate had witnessed male student ("T.H.") shoot someone at the bus stop where she was waiting to catch bus
- Female student was told gun was in locker belonging to T.H.
- T.H. also reportedly "frequented" lockers other than his assigned locker, and T.H. had been seen several times, including previous day, in area of locker #2499
- Two campus security officers searched locker #2499, finding only books inside; one of the officers then opened locker #2501, the locker assigned to another student ("J.D."), which was next to #2499
- Inside locker #2501, officers found backpack and, as they removed backpack from locker, they observed butt of sawed-off shotgun protruding from backpack
- Inside backpack, officers found school papers belonging to J.D.
- Subsequently, J.D. admitted gun belonged to him and he was charged with possessing firearm

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Searches of Student Lockers

In re: J.D.

Decision:

- Court of Appeal found that search of multiple lockers, including J.D.'s locker, was justified even though campus security officers lacked individualized suspicion that evidence of violation of law or school rule by J.D. would be found in that locker
- Court acknowledged T.L.O. standard that school search is justified at its inception by reasonable suspicion that search will turn up evidence that student has violated law or school rule
- However, citing increasing incidents of gun violence in schools, court relied on Supreme Court's decisions in Vernonia and Earls (approving random searches of students participating in school sports or competitive extracurricular activities without need to show individualized suspicion)
- Here, report that on previous day that T.H. had shot someone made it reasonable for security officers to determine if T.H. was on campus with weapon and to inspect lockers that could have been used by T.H. to store weapon

(In re: J.D. (Cal. Ct. App 2014) 225 Cal App. 4th 709)

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Notebook Searches

- Notebooks can only be examined from outside, unless student has waived right to privacy
- If notebook is property of district, written policy that makes such books subject to inspection at discretion of school authorities will suffice
- Otherwise, T.L.O. reasonableness standard applies

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Automobile Searches

- Generally, if student is present, student's vehicle may be searched when there is reasonable cause to believe that vehicle contains contraband or anything that may endanger health and welfare of other persons
- Search of unlocked student vehicle in the absence of student should be conducted only in emergency situations (i.e., cases of serious and immediate danger to health and welfare and/or property)
- Pursuant to California Vehicle Code section 21113, vehicles parked or driven onto school property are subject to search without suspicion, provided that notice of search policy is clearly posted

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Use of Dogs to Conduct Searches

- Law is not well-established and is far from settled
- Most district policies allow presence of drug-sniffing dogs on campus to sniff air around lockers, gym areas, restrooms, vehicles, vacated classrooms and school grounds as they search for potential contraband items
- But policies typically preclude use of dogs to sniff any student, employee, visitor or anyone else while on district property or at any district event
  - Horton v. Goose Creek Indep. School District (5th Cir. 1982) 690 F.2d 470: District could use trained detection canines to randomly sniff student lockers and cars for drugs and if dog "alerted" on locker or car, then they could proceed to search it, but use of trained detection canines to search persons of students was overly intrusive and thus Fourth Amendment violation
  - B.C. v. Plumas Unified School District (9th Cir. 1999) 192 F.3d 1260: Random sniffing of students is "highly intrusive" because body odors are highly personal and dogs often engender irrational fear

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Body Searches

- California law restricts body searches of students in schools
- Specifically, under California Education Code section 49050, no school employee may conduct a search that involves: (a) conducting body cavity search of student manually or with instrument; or (b) removing or arranging any or all of student's clothing to permit visual inspection of underclothing, breast, buttocks, or genitalia
- In other circumstances, reasonableness standard of T.L.O. has been applied to body (frisk) searches
  - Jenkins v. Talladega City Board of Education (11th Cir. 1996) 95 F.3d 1036: As the intrusiveness increases, amount of suspicion necessary to justify body search also increases; recovering $7 did not justify body search

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Searches and Access to Cell Phones and Other Electronic Devices

- T.L.O. reasonableness standard is limited by California Electronic Communications Privacy Act ("CalECPA") (Penal Code sections 1546-1546.5)
- Under CalECPA, districts may not compel production of, or access to, electronic device information from any person other than device's authorized possessor, except in limited circumstances
- Electronic devices include
  - Cellphones
  - Laptops
  - Tablets
  - Any other device that stores, generates or transmits information in electronic form

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Searches and Access to Cell Phones and Other Electronic Devices

- CalECPA allows schools to access electronic device information through physical interaction or electronic communications with device:
  - With consent of authorized possessor of device
  - Pursuant to search warrant
  - If school believes, in good faith, that device is lost, stolen or abandoned, as long as school accesses information only to attempt to identify owner
  - If the school believes, in good faith, that emergency involving danger of death or serious bodily injury requires access
- CalECPA does not appear to prohibit schools from accessing information on "school-issued electronic device"

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On-Campus Detentions

- School officials have authority to stop minor student on campus in order to ask questions or conduct investigation, without needing reasonable suspicion that student has committed crime or violated school rule
- Such authority, however, may not be exercised in "an arbitrary, capricious or harassing manner"

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On-Campus Detentions

In re: Randy G.

Facts:

- Campus security officer testified that during "passing time," student ("Randy G.") was between "C building and A auditorium."
- When Randy G. saw security officer, he "fixed his pocket very nervously" and acted "very paranoid and nervous" on way back to class
- Security officer asked Randy G. if she could see him outside
- Once in hallway, security officer asked Randy G. if he had anything on him; he replied "no" and repeated that denial when asked again.
- Randy G. consented to search of his bag and pat-down search.
- Pat-down search revealed knife, later found to have locking blade, in Randy G.'s left pocket
- During 10 minutes that Randy G. was in hallway being questioned before consent to search was given, he was not free to leave

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On-Campus Detentions

In re: Randy G.

Decision:

- California Supreme Court found no Fourth Amendment violation occurred
- While this case involved the question of seizure, not search, reasonableness of intrusion would still be determined by balancing need to conduct search against the extent of intrusion
- "The governmental interest at stake is of the highest order"—the need to maintain discipline and order so that the school can perform its educational function
- Intrusion on minor student is trivial since student's liberty at school is already curtailed
- Since detention is generally less intrusive than a search—and reasonable suspicion is required for search of student—such standard need not be required for seizure
- "Detentions of minor students on school grounds do not offend the Constitution so long as they are not arbitrary, capricious or for the purposes of harassment," which was not alleged here

(In re: Randy G. (2001) 26 Cal.4th 556)

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Restraint and Seclusion

- Use of restraints and seclusion can be considered unreasonable seizure in violation of Fourth Amendment if restraint or seclusion was not justified at its inception or was not reasonable in scope
- California law specifically states that "an educational provider may use seclusion or a behavioral restraint only to control behavior that poses a clear and present danger of serious physical harm to the pupil or others that cannot be immediately prevented by a response that is less restrictive"

(Ed. Code, § 49005.4)

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Restraint and Seclusion

- Educational provider may not do any of the following:
  - Use seclusion or behavioral restraint for purpose of coercion, discipline, convenience, or retaliation
  - Use locked seclusion, unless it is in facility licensed or permitted by law to use locked room
  - Use physical restraint technique that obstructs student's respiratory airway or impairs student's breathing or respiratory capacity, including techniques in which staff member places pressure on student's back or places body weight against student's torso or back
  - Use behavioral restraint technique that restricts breathing, including, but not limited to, using pillow, blanket, carpet, mat, or other item to cover student's face
  - Use prone restraint
  - Use behavioral restraint for longer than is necessary to contain behavior that poses clear and present danger of serious physical harm to student or others

(Ed. Code, § 49005.8)

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Practical Pointers

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Reasonable Suspicion

- Although T.L.O. did not specify, other cases have found that these circumstances may constitute reasonable grounds for suspecting that search will turn up evidence that student has violated (or is violating) either law or rules of the school:
  - Independent reports by more than one student
  - Student's demeanor, mental or physical condition, suspicious conduct
  - Single, "highly reliable" student or staff member
  - Outside informant with specific and credible information

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Reasonable Suspicion (cont'd)

- Even if information source is good:
  - Consider student's age and behavior patterns
  - Consider seriousness of possible offense compared with intrusiveness of search
  - Consider urgency requiring search
  - Consider location of student at time of incident leading to reasonable suspicion

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Conducting Searches

- Follow these general rules related to conducting student searches:
  - When lockers are assigned to students, make students aware of need for both regular and emergency inspections and/or searches
  - Whenever possible, adult witness should be present when search is believed necessary
  - Whenever possible, student should be present if student's locker or car is being searched
  - Contact school police or other law enforcement professionals for assistance if there is doubt as to nature of contents found
  - To minimize embarrassment to student being searched, searches of students should be conducted out of presence of other students
  - Document (or keep records on) basis for search and the evidence found (take pics!)

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Group Searches

- Keep in mind that reasonable suspicion does not have to be individualized to particular student, although search must still be reasonable based upon facts
- If only way to follow up reliable information of violation of law or school rules is through group search, then it likely will be permissible
- Example: Smoke hovering over group of students

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Suspicionless Searches

- Be very careful about conducting suspicionless searches
- All suspicionless searches should be based upon clear district policy
- Parents and students should be given notice of possibility of these searches
- Remember that suspicionless searches are considered reasonable only in limited circumstances where: (1) privacy interests implicated by the search are minimal; and (2) important government interest furthered by intrusion would be placed in jeopardy if individualized suspicion were required

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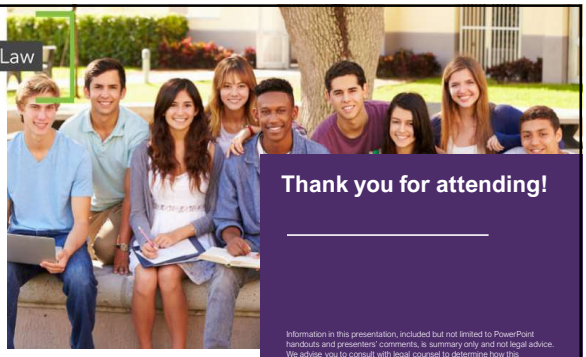
F3 Law



Thank you for attending!

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F3 Law

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- Labor Relations & Negotiations
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Fourth Amendment Search and Seizure

F3 Law

THE FOURTH AMENDMENT: SEARCHES AND SEIZURES IN THE SCHOOL

Introduction. The Fourth Amendment to the U.S. Constitution guarantees the rights of individuals against unreasonable searches and seizures. This session examines, through legal analysis and practical pointers, the unique rules that govern how the Fourth Amendment applies to searches and seizures in public schools. We will cover the definition of "search and seizure"; the constitutional standard applied to school districts; searches of student notebooks, cars, lockers, and cell phones; off-campus searches and much more.

We will cover the following topics:

- **Fourth Amendment Overview.**
- **U.S. Supreme Court Decisions: Suspicion-Based Searches (New Jersey v. T.L.O.; Safford Unified School District v. Redding).**
- **U.S. Supreme Court Decisions: Random, Suspicionless Searches: (Vernonia School District 47J v. Acton; Board of Education of Independent School District No. 92 v. Earls).**
- **Application of Fourth Amendment Standards to Specific Searches and Seizures of Students and/or Their Property in California Public Schools.**
- **Practical Pointers.**

I. Fourth Amendment Overview. The Fourth Amendment to the U.S. Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause . . . . " In a landmark decision, New Jersey v. T.L.O., discussed in detail below, the U.S. Supreme Court interpreted the language of the Fourth Amendment in relation to public school officials to conclude that schools have the right to initiate a search based on "reasonable suspicion." Accordingly, based on New Jersey v. T.L.O and

subsequent judicial interpretations, the Fourth Amendment rights of public school students are more limited than those guaranteed to adults and minors outside of the school environment. Both the U.S. Supreme Court and California courts have delineated the standards for school searches, seizures and detentions by applying the reasonableness balancing test, which weighs the governmental interest in the search against the intrusiveness of the privacy invasion on the person being searched. Specifically, courts have balanced the schools' legitimate need to maintain a safe and secure learning environment against students' reasonable expectations of privacy in their persons and belongings at school. These expectations are less than those of adults and minors in non-school settings because students are necessarily subject to supervision and control while on K-12 school campuses.

II. U.S. Supreme Court Decisions: Suspicion-Based Searches.

A. New Jersey v. T.L.O. In the landmark case of New Jersey v. T.L.O. (1985) 469 U.S. 325, the U.S. Supreme Court ruled that the Fourth Amendment's prohibition against unreasonable searches applies to searches by public school officials. In conducting searches, school officials act not merely as surrogates for the parents, but also as representatives of the state, and, therefore, cannot claim Fourth Amendment immunity. But the Court also concluded that neither a warrant nor probable cause is required for an on-campus search of a student or the student's personal property by a school official; reasonable suspicion is sufficient.

1. Facts. The case originated in Piscataway, New Jersey, where, in 1980, a teacher at the local public high school observed two girls smoking in a bathroom. One of the girls ("T.L.O.") was a 14-year-old ninth-grader. Because smoking was against school rules, the teacher brought T.L.O. and her companion to an assistant vice principal, who questioned both girls. During the questioning, T.L.O.'s friend admitted her own guilt, but T.L.O. denied the accusation. The assistant vice principal then demanded to see T.L.O.'s purse. Upon searching it, he saw a pack of cigarettes. As he reached into the purse to seize the

pack, he noticed a package of cigarette rolling papers that he associated with the use of marijuana. Suspecting that he might find further evidence of drug use in the purse, the assistant vice principal searched it more thoroughly. He found a small amount of marijuana, a pipe, empty plastic bags, a quantity of one-dollar bills, a list of students who apparently owed T.L.O. money, and letters implicating her in marijuana dealing. T.L.O. confessed to selling marijuana at the high school. The assistant vice principal turned over the contents to the police, who used that evidence to bring delinquency charges against T.L.O. She was adjudicated a delinquent and placed on probation. The attorney for T.L.O.'s parents moved to have the contents of her purse ruled inadmissible in court, arguing that they were obtained through an illegal search under the Fourth Amendment. The trial and appeals courts rejected the motion, but the New Jersey Supreme Court disagreed, holding that the exclusionary rule applies to public school officials.

2. **Decision.** Ultimately, the case reached the U.S. Supreme Court, where the Court held, in 6-3 decision, that the school's search of T.L.O.'s purse was constitutional. Writing for the majority, Justice Byron White began by noting that public schools are institutions operated by the government; therefore, public school students retain their Fourth Amendment rights that protect them against unreasonable searches and seizures by public authorities. But the Court then qualified these rights to explain how the Fourth Amendment applies in public schools. On the one hand, the Court said, "schoolchildren have legitimate expectations of privacy." On the other hand, schools have an "equally legitimate need to maintain an environment in which learning can take place." The Court answered by distinguishing the situation. "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." As such, a warrant is not required to search a student, nor is "probable cause"

required. Instead, the Court stated that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." A search by a school official "will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Such a search "will be 'permissible in its scope' when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Under this new standard, the Court held that both the initial search of T.L.O.'s purse for cigarettes (which yielded the pack of cigarettes and the rolling papers) and the second search of the purse for marijuana (which yielded the drug and evidence of sales) were justified at their inception and were not excessive in scope.

B. **Safford Unified School District v. Redding.** In this decision (Safford Unified School Dist. #1 v. Redding (2009) 557 U.S. 364), decided over two decades after T.L.O., the U.S. Supreme Court was asked to decide whether the Fourth Amendment prohibited school officials from strip searching a middle school student suspected of possessing drugs in violation of school policy. Applying the standards established by the T.L.O. decision, the Court ruled that the strip search violated the Fourth Amendment.

1. **Facts**. After escorting 13-year-old student Savana Redding ("Savana") from her middle school classroom to his office, an assistant principal showed her a day planner containing knives and other contraband. She admitted owning the planner, but said that she had lent it to her friend and that the contraband was not hers. The assistant principal then produced four prescription-strength pills and one over-the-counter pain relief pill, all of which were banned without advance permission under school rules. Savana denied knowledge of them, but the assistant principal said that he had a report that she was giving pills to fellow students. She denied it and agreed to let

him search her belongings. The assistant principal and an administrative assistant searched Savana's backpack, finding nothing. The assistant principal then had the administrative assistant take Savana to the school nurse's office to search her clothes for pills. After the assistant and a school nurse had Savana remove her outer clothing, they told her to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found. Savana's mother sued the district and its staff alleging that the strip search violated Savana's Fourth Amendment rights. Claiming qualified immunity, the individuals moved for summary judgment. The case ultimately reached the U.S. Supreme Court.

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2. **Decision**. The High Court ruled that the search of Savana's undergarments violated the Fourth Amendment. The Court noted that under the resulting "reasonable suspicion" standard established by T.L.O., a school search "will be permissible . . . when measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The required knowledge component of reasonable suspicion for a school administrator's evidence search is that it must raise a moderate chance of finding evidence of wrongdoing. In this case, the assistant principal demonstrated sufficient suspicion to justify searching Savana's backpack and outer clothing because a week earlier, another student, Jordan, had told the principal and assistant principal that students were bringing drugs and weapons to school and that he had gotten sick from some pills. On the day of the search, Jordan gave the assistant principal a pill that he said came from Marissa. Marissa claimed the pill belonged to Savana. Marissa's statement that the pills came from Savana was sufficiently plausible to create a reasonable suspicion that Savana was involved in pill distribution. A student who is reasonably suspected of giving out contraband pills is reasonably suspected of carrying them on her person and in

her backpack. The Court stated that looking into Savana's bag, in her presence and in the relative privacy of the office, was not excessively intrusive, no more than was the subsequent search of her outer clothing.

However, because the suspected facts pointing to Savana did not indicate that the drugs presented a danger to students or were concealed in her underwear, the assistant principal did not have sufficient suspicion to warrant extending the search to the point of making Savana undress and pull out her underwear. The administrative assistant and school nurse said that they did not see anything when Savana pulled out her underwear, "but a strip search and its Fourth Amendment consequences are not defined by who was looking and how much was seen." The Court noted that Savana's actions in their presence necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. "Savana's subjective expectation of privacy is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation is indicated by the common reaction of other young people similarly searched, whose adolescent vulnerability intensifies the exposure's patent intrusiveness. Its indignity does not outlaw the search, but it does implicate the rule that 'the search [be] reasonably related in scope to the circumstances which justified the interference in the first place'." Here, the content of the suspicion failed to match the degree of intrusion. The assistant principal could not have suspected that Savana was hiding common painkillers in her underwear. The Court stated that "[w]hen suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, [a] general belief that students hide contraband in their clothing falls short; a reasonable search

that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school . . . ."

C. Unanswered Questions.

1. What exactly constitutes "reasonable suspicion"? For example, to what extent can tips from other students create such reasonable suspicion? T.L.O. did not delineate the various factors.

2. Does the analysis in T.L.O. change if the search is carried out by school resource officers rather than school administrators themselves.

III. U.S. Supreme Court Decisions: Random, Suspicionless Searches.

A. Vernonia School District 47J v. Acton: The first case to reach the U.S. Supreme Court regarding random and suspicionless searches of students in public schools was Vernonia School District 47J v. Acton (1995) 515 U.S. 646 from Oregon. T.L.O. left open the question of whether individualized suspicion would always be necessary to satisfy a student search that would not violate the Fourth Amendment. Vernonia presented the Court with the issue of random and suspicionless searches to resolve.

1. Facts. Motivated by the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury, the district adopted the "Student Athlete Drug Policy" ("Policy"), which authorized random urinalysis drug testing of students who participated in its athletics programs. The student, James Acton ("James"), a seventh grader, was denied participation in his school's football program when he and his parents refused to consent to the testing. James and his parents then filed suit, seeking declaratory and injunctive relief on the grounds that the Policy violated the Fourth and Fourteenth Amendments and the

Oregon Constitution. The district court denied the claims, but the Ninth Circuit reversed, holding that the Policy violated both the Federal and State Constitutions.

2. **Decision.** Vacating and remanding the Ninth Circuit's decision, the Supreme Court ruled, by a 6-3 vote, that the district's random drug-testing policy for student athletes was reasonable under the Fourth Amendment. The Court first noted that the district's collection and testing of urine constituted a "search" under the Fourth Amendment. Where there was no clear practice, either approving or disapproving the type of search at issue, the Court stated that the "reasonableness" of a search should be judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental (school district) interests. The first factor to be considered in determining reasonableness was the nature of the privacy interest on which the search intrudes. Here, the subjects of the Policy were children who "have been committed to the temporary custody of the State as schoolmaster; in that capacity, the State may exercise a degree of supervision and control greater than it could exercise over free adults." The Court added that the requirements that public school children submit to physical examinations and be vaccinated indicated that they "have a lesser privacy expectation with regard to medical examinations and procedures than the general population." Student athletes have even less of a legitimate privacy expectation, the Court continued, "for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct." The Court stated that the privacy interests compromised by the process of obtaining urine samples under the Policy were negligible, since the conditions of collection were nearly identical to those typically encountered in public restrooms. In addition, the tests looked only for standard drugs, not medical conditions, and the results are released to a limited group.

The nature and immediacy of the governmental concern at issue, and the efficacy of this district's means for meeting it, also favored a finding of reasonableness, the Court stated. "The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover, the Policy is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high. The District Court's conclusion that District's concerns were immediate is not clearly erroneous, and it is self-evident that a drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs."

B. **Board of Education of Independent School District No. 92 v. Earls.** This case, Board of Education of Independent School District No. 92 v. Earls (2002) 536 U.S. 822, involved an Oklahoma school district that adopted a very similar drug-testing policy to the one at issue in Vernonia, except that the policy applied to all students participating in competitive extracurricular activities. Unlike in Vernonia, where the drug policy was adopted in response to a serious drug problem that already existed in the school, the policy at issue here was adopted largely from a preventative standpoint, in order to respond to limited instances of drug use.

1. **Facts.** The Student Activities Drug Testing Policy ("Policy") adopted by the district required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association ("OSSAA"). Several high school students and their parents sued, alleging that the Policy violated the Fourth Amendment. Applying Vernonia, the district court granted summary judgment to the district. The Tenth Circuit, however, reversed, holding that the Policy violated the Fourth Amendment. It concluded that before imposing a suspicionless drug testing program, a school must

demonstrate some identifiable drug abuse problem among a sufficient number of those tested, such that testing that group will actually redress its drug problem. The court held that the district had failed to demonstrate such a problem among students participating in competitive extracurricular activities.

2. **Decision.** The Supreme Court reversed the Tenth Circuit's decision, holding that the Policy was a reasonable means of furthering the district's important interest in preventing and deterring drug use among its schoolchildren and did not violate the Fourth Amendment. Applying Vernonia's principles to "the somewhat different facts of this case" demonstrated that the Policy was also constitutional, the Court stated. Considering first the nature of the privacy interest allegedly compromised by the drug testing, the Court concluded that the students affected by the Policy had a limited expectation of privacy. "[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress, and all of them have their own rules and requirements that do not apply to the student body as a whole. Each of them must abide by OSSAA rules, and a faculty sponsor monitors students for compliance with the various rules dictated by the clubs and activities. Such regulation further diminishes the schoolchildren's expectation of privacy."

Considering the character of the intrusion imposed by the Policy, the Court concluded that the invasion of students' privacy was not significant, given the minimally intrusive nature of the sample collection and the limited uses to which the test results were put. "The degree of intrusion caused by collecting a urine sample depends upon the manner in which production of the sample is monitored. Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must listen for the normal

sounds of urination to guard against tampered specimens and ensure an accurate chain of custody. This procedure is virtually identical to the 'negligible' intrusion approved in Vernonia." Finally, considering the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them, the Court determined that the Policy effectively served the district's interest in protecting its students' safety and health. "The health and safety risks identified in Vernonia apply with equal force to [district's] children. . . . Teachers testified that they saw students who appeared to be under the influence of drugs and heard students speaking openly about using drugs. A drug dog found marijuana near the school parking lot. Police found drugs or drug paraphernalia in a car driven by an extracurricular club member. And the school board president reported that people in the community were calling the board to discuss the 'drug situation.'" The Court further noted that "a demonstrated drug abuse problem is not always necessary to the validity of a testing regime, even though some showing of a problem does shore up an assertion of a special need for a suspicionless general search program. . . . The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Given the nationwide epidemic of drug use, and the evidence of increased drug use in [district] schools, it was entirely reasonable for the School District to enact this particular drug testing policy."

C. Unanswered Questions.

1. Can a district adopt a random drug-testing policy that applies to all students? Note: While the Supreme Court, in Vernonia, reserved the question of whether a school district can extend suspicionless searches to all students, lower courts generally have found that drug testing of the student body violates the Fourth Amendment where there is no individualized suspicion that the student was (or is) using illegal substances. (See, e.g., Willis v. Anderson Community School Corporation (7th

Cir. 1998) 158 F.3d 415 [policy of drug testing of all students who used tobacco products or were truant was insufficient to create individualized suspicion of drug use; unlike Vernonia and in contrast to athletics and other extracurricular activities, the conduct covered by the policy lacked the elements of voluntariness and control].)

2. Would the outcome of the Vernonia and Earls have been different if the drug test results had been handed over to law enforcement rather than being kept within the school district?

IV. Application of Fourth Amendment Standards to Specific Searches and Seizures of Students and/or Their Property in California Public Schools.

A. The Reasonable Suspicion Standard. Under the standard of T.L.O., discussed above, determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. In other words, under ordinary circumstances, the search of a student by a school official will be considered justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted for the search are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. Further, the search must be limited to the specific area that is the subject of the suspicion. (See, e.g, In re William G. (1985) 40 Cal.3d 550 [on-campus searches of students by public school officials must be based on a reasonable suspicion that the student has engaged or is engaging in the violation of a school rule or criminal statute; probable cause is not required].)

An instance in which reasonable suspicion did not exist in conducting a search of a student's belongings occurred in the case

of In re: Lisa G. (Cal. Ct. App. 2004) 125 Cal. App. 4th 801. In that case, the student ("Lisa G.") became very irritated by the fact her teacher would not let her go the restroom, so she got up and walked to the classroom door. The teacher blocked the door with her hand. Lisa G. proceeded to move the teacher's hand from the door handle and walked past her out of the classroom. The teacher noticed that Lisa G. had left her purse behind, so she kept the purse at her desk for safekeeping. The period ended and Lisa G. never came back. The teacher dismissed the other students and decided to write a disciplinary referral for Lisa G.'s behavior and disruption, but because she was not the regular teacher, she could not remember Lisa G.'s name or her student ID number. So the teacher looked through Lisa G.'s purse for identification or a schedule to identify her. Instead, she found a switchblade knife. The teacher immediately took Lisa G.'s purse and the knife to the principal's office. The police were called and Lisa G. was arrested. She was subsequently expelled for possession of the switchblade. The Court of Appeal ruled that because the search was not justified at its inception under the T.L.O. standard, the knife in Lisa G's purse was seized in violation of her Fourth Amendment rights. The court stated that the search of Lisa G.'s purse would be justified only if the teacher reasonably suspected that the search would disclose evidence that Lisa G. had violated the law or school rules. The court held that the teacher lacked such a reasonable suspicion, since there were no facts in the record suggesting that the teacher suspected that Lisa G. had engaged in proscribed activity justifying a search or that she was carrying a knife or another prohibited item. Although Lisa G. engaged in disruptive behavior in class, the court stated that "mere disruptive behavior does not authorize a school official to rummage through [student's] personal belongings." Thus, the knife could not be used as evidence against Lisa G. in the juvenile criminal proceeding.

Note: It is important to remember, however, that evidence which is obtained in violation of the Fourth Amendment need not necessarily be excluded from a school disciplinary proceeding. The "Exclusionary Rule" that applies in criminal proceedings to prohibit

the introduction of evidence tainted by being obtained in an unconstitutional manner does not apply in school disciplinary proceedings. (Gordon J. v. Santa Ana Unified School District (Cal. Ct. App. 1984) 162 Cal. App. 3d 530.) Accordingly, in this instance, the district was not precluded from using the switchblade as evidence in Lisa G.'s expulsion even though it was obtained through an unreasonable search.

B. **Suspicionless Searches.** In limited circumstances, some searches may not require reasonable suspicion if privacy invasion is minimal and an important school interest is served. Any such suspicionless searches should be based upon a clear policy. California courts have been reluctant to sanction suspicionless searches in the school environment, yet they have done so in a few cases, relying on the principles of the U.S. Supreme Court's decision in Vernonia, discussed above.

One such example is In re: Sean A. (Cal. Ct. App. 2010) 191 Cal. App. 4th 182. In that case, the student ("Sean A"), was observed by an attendance clerk as he was returning to campus in the middle of the school day. The assistant principal reviewed his attendance record for the day and noticed that Sean A. had been absent from his period 1 and 2 classes, present for his period 3 class, and then absent from his period 4 class. The high school conducted searches of students who leave campus and then return during the school day. Specifically, the school's written policy, set forth in the behavior code section of the school's student handbook, stated that "students who return to campus after being 'out-of-bounds' were subject to a search of their person, their possessions, and vehicle when appropriate." Having determined from Sean A.'s attendance record that he had left and returned to campus, the assistant principal called him to his office. Sean A. told the assistant principal that he went home to retrieve a notebook. The assistant principal asked Sean A. to empty his pockets of their contents. One of his pockets held a plastic bag containing 44 pills of methylenedioxy-methamphetamine (commonly known as MDMA or Ecstasy). After being arrested, Sean A. apparently told police that he left campus to pick up the pills and had sold some of them on the way back to campus. A petition was

filed against Sean A. in juvenile court alleging (1) unlawful possession of a controlled substance for the purpose of sale; and (2) unlawful possession of a controlled substance. Sean A. brought a motion to suppress the evidence obtained as a result of the assistant principal's search of him, contending that the search was unlawful.

The Court of Appeal's majority opinion held that the search of Sean A. pursuant to the policy, without any individualized suspicion, was a permissible "special needs" search. The court concluded that the school's policy authorizing searches of all students who leave and then return to campus served the same purpose as the suspicionless drug testing for student athletes approved in Vernonia, which was to prevent students from possessing and using drugs. The court's majority concluded that a significant government interest (the need to prevent students who left and returned to school from bringing in harmful objects such as weapons or drugs in order to assure a safe learning environment for students) motivated the school's policy. The court also found that the search of Sean A., conducted by the assistant principal was minimally intrusive as the administrator did not touch Sean A. but merely ordered him to empty his pockets and open his backpack. According to the court, this was even a less intimate intrusion than the drug testing policy approved by the U.S. Supreme Court in Vernonia. The court determined that given the special needs promoted by the school policy, individualized suspicion was not required.

C. Specific Examples.

1. Searches of Student Lockers. Generally, locker searches are not searches for purposes of the Fourth Amendment since most districts have established clear policies stating that all student lockers are the property of the school district and subject to search.

However, locker searches for purpose of establishing criminal liability must be motivated by individualized suspicion of criminal activity. A notable exception to this rule was the decision in In re: J.D. (Cal. Ct. App 2014) 225 Cal App. 4th

709. In that case, a school security officer was approached by a female student who reported that a classmate had witnessed a male student ("T.H.") shoot someone at the bus stop where she was waiting to catch a bus. The female student was told that the gun was in the locker belonging to T.H. T.H. also reportedly "frequented" lockers other than his assigned locker and it was common for students to share their assigned lockers with other students, often for the purpose of concealing contraband. T.H. had been seen several times, including the previous day, in the area of locker #2499. Two campus security officers searched locker #2499, finding only books inside. One of the officers then opened locker #2501, the locker assigned to another student ("J.D."), which was next to #2499. The officers found a backpack inside locker # 2501. As they removed the backpack from the locker, they observed the butt of a sawed-off shotgun protruding from the backpack. Inside the backpack, the officers found school papers belonging to J.D. Subsequently, J.D. admitted that the gun belonged to him. He was charged with possessing a firearm at school.

The Court of Appeal found that the search of multiple lockers, including J.D.'s locker, was justified even though the campus security officers lacked an individualized suspicion that evidence of a law or rule violation by J.D. would be found in that locker. The court acknowledged the rule of T.L.O. that a school search is justified at its inception by reasonable suspicion that the search will turn up evidence that the student has violated the law or a school rule. However, citing the increasing incidents of gun violence in schools the Court relied on the U.S. Supreme Court's decisions in Vernonia and Earls (approving random searches of students participating in school sports or competitive extracurricular activities without any need to show individualized suspicion). Here, the report that on the previous day that T.H. had shot someone made it reasonable for the security officers to determine whether T.H.

was on campus with a weapon and to inspect lockers that could have been used by T.H. to store a weapon.

2. **Notebook Searches.** Notebooks can only be examined from the outside, unless students have waived their right to privacy. If the notebook is property of the district, a written policy making such books subject to inspection at the discretion of school authorities will suffice. Otherwise, the T.L.O. reasonableness standard applies.

3. **Automobile Searches.** Generally, if the student is present, the student's vehicle may be searched when there is reasonable cause to believe that the vehicle contains contraband or anything that may endanger the health and welfare of other persons. A search of an unlocked student vehicle in the absence of the student should be conducted only in emergency situations (i.e., cases of serious and immediate danger to health and welfare and/or property). Importantly, pursuant to California Vehicle Code section 21113, vehicles parked or driven onto school property are subject to search without suspicion, provided that notice of the search policy is clearly posted.

4. **Use of Dogs to Conduct Searches.** The law in this area is not well-established and is far from settled. Most district policies allow the presence of drug-sniffing dogs on campus to sniff the air around lockers, gym areas, restrooms, vehicles, vacated classrooms, and school grounds as they search for potential contraband items. But those policies typically preclude the use of dogs to sniff any student, employee, visitor, or anyone else while on district property or at any district event.

   The first notable case concerning the use of canines to conduct searches in school was Horton v. Goose Creek Indep. School District (5th Cir. 1982) 690 F.2d 470, which held that a school district could use trained detection canines to randomly

sniff student lockers and cars for drugs and if a dog "alerted" on the locker or car, the district could proceed to search it. Horton further held that the use of trained detection canines to search the persons of students was overly intrusive and thus a Fourth Amendment violation.

The Ninth Circuit, in B.C. v. Plumas Unified School District (9th Cir. 1999) 192 F.3d 1260, agreed with the Fifth Circuit in Horton, holding that the use of dogs to sniff students constitutes a "search." In that case, the student ("B.C.") and his high school classmates were directed to exit their classroom. As they exited, the students passed by a sheriff and a drug-sniffing dog stationed right outside the classroom door. The dog alerted to one of the students as he passed by. The students were told to wait outside their classroom while the dog sniffed backpacks, jackets and other personal belongings left behind in the classroom. When the students were let back in the classroom, they had to walk by the dog again, and the dog again alerted to the same student. That student was taken away and searched by school officials. (No drugs were found.) Having determined that a search occurred because the students were sniffed as they exited and re-entered their classroom, the court proceeded to determine whether the suspicionless search was reasonable. The court noted that a suspicionless search is reasonable only in limited circumstances where: (1) the privacy interests implicated by the search are minimal, and (2) the important government interest furthered by the intrusion would be placed in jeopardy if individualized suspicion were required. The court then determined that a sniff is "highly intrusive" because body odors are highly personal and dogs often engender irrational fear. Additionally, the record did not evidence a drug problem or crisis at the district, so the district's interest in deterring student drug use would not be put in jeopardy. And there was no evidence that a less-intrusive suspicion-based means had been proven ineffectual. Thus, the Ninth Circuit determined that the search in this case was unreasonable.

5. **Body Searches.** California law restricts body searches of students in schools. Specifically, under California Education Code section 49050, no school employee may conduct a search that involves: (a) conducting a body cavity search of a student manually or with an instrument; or (b) removing or arranging any or all of the clothing of a student to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the student. In other circumstances, the reasonableness standard of T.L.O. has been applied to body searches. (See, e.g., Jenkins v. Talladega City Board of Education (11th Cir. 1996) 95 F.3d 1036 [as the intrusiveness increases, the amount of suspicion necessary to justify the body search increases; recovering $7 did not justify a body search].)

6. **Searches and Access to Cell Phones and Other Electronic Devices.** With respect to access to and searches of students' cell phones and other electronic devices, the T.L.O. reasonableness standard is limited by the California Electronic Communications Privacy Act ("CalECPA"). CalECPA is a California law, codified in Penal Code sections 1546-1546.5, that regulates the collection, use, and disclosure of electronic communication and location information by governmental entitles, including school districts. CalECPA went into effect on January 1, 2016. Under the terms of CalECPA, districts and their schools may not compel the production of, or access to, electronic device information from any person other than the device's authorized possessor except as otherwise provided by CalECPA. "Electronic devices" include cellphones, laptops, tablets, and any other device that stores, generates, or transmits information in electronic form. Schools may access electronic device information through physical interaction or electronic communications with the device with the consent of the authorized possessor of the device or pursuant to a valid search warrant. Schools also may access electronic device information through physical interaction or electronic communications with the device if the

school believes, in good faith, that the device is lost, stolen or abandoned, as long as the school accesses information only to attempt to identify the owner or if the school believes, in good faith, that an emergency involving the danger of death or serious bodily injury requires access. CalECPA does not appear to prohibit schools from accessing information on a "school-issued electronic device."

7. **On-Campus Detentions.** School officials have the authority to stop a minor student on campus in order to ask questions or conduct an investigation (also called a "detention"), without needing a reasonable suspicion that the student has committed a crime or violated a school rule. Such authority, however, may not be exercised in an arbitrary, capricious or harassing manner. This was the standard established by the California Supreme Court in In re: Randy G. (2001) 26 Cal.4th 556. In that case, a campus security officer at the public high school attended by the student ("Randy G.") testified that during "passing time," she was stationed between "C building and A auditorium." As she came around one of two large pillars in that area, she observed Randy G. and a friend in an area of the campus in which students are not permitted to congregate. When Randy G. saw the security officer, he "fixed his pocket very nervously." Some of the lining of the left pocket was still sticking out. The security officer asked the two if they needed anything and instructed them to go to class. Randy G. finished fixing his pocket and went back to class. The security officer followed them to see where they were going because Randy G. acted "very paranoid and nervous." She then notified her supervisor and at his direction summoned another security officer. The security officer asked Randy G. if she could see him outside. Once in the hallway, the security officer asked Randy G. if he had anything on him. He replied "no" and repeated that denial when asked again. The second officer asked for consent to search his bag and Randy G. consented. The second officer then asked Randy G. for permission to do a pat-down search. The first officer asked

if it was okay, and Randy G. replied "yes." A pat-down search by the other officer revealed a knife, later found to have a locking blade, in Randy G.'s left pocket. During the 10 minutes that Randy G. was in the hallway being questioned before the consent to search was given, he was not free to leave. Assuming (but not definitively answering) that the security officers' interaction with Randy G. qualified as a detention, the California Supreme Court then weighed whether such detention needed to be supported by individualized suspicion. The Court noted that the usual Fourth Amendment prerequisites could be modified when "special needs" render those rules impracticable. While this case involved a seizure, not a search, the reasonableness of the intrusion would still be determined by balancing the government's need to search against the extent of the intrusion. The Court stated that "[t]he governmental interest at stake is of the highest order"—the need to maintain discipline and order so that the school can perform its educational function. It observed that school officials should be permitted to send students in and out of the classroom and summon students to the office without familiarizing themselves with Fourth Amendment law. The Court found that the intrusion on a minor student is trivial since a student's liberty at school is already curtailed. It determined that since a detention is generally less intrusive than a search—and reasonable suspicion is required for a search of a school student—such standard need not be required for a seizure. According to the Court, "detentions of minor students on school grounds do not offend the Constitution so long as they are not arbitrary, capricious or for the purposes of harassment." [Emphasis added.] Here, because Randy G. never contended that the two security officers acted arbitrarily, capriciously or in a harassing manner when they called him into the hall for questioning, the Court found that no Fourth Amendment violation occurred.

The standard established in In re: Randy G. was subsequently applied by the Court of Appeal to uphold the detention and

handcuffing of a high school student by a school resource officer. (In re K.J. (Cal Ct. App. 2018) 11 Cal. App. 5th 1123.) In that case, a student tipster sent a text message to an assistant principal advising him that there was "a guy with a loaded gun on campus." The tipster further indicated she had received a social media video showing a student displaying a gun and magazine in a classroom. The tipster knew the suspect but not his name, and described the suspect's gender, race, and hairstyle. The assistant principal gave the tipster the names of two students who fit the description and she identified the student ("K.J.") as the student in the video. Subsequently, two police officers and the school's principal escorted K.J. from the classroom, where he was handcuffed and his backpack removed. A search revealed a semi-automatic firearm.

The Court of Appeal concluded that the detention was lawful under the Randy G. standard because the removal of K.J., a student reported to have a gun, from the classroom was a minimally intrusive action necessary to protect the students and staff. It was neither arbitrary, capricious or for purposes of harassment. The court rejected K.J.'s contention that the Randy G. standard should not apply here because as soon as he was out of the classroom, his backpack was removed and he was handcuffed and searched, thus effectuating a more intrusive de facto arrest. It pointed out that although handcuffing substantially increases the intrusiveness of a stop and is not part of a typical detention, it is justified if necessary to protect officer safety and maintain the status quo during the detention. Here, the Court of Appeal found it was reasonably necessary to remove K.J. from the classroom to prevent a possible shooting and then to immediately handcuff him to make sure that he could not access the reported gun. (The Court of Appeal also found that search of K.J. was justified at its inception because the school administrators and the two officers had a reasonable suspicion that the search would turn up evidence that K.J. was carrying a gun.)

F3 Law

8. **Restraint and Seclusion.** The use of restraints and seclusion can be considered an unreasonable seizure in violation of the Fourth Amendment if it was not justified at its inception or reasonable in scope. (See, e.g., A.T. v. Dry Creek Joint Elementary School District (E.D. Cal. 2018) 316 F. Supp. 3d 1204 [employees of a California district were required to defend allegations that they violated the Fourth Amendment rights of a child with bipolar disorder and ADHD by physically restraining him 112 times over the course of three years; the court denied the employees' motion to dismiss the parents' Section 1983 claim].) Other courts have held that to hold a district responsible for an employee's use of an inappropriate restraint, a parent must demonstrate that the constitutional violation was the result of an express district policy or widespread practice. (See, e.g., Thomas v. Neenah Joint School District (7th Cir. 2023) 74 F.4th 521.)

California law specifically states that "an educational provider may use seclusion or a behavioral restraint only to control behavior that poses a clear and present danger of serious physical harm to the pupil or others that cannot be immediately prevented by a response that is less restrictive. (Ed. Code, § 49005.4.) In addition, an educational provider shall not do any of the following: (1) use seclusion or a behavioral restraint for the purpose of coercion, discipline, convenience, or retaliation; (2) use locked seclusion, unless it is in a facility otherwise licensed or permitted by state law to use a locked room; (3) use a physical restraint technique that obstructs a student's respiratory airway or impairs the student's breathing or respiratory capacity, including techniques in which a staff member places pressure on a student's back or places his or her body weight against the student's torso or back; (4) use a behavioral restraint technique that restricts breathing, including, but not limited to, using a pillow, blanket, carpet, mat, or other item to cover a student's face; (5) place a student in a facedown position with the student's hands held or restrained behind the pupil's back;

and (6) use a behavioral restraint for longer than is necessary to contain the behavior that poses a clear and present danger of serious physical harm to the student or others. (Ed. Code, § 49005.8.)

V. Practical Pointers.

A. Reasonable Suspicion. The following circumstances may constitute reasonable grounds for suspecting that a search will turn up evidence that the student has violated or is violating either the law or the rules of the school:

- Independent reports by more than one student;
- A student's demeanor, mental or physical condition, suspicious conduct;
- Single, highly reliable student or staff member;
- An outside informant with specific and credible information.

Even if information source is good:

- Consider the student's age and behavior patterns;
- Consider the seriousness of the possible offense compared with the intrusiveness of the search;
- Consider the urgency requiring search;
- Consider the location of the student at the time of the incident leading to reasonable suspicion.

B. Conducting Searches. Follow these general rules related to the conduct of student searches:

1. When lockers are assigned to students, make students aware of the need for both regular and emergency inspections and/or searches.

2. Whenever possible, an adult witness should be present when a search is believed necessary.

3. Whenever possible, the student should be present if student's locker or car is being searched.

4. Contact school police or other law enforcement professionals for assistance if there is doubt as to the nature of the contents found.

5. To minimize embarrassment to the student being searched, searches of students should be conducted out of the presence of other students.

6. Document (or keep records on) the basis for the search (as well as the items found during the search). Take pictures, use rulers, etc., to document the items seized.

C. **Group Searches**. Keep in mind that reasonable suspicion does not have to be individualized to a particular student, although the search must still be reasonable based upon the facts. If the only way to follow up reliable information of a violation of the law or school rules is a group search, then it likely will be permissible. (Example: smoke hovering over group of students.)

D. **Suspicionless Searches.** Be very careful about conducting a suspicionless search. All suspicionless searches should be based upon a clear district policy. Parents and students should be given notice of the possibility of these searches. Remember that suspicionless searches are considered reasonable only in limited circumstances where: (1) the privacy interests implicated by the search are minimal, and (2) the important government interest furthered by the intrusion would be placed in jeopardy if individualized suspicion were required.

F3 Law

Student Records and Confidentiality

1

What We'll Cover . . .

- General Overview of Federal and State Law Governing Student Records and Confidentiality
- What Is an Education Record?
- Rights of Parents to Access Their Child's Education Records
- Rights of Parents to Prevent Nonconsensual Disclosure of Education Records to Third Parties
- Rights of Parents to Amend Their Child's Education Records
- Parents' Right to Receive Annual Notice
- Other Laws Protecting Student Privacy

2

Overview of Federal and State Laws Governing Student Records and Confidentiality

3

FERPA

- Family Educational Rights and Privacy Act (FERPA) is federal law that protects privacy of student education records
- Administered by USDOE's Student Privacy Policy Office (SPPO) (formerly known as Family Policy Compliance Office (FPCO)) and applies to "educational agencies and institutions" that receive USDOE funds
- Provides rights to parents (and students over 18)
  - Right to inspect and review education records
  - Right to prohibit disclosures of records to third parties
  - Right to amend records if misleading or inaccurate
  - Right to notice of FERPA rights

(20 U.S.C. § 1232g; 34 C.F.R. Part 99)

4

IDEA

- Provisions of FERPA apply to all students receiving special education and related services under IDEA (FERPA incorporated by reference in IDEA)
- IDEA also includes additional protections, requiring:
  - Destruction of certain information when no longer needed and at request of parents
  - Designation of official responsible for ensuring confidentiality of records
  - Maintenance of list of individuals who have access to personally identifiable information

(34 C.F.R. §§ 300.610-300.627)

5

California Education Code and Regulations

- Legislative amendments in 2012 (AB 143) revised many of Education Code provisions to better track language of FERPA, which they now largely parallel
- Special education statutes reference protections of IDEA and FERPA
- Some differences remain between state and federal law with respect to student records and confidentiality
- Provisions regarding education records are also contained in California Regulations, Title 5, sections 430 through 438

(Ed. Code, §§ 49060-49079.7, 56501, 56504, 56515)

6

What Is an Education Record?

7

Definition

- Those records that are:
  - "Directly related to a student"; and
  - "Maintained" by an educational agency or institution or by a party acting for the agency or institution
- Education records may be recorded "in any manner, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, or microfiche"

(34 C.F.R. § 99.3; Ed. Code, § 49061, subd. (b))

8

"Directly Related to a Student"

- Term is not defined in any statute or regulation
- Closest equivalent is definition of "personally identifiable information," which includes:
  - Name/address of student, parents or other family
  - Personal identifier, such as student's SSN
  - Indirect identifiers, such as student's date of birth, place of birth, and mother's maiden name
  - Other information that would allow reasonable person in school community, who does not have personal knowledge of relevant circumstances, to identify student with reasonable certainty

(34 C.F.R. § 99.3)

9

"Maintained"

- No statutory or regulatory definition of what it means to "maintain" records
- U.S. Supreme Court defined the word "maintained" by its ordinary meaning to "preserve" or "retain"
  - Court suggested that, when enacting FERPA, Congress contemplated that education records would be kept in one place with a single record of access, such as a record room or secure database, by a central custodian
  - Court held that grades on peer-graded papers before they are collected and recorded by a teacher were not education records because they were not "maintained" by district

(Owassso Indep. School Dist. v. Falvo (2002) 534 U.S. 426)

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"Maintained" (cont'd)

- Neither FERPA nor IDEA specifies any particular type of records that districts are required to maintain
- California law contains lengthy list of information about students that districts must maintain—as well as for how long they must maintain it—depending on whether information is part of "mandatory permanent records," "mandatory interim records" or "permitted records"

(Cal. Code Regs., tit. 5, §§ 430, 432)

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"Maintained" – Case Example

Student v. Saddleback USD

- Parents requested accident reports following Student's injury on playground
- Claimed denial of FAPE when District refused to provide copy of reports
- ALJ denied Parents' claim
- Incident reports were not education records because they were prepared in anticipation of litigation and were not "maintained" in Student's file
- Reports were kept in risk management department of District's business office

(Student v. Saddleback Unified School Dist. (OAH 2011) Case No. 2011040670, 57 IDELR 298)

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Exclusions from Definition of "Education Record"

- Certain records – even though they contain personally identifiable information about students and are maintained by districts – are excluded by FERPA from being considered "education records"
  - "Sole possession" notes (also excluded by California law)
  - Employee records
  - Records created and maintained by law enforcement unit
  - Certain medical records of students over 18 or in college
  - Certain records created after student is no longer attending
  - Grades on peer-graded papers before collection by teacher (Falvo decision)

(34 C.F.R. § 99.3)

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"Sole Possession" Notes

- Law excludes from definition of "education record" those records that are kept in sole possession of maker, are used only as personal memory aid, and are not accessible or revealed to any other person except temporary substitute for maker of the record
  - When teachers or other school officials decide to make their "sole possession" records available to person(s) other than substitute, records become "education records" subject to FERPA
  - School official's personal knowledge or observation of student would be protected by FERPA if school official, in official capacity, uses such knowledge or observation in manner that produces education record (e.g., principal's observation of student's conduct subsequently used to generate disciplinary report)

(34 C.F.R. § 99.3; Ed. Code, § 49061; Letter to Parker (FPCO 2010) 110 LRP 65735)

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"Sole Possession" Notes – Case Example

Student v. Temecula Valley USD

- Speech/language pathologist and PE teacher took informal notes during administration of assessments
- Parents claimed notes were part of Student's education records and requested that they be produced at due process hearing
- ALJ found that "sole possession" exception applied
- Notes were taken exclusively for assessors' own use and were not placed in Student's file maintained by District

(Student v. Temecula Valley Unified School Dist. (OAH 2009) Case Nos. 2009050048, 2009031335 and 2009040514, 109 LRP 74851)

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Emails as Education Records

- Emails that are not maintained by district are not education records
- What does it mean to "maintain" an email
- Law is unclear, but two court decisions are instructive:
  - District Court decision (S.A. v. Tulare COE): Emails that are not "printed and placed" in student's permanent file are not "maintained" by LEA, even if they are kept in staff email in-boxes or may be electronically retrieved from LEA's server
  - Ninth Circuit (unpublished) decision (Burnett v. San Mateo-Foster City SD): District was not required to turn over emails that were not "maintained" in physical folder or secure electronic data base

(S.A. v. Tulare County Office of Education (N.D. Cal. 2009) 53 IDELR 143 and 53 IDELR 218; Burnett v. San Mateo-Foster City School Dist. (9th Cir. 2018, unpublished) 739 F. App'x 870, 72 IDELR 147)

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Photos/Videos as Education Records

- Photo or video should be considered "directly related" to student if:
  - District uses photo or video for disciplinary actions or other official purposes involving student
  - Photo or video depicts an activity that: resulted or may result in use of photo or video for disciplinary actions or other official purposes; shows student violating local, state, or federal law; or shows student getting injured, attacked, victimized, ill, or having health emergency
  - Individual taking photo or video intends to make specific student as focus of photo or video; or
  - Audio or visual content of photo or video otherwise contains personally identifiable information contained in student's education records
- Photo or video photo or video should not be considered directly related to student in absence of these factors (and if student's image is incidental or captured only as part of background or if student is shown participating in school activities that are open to public and without specific focus on any individual)

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Photos/Videos as Education Records (cont'd)

- Examples of situations that may cause a video to be considered education record:
  - School surveillance video showing two students fighting in hallway, used as part of disciplinary action, is directly related to students fighting
  - Classroom video that shows student having seizure is directly related to that student because depicted health emergency becomes focus of the video.
  - If school maintains close-up photo of two or three students playing basketball with general view of student spectators in background, photo is directly related to basketball players because they are focus of photo, but it is not directly related to students pictured in background (Note: Schools often designate photos or videos of students participating in public events (e.g., sporting events, concerts, etc.) as directory information and/or obtain consent from parents to publicly disclose photos or videos from these events)
  - Video recording of faculty meeting during which specific student's grades are being discussed is directly related to that student because discussion contains personally identifiable from the student's education record

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Photos/Videos as Education Records (cont'd)

- Remember that to be considered education record under FERPA, district (or party acting for district) also must maintain such record:
  - For example, photo or video taken by parent at school football game would not be considered education record, even if it is directly related to particular student, because it is not being maintained by school or on school's behalf
  - If, however, parent's photo or video shows two students fighting at game, and parent provides copy to school, which then maintains photo or video in students' disciplinary records, then copy of photo or video being maintained by school is education record

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Photos/Videos as Education Records (cont'd)

- Keep in mind that FERPA excludes from definition of education records those records created and maintained by law enforcement unit of district for law enforcement purpose
  - So, if law enforcement unit creates and maintains school's surveillance videos for law enforcement purpose, then any such videos would not be considered to be education records
  - But if law enforcement unit provides copy of video to another component within district (for example, to maintain the record in connection with a disciplinary action), then copy of video may become education record of student(s) involved if video is not subject to any other exclusion from definition of "education records" and it is: (1) directly related to a student; and (2) maintained by district

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Photos/Videos as Education Records (cont'd)

- Note that single recorded image can be considered education record of more than one student under FERPA
  - For example, surveillance video that shows two students fighting on school bus that school subsequently uses and maintains to discipline the two students, would be "directly related to" and, therefore, education record of both students

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Test Protocols as Education Records

- Test protocols consist of items such as standardized assessment scoring forms, instruction sheets, testing information and rules, etc.
- Generally, standardized test protocols are copyrighted documents owned by test's publisher
- Protocols can also include assessor's observations of student's behavior during test
- Test protocol or question booklet that is separate from sheet on which student records answers and that is not personally identifiable to student is not part of student's education records
- Regardless, protocols may need to be disclosed in order to comply with FERPA requirement to provide parents with explanation and interpretation of records

(Letter to Schuster (OSEP 2007) 108 LRP 2302)

22

Rights of Parents to Access Their Child's Education Records

23

Legal Rights and Limitations

- FERPA, IDEA and California law
  - Parents have right to inspect and review education records relating to their children that are collected, maintained, or used by district
- Limitation on Access Rights
  - If student's education records contain information on more than one student, parents may inspect and review only specific information about their child
  - In many cases, districts will be required to redact information about other student (or students) to comply with this obligation

(34 C.F.R. §§ 99.3, 99.10, 99.12, 300.613, 300.615; Ed. Code, § 49069.7)

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Example: Access to Videos

- When video is education record of multiple students, FERPA requires district to allow, upon request, parent of student to whom the video directly relates to inspect and review the video
- If district can reasonably redact or segregate out portions of the video directly related to other students, without destroying meaning of record, then it would be required to do so prior to providing parent with access
- On the other hand, if redaction or segregation of video cannot reasonably be accomplished, or if doing so would destroy meaning of record, then parents of each student to whom video directly relates would have right under FERPA to access entire video even though it also directly relates to other students

(Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524)

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Time and Place for Inspection

- FERPA
  - Does not address where/when inspection may take place
  - Does not require records be maintained at location where student attends school
- California
  - Inspection and review: "During regular school hours"
  - For students with IEPs, copy of IEP must be maintained at school where student is enrolled
  - Must notify parents of location of records (if not centrally located) and adopt procedures for making personnel available to interpret records

(Letter to Woodson (OSEP 1989) 213 IDELR 224; Ed. Code, §§ 49069.7, 56347)

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Timeframe for Response

- FERPA
  - Within "reasonable" time but not more than 45 days after receiving request
- California
  - Within 5 business days after request is made, either orally or in writing
  - For students with disabilities: "Without any unnecessary delay" – but in no case more than 5 business days – before any IEP meeting or due process hearing

(34 C.F.R. § 99.10(b); Ed. Code, §§ 49069.7, 56504)

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Parents' Right to Copies

- FERPA
  - Only entitled to copies when circumstances "effectively limit" in-person inspection (e.g., living too far from school)
- California
  - Definition of "access" under California law requires districts to provide copies upon request (within 5 business day timeframe)

(34 C.F.R. § 99.10(b); Ed. Code, §§ 49069.7, 56504)

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Fees for Copies

- FERPA
  - Districts may charge fees for copies, but fees must be waived if they would "effectively prevent" access
- California
  - Reasonable charge not exceeding actual cost of copies, but no charge if fees "effectively prevent" parental access
  - For students with disabilities, copy of IEP must be provided at no cost
  - Cannot charge fees to search for or retrieve records

(34 C.F.R. § 99.11(a); 34 C.F.R. § 300.322(f); 34 C.F.R. § 300.617; Ed. Code, §§ 49065, 56504)

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Rights of Parents to Prevent Nonconsensual Disclosure of Education Records to Third Parties

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General Prohibition

- FERPA, IDEA and California law prohibit districts from disclosing information from student's education records without prior parental consent
  - But there are numerous exceptions allowing nonconsensual disclosures
- "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party . . . that provided or created the record"

(34 C.F.R. § 99.30; 34 C.F.R. § 300.622; Ed. Code, § 49076, subd. (a))

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"Disclosure"

- Disclosures do not have to be intentional or made directly to identifiable third party to violate FERPA
- Examples:
  - Discussion about student's IEP during open school board meeting attended by reporters
  - District's practice of mailing postcards to parents advising them that their child is failing coursework
- But disclosures about student derived from sources other than education records (i.e., personal knowledge, observations) do not violate FERPA

(Greater Hoyt School Bd. (FPCO 1993) 20 IDELR 105; Letter to Bell (FPCO 2004) 105 LRP 649; Jackson Pub. School Dist. (FPCO 2007) 108 LRP 20761)

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"Disclosure" – Case Example

Letter to Anonymous

- Teacher allegedly violated FERPA by improperly displaying student's grades and school identification number in classroom without parent's consent, causing student embarrassment
- SPPO rejecting complaint, stating that FERPA is not intended to interfere with classroom teacher's ability to carry out "normal and legitimate educational activities and functions"
- Because teacher displayed student's grades and ID number in classroom and not in public area, nonconsensual disclosure did not violate FERPA
- SPPO: "Parents and school officials [should] work together to resolve these types of concerns where possible"

(Letter to Anonymous (SPPO 2023) 124 LRP 4247)

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Consent

- Absent applicability of one or more exceptions, disclosures to third parties without "signed and dated written consent" from parents violate FERPA
- To be valid, the written consent must: (1) specify records that district may disclose; (2) state the purpose of disclosure; and (3) identify party or parties to whom disclosure may be made
- If parent requests, district must provide copy of record or records that were disclosed

(34 C.F.R. § 99.30)

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Exceptions to Disclosure Prohibition

- FERPA contains 17 specific exceptions under which districts may disclose personally identifiable information without prior parental consent
  - California Education Code provides additional exceptions
  - Several relate to postsecondary institutions and several are rarely used
- IDEA also allows nonconsensual disclosures to "participating agencies" (i.e., those receiving IDEA funds)
  - Except prior consent is required before disclosures can be made to: (1) any agency providing transition services; and (2) between officials in district where NPS is located and officials in district of parent's residence

(34 C.F.R. § 99.31; 34 C.F.R. § 300.622; Ed. Code, § 49076)

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Exceptions to Disclosure Prohibition

- Exceptions to prohibition on nonconsensual disclosure that most frequently impact K-12 students
  - Disclosures to school officials with legitimate educational interest
  - Disclosures in event of health or safety emergencies
  - Disclosure of directory information
  - Disclosure to officials from other schools
  - Disclosures in connection with judicial orders or subpoenas

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School Officials

- Nonconsensual disclosure may be made to other "school officials," including teachers, within district who have "legitimate educational interest" in receiving records
  - FERPA requires districts to use "reasonable methods" (physical or technological access controls) to ensure that school officials obtain access to only those education records in which they have legitimate educational interest
  - District's definition of "school official" and what constitutes "legitimate educational interest" must be included in its annual FERPA notice

(34 C.F.R. § 99.31; 34 C.F.R. § 99.7; Ed. Code, § 49063)

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School Officials (cont'd)

- In addition to employees, "school officials" can include contractors, consultants, or other parties to whom district has outsourced services or functions, provided they:
  - Perform service or function for which district would otherwise use employees
  - Are under direct control of district with respect to use and maintenance of education records
  - Are subject to specific restrictions contained in FERPA governing redisclosure of personally identifiable information

(34 C.F.R. § 99.31; Ed. Code, § 49076, subd. (a))

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School Officials (cont'd)

- "Legitimate educational interest"
  - Not defined by FERPA or IDEA
  - Left up to districts to determine and define
- For students with disabilities, school officials responsible for implementing student's IEP are considered to have "legitimate educational interest" in receiving the document
  - California law requires districts to ensure that "the regular teacher or teachers, the special education teacher or teachers, and other persons who provide special education, related services, or both to the individual with exceptional needs have access to the [IEP]"

(34 C.F.R. § 99.31; Ed. Code, § 56347)

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Health or Safety Emergency

- Districts may make nonconsensual disclosures "to appropriate parties . . . in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals"
  - Must be "articulable and significant threat" to health or safety of student or other individuals
  - Districts may take into account "totality of the circumstances" pertaining to a threat"
  - Judgment will not be questioned by SPPO if district had "rational basis" for decision to disclose

(34 C.F.R. § 99.36; 73 Fed. Reg. 74838 (2008); Ed. Code, § 49076)

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Directory Information

- Provided certain conditions are met, districts may make nonconsensual disclosures of information designated as "directory information"
- "Directory information" is defined as information contained in student's records that would not be considered harmful or an invasion of privacy if disclosed
- Directory information can include, but is not limited to:
  - Name, address, phone number, email address, date of birth
  - Dates of attendance
  - Participation in officially recognized activities and sports
  - Honors and awards received
  - Weight and height of members of athletic teams
  - Most recent previous public or private school attended

(34 C.F.R. § 99.3; Ed. Code, § 49061)

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Directory Information (cont'd)

- District may disclose directory information only if it has given public notice to parents of students in attendance of:
  - Types of personally identifiable information that it has designated as directory information
  - Parents right to refuse to allow district to designate any or all of those types of information about their child
  - Period of time within which a parent has to notify the district in writing that he or she does not want such information to be designated as directory information

(34 C.F.R. § 99.37)

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Directory Information (cont'd)

- In California
  - Directory information is specifically excluded from definition of "pupil record"
  - Ed Code does not allow release of directory information to private profitmaking entities (other than employers, prospective employers, and representatives of news media)
  - Districts may limit or deny release of specific categories of directory information to any public or private nonprofit organization "based upon a determination of the best interests of pupils"
  - Law directs districts to "minimize the release of pupil telephone numbers"

(Ed. Code, §§ 49061, 49073)

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Officials from Other Schools

- Nonconsensual disclosures are allowed to officials from another school where student seeks or intends to enroll (or where student is already enrolled so long as disclosure is related to enrollment or transfer)
  - Disclosure may be made if statement is included in annual FERPA notice that school makes disclosures for this purpose (or if district attempts to notify parents in advance)
  - Parents entitled to copy of record that was disclosed
- Federal law requires transfer of records with respect to student's suspension/expulsion to any school in which student later enrolls or seeks to enroll

(34 C.F.R. § 99.31(a)(2); 34 C.F.R. § 99.34(a); Ed. Code, § 49076; 20 U.S.C. § 7917)

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Officials from Other Schools (cont'd)

- For students with disabilities, districts may disclose personally identifiable information from a student's education records to a third party (such as another school) in order to make an educational placement under the IDEA
- For students with disabilities who transfer, new district must take reasonable steps to promptly obtain student's records—including IEP and any other records relating to the provision of special education or related services—from previous district
  - Previous district is also obligated to take reasonable steps to promptly respond to records request from new district

(Letter to Anonymous (FPCO 2013) 113 LRP 35724; 34 C.F.R. § 300.323(g); Ed. Code, § 56325)

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Judicial Orders or Subpoenas

- Nonconsensual disclosure to comply with judicial order or subpoena may be made only if district makes "reasonable effort" to notify parents in advance of compliance to give them opportunity to seek protective order
  - Some exceptions to notification rule apply
- If district initiates legal action against parent/student, it may disclose to the court, without order or subpoena, those education records necessary to proceed with claim
  - Same rule applies if district is defendant

(34 C.F.R. § 99.31(a)(9))

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Rights of Parents to Amend Their Child's Education Records

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Right to Amend Records

- FERPA grants parents right to request the district to amend student's education records (or request a hearing to correct or amend those records) if they believe that the records contain information that is "inaccurate, misleading, or in violation of the privacy rights of the student"
- IDEA also affords parents the right to amend education records, paralleling the amendment rules and requirements under FERPA

(34 C.F.R. §§ 99.20-99.22; 34 C.F.R. §§ 300.618-300.621)

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Right to Amend Records (cont'd)

- California law (contains slightly different requirements, allowing parents to file written request with superintendent to correct or remove information in student's records that they allege to be:
  - Inaccurate;
  - An unsubstantiated personal conclusion or inference;
  - A conclusion or inference outside of the observer's area of competence;
  - Not based on the personal observation of a named person with the time and place of the observation noted;
  - Misleading; or
  - In violation of the student's privacy or other rights.

(Ed. Code, § 49070)

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Grades and Other Substantive Decisions

- Generally, these are not subject to challenge by parent unless challenge asserts one allegations contained in Education Code section 49070
- Further, under California law, superintendent cannot order student's grade to be changed unless teacher who determined the grade is, to extent practicable, given opportunity to state orally, in writing, or both, reasons for which grade was given and is, to extent practicable, included in all discussions relating to changing of grade

(Ed. Code, § 49070)

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Decision to Amend and Right to Hearing

- FERPA: If parent request district to amend education record, district must decide whether to amend the record "within a reasonable period of time"
  - In California, time limit on the decision is within 30 days after receipt of request
- FERPA: If district decides not amend record, it must inform parent of denial and, upon request, provide parent opportunity for hearing to challenge information in student's records
  - California law provides that parent has 30 days to appeal district's (superintendent's) decision to district's governing board
  - Decision of governing board is final and binding

(34 C.F.R. §§ 99.20-99.21; Ed. Code, § 49070)

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Decision to Amend and Right to Hearing

- Following conclusion of appeal, if governing board sustains any or all of allegations, it must order superintendent to immediately correct or remove/destroy information from written records of student and inform parents in writing of its decision
- If final decision of governing board is unfavorable to parents, parents must be informed of decision and of right to submit written statement of their objections to such decision, which becomes part of student's school record
  - Note: If superintendent or governing board sustains parents' amendment request to change name, gender, or both, of student (or former student), district must add new document to student's record that includes list of information detailed in Education Code section 49070

(Ed. Code, § 49070)

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Parents' Right to Receive Annual Notice

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Right to Notice

- Both FERPA and California law require districts to provide parents of currently enrolled students with notice, on an annual basis, of their rights with respect to their child's education records
- Notice must be, insofar as is practicable, in student's home language
- California law contains more specific, and broader, notification requirements than does FERPA
  - Requirements of notice are detailed in session materials and in Education Code section 49063
- USDOE: In addition to FERPA notice, it is best practice also to inform parents concerning what data district is collecting about students; why it is collecting that information; and how that information is protected and shared

(34 C.F.R. § 99.7; Ed. Code, § 49063; Transparency Best Practices for Schools and Districts (USDOE 2014)

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Other Laws Protecting Student Privacy

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HIPAA

- **Health Insurance Portability and Accountability Act**
  - Federal law protecting confidentiality of health care information created or maintained by "health care providers"
  - Covers "protected health information" (i.e., individually identifiable health information maintained or transmitted in any form)
  - Records protected under FERPA are not subject to HIPAA requirements
  - But districts may come under scope of HIPAA if they employ outside health care providers

(Joint Guidance on the Application of FERPA and HIPAA To Student Health Records (USDOE/HHS 2019) and Family Educational Rights And Privacy Act: Guidance for School Officials on Student Health Records (SPPO 2023) 123 LRP 13132)

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PPRA

- **Protection of Pupil Rights Amendment**
  - Federal law governing student participation in surveys that concern one or more of eight protected areas, including questions about mental or psychological issues/disabilities of student or family members
  - Districts must provide parents with advance notice of rights, including consent prior to student's participation if survey is federally funded and right to opt-out of student's participation in any survey, regardless of funding

(20 U.S.C. § 1232h)

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Digital Privacy Laws

- **Children's Online Privacy Protection Act (COPPA)**
  - Federal law controlling what information may be collected from children under 13 by website companies
- **Student Online Personal Information Protection Act (SOPIPA)**
  - State law establishing privacy rules for websites and applications marketed for K-12 school purposes
- **Education Code 49073.6**
  - Requires districts to notify parents of any proposed program to gather or maintain information obtained from social media
- **Education Code 49073.1**
  - Establishes requirements for technology service agreements

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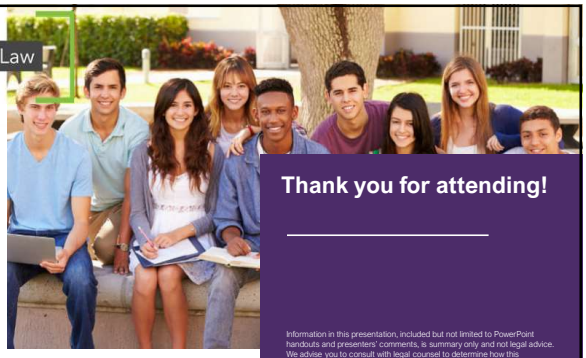
F3 Law



Thank you for attending!

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F3 Law

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Real Estate & Property
Special Education
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Title IX
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Student Records and Confidentiality

F3 Law

STUDENT RECORDS AND CONFIDENTIALITY

Introduction. The legal obligation of school districts to maintain and preserve the confidentiality of student education records is established in both federal and state statutes and regulations. In this presentation, we will explore the requirements of both the federal Family Educational Rights and Privacy Act ("FERPA") and the California Education Code. Specifically, the materials below will explain the definition of an "education record," the rights of parents to access their child's records, the right of parents to prevent nonconsensual disclosure of records to third parties, rules governing electronic records, and other key essentials of this important and often controversial topic.

Specifically, we will cover the following topics:

- **General Overview of Federal and State Laws Governing Student Records and Confidentiality.**
- **What Is an Education Record?**
- **Rights of Parents to Access Their Child's Education Records.**
- **Rights of Parents to Prevent Nonconsensual Disclosure of Education Records to Third Parties.**
- **Rights of Parents to Amend Their Child's Education Records.**
- **Parents' Right to Receive Annual Notice.**
- **Other Laws Protecting Student Privacy.**

I. General Overview of Federal and State Laws Governing Student Records and Confidentiality.

A. FERPA. The Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 C.F.R. Part 99) is a federal law that protects the privacy of student education records. FERPA applies to educational agencies and institutions that receive funds under any

program administered by the U.S. Department of Education ("USDOE"). This includes virtually all public schools and school districts and most private and public postsecondary institutions, including medical and other professional schools. FERPA is administered and enforced by USDOE's Student Privacy Policy Office ("SPPO"), formerly known as the Family Policy Compliance Office ("FPCO").

FERPA grants four basic rights to parents, specifically:

- The right to inspect and review their child's education records;
- The right to prohibit school districts from releasing their child's education records to third parties without obtaining prior consent;
- The right to amend their child's records if a record is misleading or inaccurate; and
- The right to receive notice of parental rights under FERPA.

These rights transfer from parents to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are referred to by FERPA as "eligible students." (34 C.F.R. § 99.5(a).)

B. **The IDEA.** The provisions of FERPA apply to all students receiving special education and related services under the Individuals with Disabilities Education Act ("IDEA"), which incorporates and cross-references FERPA. For example, under the IDEA regulations, the term "education records" is defined as the type of records covered by FERPA. (34 C.F.R. § 300.611.)

In addition to the IDEA-specific provisions that restate the FERPA requirements, the IDEA regulations (34 C.F.R. §§ 300.610-300.627) also include several additional protections tailored to special confidentiality concerns for students with disabilities and their families. For example, districts must inform parents of students with disabilities when information about their child is no longer needed and, except for certain permanent record information, that information must be destroyed at the request of the parents.

Additionally, each district must have one official who is responsible for ensuring the confidentiality of any personally identifiable information, must provide training to all persons who are collecting or using personally identifiable information regarding the state's policies about confidentiality and FERPA, and must maintain for public inspection a current listing of the names and positions of individuals within the agency who have access to personally identifiable information. (34 C.F.R. § 300.624).

C. **California Education Code and Regulations.** California's Education Code contains numerous provisions concerning education records, referred to as "pupil records" under the statutes. (Ed. Code, §§ 49060-49079.7, 56501, 56504, 56515.) Legislative amendments in 2012 (Assembly Bill 143) revised many of the Education Code provisions to better track the language of FERPA, and they now largely parallel. However, some important differences remain between state and federal law governing access to—and disclosures of—student education records. Those differences will be indicated throughout the discussion below. Provisions regarding education records are also contained in California Regulations, Title 5, sections 430 through 438.

II. **What Is an Education Record?** Defining what constitutes an education record is essential to establishing the parameters of parental rights, since, as noted above, the rights established by FERPA and the IDEA apply only to records characterized as "education records" (or "pupil records" under the California Education Code).

A. **Legal Definitions.** Under FERPA, an education record is defined as "those records that are: (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." (34 C.F.R. § 99.3.) Education records may be recorded in any manner, "including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, or microfiche." (34 C.F.R. § 99.3.) As noted above, the IDEA does not have a separate definition of education records, and adopts FERPA's definition by reference. (34 C.F.R. § 300.611(b).) California law contains a similar definition of "pupil records."

Education Code section 49061(b) states that a "pupil record" means "any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means."

There are two important components in the definition of an "education record" that require further elaboration:

1. **"Directly related to a student".** Although both federal and state law include the requirement that a record must be "directly related" to a student to qualify as a protected education (or pupil) record, the term "directly related" is not defined in any statute or regulation. The closest equivalent is the definition of "personally identifiable information," found in the FERPA regulations at 34 C.F.R. § 99.3. That section provides that personally identifiable information includes, but is not limited to:

    - The student's name;
    - The name of the student's parents or other family members;
    - The address of the student or student's family;
    - A personal identifier, such as the student's social security number, student number, or biometric record (Biometric record means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.);
    - Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
    - Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant

circumstances, to identify the student with reasonable certainty; or

- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

The definition of "personally identifiable information" in the Education Code and IDEA is similar to that contained in FERPA. It includes: (a) the name of the student, the student's parent, or other family member; (b) the address of the student; (c) a personal identifier, such as the student's social security number or student number; or (d) a list of personal characteristics or other information that would make it possible to identify the student with reasonable certainty. (34 C.F.R. § 300.32; Ed. Code, § 56515, subd. (b).) The IDEA equates "personally identifiable information" to information "directly related to a student." (See, e.g., 34 C.F.R. § 300.513(d).)

Note: Although a district may maintain records pertaining to its employees, such as teachers, administrators, and other staff, these records do not meet the definition of "education records." Because employee records generally do not contain personally identifiable information related to students, they are not subject to FERPA protections. Questions and Answers on the Applicability of FERPA to Disclosures Related to COVID-19 (SPPO 2020) 120 LRP 9700.)

2. **"Maintained".** As with "directly related to a student," there is no statutory or regulatory definition of what it means to "maintain" a record. The U.S. Supreme Court provided help in Owasso Independent School District No. 1-011 v. Falvo (2002) 534 U.S. 426, 36 IDELR 62, one of the rare instances in which the High Court has addressed FERPA. In that decision, the Court held that grades on peer-graded papers before they are collected and recorded by a teacher were not education records because they were not "maintained" by the district—at least until the teacher has recorded the grades. The Court

defined the word "maintained" by its ordinary meaning to "preserve" or "retain" and suggested that, when enacting FERPA, Congress contemplated that education records would be kept in one place with a single record of access, such as a record room or a secure database, by a central custodian.

Neither FERPA nor the IDEA specifies the types of records that districts must maintain. However, California law is more specific, setting forth a lengthy list of information about a student that districts must maintain—as well as for how long they must maintain such information—as either "mandatory permanent records," "mandatory interim records" or "permitted records." (Cal. Code Regs., tit. 5, §§ 430, 432.)

(a) **Case Example.** In Student v. Saddleback Valley Unified School District (OAH 2011) Case No. 2011040670, 57 IDELR 298, Student was injured on two occasions on the school playground, with the latter injury resulting in a wrist fracture. Parent requested copies of incident reports, but District refused to produce them. At due process, Parent alleged that District denied Student a FAPE under the IDEA by failing to provide them with a copy of Student's education records in a timely manner. The ALJ denied Parent's claim, finding that she "failed to meet her burden of establishing by a preponderance of the evidence that the incident reports were educational [sic] records." Instead, the evidence showed, through the credible testimony of District staff, that the incident reports were internal District documents prepared in anticipation of litigation. As such, they were not maintained in student's education files. Rather, District maintained them in a confidential manner in the risk management department of its business office and kept them in a file for each corresponding school year. Each file bore the words "Attorney-Client, Work Product, Privilege" and District forwarded them to its legal

counsel only when necessary. The ALJ observed that "case authority has firmly established that education records are those that are kept in one place by a single central custodian. . . . Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like. . . . Reports 'not directly related to the private educational interests of the student,' are not education records when they are not 'regularly maintained in a central location along with education records . . . in separate files for each student." [Citations omitted] "In the instant matter," the ALJ explained, "the incident reports were neither maintained in Student's education file, nor were they directly related to the private educational interests of Student. In other words, the incident reports, which were prepared in anticipation of litigation and maintained in non-student files in District's risk management department, did not relate to Student's identification, evaluation, or educational placement. Rather, they related to the documentation of accidents or incidents occurring on school property. As such, the incident reports were not education records, and did not have to be produced by District."

Note: Not all incident reports are prepared in anticipation of litigation and maintained in a confidential manner in the risk management department. Some incident or behavior reports documenting student behavior and maintained in a student's file may be subject to disclosure upon parent request.

B. **Exclusion from the Definition of Education Records.** There are some student-related records that are excluded from the definition of "education records" under FERPA, even when they contain personally identifiable information and are maintained by the district.

Because these records do not qualify as "education records," they are not subject to FERPA privacy protections or requirements.

1. **"Sole Possession" Notes.** FERPA specifically excludes from the definition of an "education record" those records "that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." (34 C.F.R. § 99.3.) This "sole possession" exception is also contained in California law under Education Code section 49061, which states as follows: "'Pupil record' does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. For purposes of this subdivision, 'substitute' means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position."

   In Letter to Parker (FPCO 2010) 110 LRP 65735, FPCO explained that "generally sole possession records are of the nature to serve as a 'memory jogger' for the creator of the record. For example, if a school official has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes." FPCO added that "when determining whether records are 'education records' or 'sole possession records' under FERPA, the intent in creating and maintaining the records must be considered, as well as whether such intent has been modified since the records were created. FERPA . . . generally prohibits the nonconsensual disclosure of education records, or personally identifiable information contained in education records. Thus, once a teacher or other school official decides to make the 'sole possession' records available to a party other than a temporary substitute, those records should be treated as

education records for the purposes of any disclosures which may occur.

Additionally, a school official's personal knowledge or observation of a student would be protected by FERPA's limitations on the disclosure of education records if the school official, in their official capacity, uses this knowledge or observation in a manner that produces an education record. For example, if a high school principal sees a student violating a school rule and takes disciplinary action on the basis of this observation, and, as a result, the school generates and maintains a disciplinary record about that disciplinary action (i.e., an education record), the principal's personal observations that are directly related to the student would be protected by FERPA and the principal could not disclose such information without consent.

(a) **Case Example.** In Student v. Temecula Valley Unified School District (OAH 2009) Case Nos. 2009050048, 2009031335 and 2009040514, 109 LRP 74851, District's speech and language pathologist and physical education teacher, both of whom administered assessments to Student, took informal notes during their respective assessments. Parents requested copies of Student's education records, but District did not produce either of the assessor's notes as it was unaware that the notes existed. At the due process hearing, Parents made a motion for the production of the notes, which District opposed. Parents argued that the notes were part of Student's education records and, therefore, they were entitled to a copy of them. District asserted that the notes were not education records; instead they were informal notes that were not meant to be shared with anyone. The ALJ agreed with District, finding that both assessors took the notes exclusively for their own use. (One of the assessors gave the notes to

another individual, but he was designated her substitute at an IEP meeting she could not attend.) "Neither assessor intended for anyone else to view the notes, neither disseminated the notes to anyone else, nor placed the notes in any of Student's files maintained by the District," the ALJ stated. Therefore, based upon the wording of both the federal and California statutes addressing what constitutes a student record, as well as case law interpreting those statutes, the ALJ denied Parent's motion for production of the assessment notes.

2. **Other Exclusions.** FERPA also specifically excludes five other types of records from its definition of "education records":

(a) Records maintained by a law enforcement unit that were created by that unit for the purpose of law enforcement. Law enforcement unit records, such as school incident reports, lose their status as law enforcement unit records and become "education records" if they are maintained by a district component other than the law enforcement unit.

(b) In the case of persons who are employed by an educational agency or institution but who are not in attendance there, records made and maintained in the normal course of business that relate exclusively to such person in their capacity as an employee and that are not available for use for any other purpose.

(c) Records of a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in such capacity; or made, maintained, or used only in

connection with the provision of treatment to the student; and are not available to anyone other than persons providing such treatment. Health-related records maintained by schools that are made, maintained, or used for non-treatment purposes, such as medical forms or questionnaires used to screen for eligibility to participate in school-sponsored athletics, are education records rather than treatment records under FERPA. Moreover, health records that are used for the treatment of students who are under 18 years old and are attending an elementary or secondary school are not considered "treatment records" under FERPA and are therefore considered "education records" if they meet the definition of that term.

(d) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(e) Grades on peer-graded papers before they are collected and recorded by a teacher. (Owasso Independent School District No. 1-011 v. Falvo (2002) 534 U.S. 426, 36 IDELR 62.)

(34 C.F.R. § 99.3; Family Educational Rights and Privacy Act: Guidance for School Officials on Student Health Records (SPPO 2023) 123 LRP 13132)

C. Specific Examples.

1. Emails as Education Records. Generally, emails are education records to the extent they satisfy the definition detailed above. An email that is not maintained by the educational agency is not an education record, even if it contains personally identifiable information about a student. But what does it mean to maintain an email? That question

was addressed in S.A. v. Tulare County Office of Education (N.D. Cal. 2009) 53 IDELR 111 and 53 IDELR 143, in which the District Court determined that emails that are not "printed and placed" in a student's permanent file are not "maintained" by an LEA, even if they are kept in staff email in-boxes or may be electronically retrieved from the LEA's server. In S.A., Parents had requested that the County Office of Education ("COE") produce "a copy of any and all electronic mail sent or received" concerning or personally identifying Student, "in their original electronic format." The COE produced a stack of paper emails from Student's file, but told Parent that the electronic versions of the emails had been "purged." Parent claimed the COE "maintained" all emails in the LEA's central email server and/or in the individual in-boxes of LEA staff.

The court rejected Parent's contentions, noting that nothing in FERPA "requires an LEA to maintain an email or any other record based solely on the fact that it contains personally identifiable information about a student." (The court was careful to note, however, that FERPA and the IDEA do specifically require the maintenance of certain records, such as a record of each request for access to and disclosure of personally identifiable information, a student's final grades, attendance records, and applicable health records.) The court observed that the U.S. Supreme Court has held that the word "maintain," as used in FERPA, "suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database. . . . FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar[.]" (Owasso Indep. School Dist. v. Falvo (2002) 534 U.S. 426.)

The court noted that emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, the court observed that Parent's assertion–specifically, that all emails identifying Student, whether in individual inboxes or the

retrievable database, are maintained in the same way the registrar maintains a student's folder in a permanent file–was "fanciful." Notably, however, the court did not directly address the issue of whether emails would be considered "maintained" as education records if they were printed and placed in a non-centralized file, such as a file created by a classroom teacher, rather than in a permanent file. For example, the opinion noted that the U.S. Supreme Court has declined to rule whether a teacher's classroom grade book is an education record.

Similarly, in an unpublished decision, the Ninth Circuit ruled that the district did not violate FERPA or California law when it only turned over emails concerning a student that had been printed and added to the student's physical file. (Burnett v. San Mateo-Foster City School Dist. (9th Cir. 2018, unpublished) 739 F. App'x 870, 72 IDELR 147.) The Ninth Circuit affirmed a lower court's finding that the district was not required to turn over emails that were not "maintained" in a physical folder or secure electronic database. The court observed that the word "maintained" suggests something more than an ordinary exchange of emails, referring instead to records that are kept in a filing cabinet or a permanent secure database."

2. **Photos and Videos as Education Records.** Like other types of media, photos, and videos may qualify as education records under FERPA. To meet the definition of an "education record" a photo or video must be directly related to a student and maintained by the school district or educational agency. (Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524.)

According to the USDOE, a photo or video should be considered "directly related" to a student if:

- The district or educational agency uses the photo or video for disciplinary actions or other official purposes involving the student;

- The photo or video depicts an activity that: resulted or may result in the use of the photo or video for disciplinary actions or other official purposes; shows a student violating local, state, or federal law; or shows a student getting injured, attacked, victimized, ill, or having a health emergency;

- The individual taking the photo or video intends to make a specific student the focus of the photo or video; or

- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education records.

A photo or video should not be considered directly related to a student in the absence of these factors and if the student's image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual. (Id.)

Examples of situations that may cause a video to be an education record:

- A school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting.

- A classroom video that shows a student having a seizure is directly related to that student because it depicted a health emergency that becomes the focus of the video.

- If a school maintains a close-up photo of two or three students playing basketball with a general view of student spectators in the background, the photo is directly related to the basketball players because they are the focus of the photo, but it is not directly related to the students pictured in the background. Schools often designate photos or videos of students participating in public events (e.g., sporting events, concerts, theater performances, etc.) as directory information and/or obtain consent from the parents or eligible students to publicly disclose photos or videos from these events.

- A video recording of a faculty meeting during which a specific student's grades are being discussed is directly related to that student because the discussion contains personally identifiable information from the student's education record. (Id.)

Remember that to be considered an education record under FERPA, an educational agency or institution, or a party acting for the agency or institution, also must maintain the record. Thus, a photo taken by a parent at a school football game would not be considered an education record, even if it is directly related to a particular student, because it is not being maintained by the school or on the school's behalf. If, however, the parent's photo shows two students fighting at the game, and the parent provides a copy of the photo to the school, which then maintains the photo in the students' disciplinary records, then the copy of the photo being maintained by the school is an education record. (Id.)

Also, keep in mind that FERPA excludes from the definition of education records those records created and maintained by a law enforcement unit of an educational agency or institution for a law enforcement purpose. Thus, if a law enforcement unit of an educational agency or institution creates and maintains the school's surveillance videos for a law

enforcement purpose, then any such videos would not be considered to be education records. If the law enforcement unit provides a copy of the video to another component within the educational agency or institution (for example, to maintain the record in connection with a disciplinary action), then the copy of the video may become an education record of the student(s) involved if the video is not subject to any other exclusion from the definition of "education records" and the video 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. (Id.)

Note that a recorded image can be the education record of more than one student under FERPA. For example, a surveillance video that shows two students fighting on a school bus that the school uses and maintains to discipline the two students would be "directly related to" and, therefore, the education record of both students. (Id.)

3. **Test Protocols.** Test protocols consist of items such as standardized scoring forms, instruction sheets, testing information and rules, etc. Most standardized test protocols are copyrighted documents owned by the publisher of the test. Protocols can also include the assessor's observations of a student's behavior during a test. Since protocols are generally maintained by the district, determination of whether or not they qualify as an education record typically involves the first component of the definition—whether they contain information directly related to the student.

Guidance from FPCO has stated as follows: "Psychological evaluation or other assessment document that is identifiable to a particular student would generally meet the definition of an education record under FERPA. Any test protocols or test question booklets that do not contain information directly related to the student are not education records under FERPA." (Letter re: Moriah Central School District (FPCO

2004) 105 LRP 11194.) The Office of Special Education Programs ("OSEP") maintains a similar position. It has stated that "[d]ocuments such as test instruments and interpretative materials that do not contain the student's name are not considered to be 'directly related' to the student. Accordingly, these documents would not fall under the FERPA definition of 'education records' and a parent would not have the right under FERPA to inspect and review them." (Letter to MacDonald (OSEP 1993) 20 IDELR 1159.) OSEP also explained that "a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of his or her 'education records.'" (Letter to Schuster (OSEP 2007) 108 LRP 2302.)

However, it is important to note that FERPA (and the IDEA) require districts to "respond to reasonable requests [from parents] for explanations and interpretations of their child's education records]." (34 C.F.R. § 300.613; 34 C.F.R. § 99.10(c).) To comply with this requirement—for example, when a parent asks for an explanation of a student's test answer sheet—may require the district to provide the underlying protocol. OSEP has stated that "if a school were to maintain a copy of a student's test answer sheet (an 'education record'), the parent would have a right under [the IDEA] and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the response in some other adequate manner that would inform the parent." (Letter to Schuster (OSEP 2007) 108 LRP 2302.)

If a particular test protocol maintained by the district includes personal information identifiable to a particular student—thereby qualifying as an education record—OSEP has expressed concern that providing parents with a copy of the protocol may violate federal copyright law. It explained that

"in a situation where a copyrighted document has been made part of a child's education record because it includes child-specific information, the [LEA] may wish to contact the copyright holder to discuss whether a summary or report of the child's evaluation and assessment results can be prepared that can be provided to the parents as part of the child's education record, in lieu of providing a copy of the copyrighted document." However, an important federal District Court case has held that providing parents with a copy of their child's test protocol does not violate copyright restrictions because it qualifies under the "fair use" exemption. The case—Newport-Mesa Unified School District v. State of California Department of Education (C.D. Cal. 2005) 371 F. Supp. 2d 1170, 43 IDELR 161—involved the district's decision not to provide parents with the copyrighted test protocol for the Woodcock-Johnson Test of Achievement III. (Both parties agreed that the test protocol sought by parents qualified as an "education record" because student wrote answers on the protocol, making it personally identifiable.) Parent then filed a compliance complaint with CDE, which found the district out of compliance with California Education Code section 56504 by failing to provide parents with records within five days of their request. The district asked the court to issue a declaration of its rights under copyright law and an injunction to prevent CDE from enforcing its compliance report.

The court denied the district's request, concluding that when a district gives parents of special education students copies of their children's test protocols when requested under California Education Code section 56504, it constitutes a "fair use" under federal copyright law. (Under the "fair use doctrine," copying a copyrighted work "for purposes such as criticism, comment, news reporting, teaching—including multiple copies for classroom use—, scholarship, or research," is a fair use of the copyrighted work and is not a copyright infringement. (17 U.S.C. § 107.) The court considered the various factors to be employed in a "fair use" analysis—purpose and character of

use; nature of copyrighted work; proportion of work used in relation to work as a whole; and effect upon potential market for the work—to determine that the protocols qualified under the exemption. It concluded as follows: "The more appropriate outcome of this case is apparent to all. In order to avoid a 'fair use' analysis whenever a district releases documents, and to protect California's school districts from fear of violating federal law, the California legislature should update section 56504 with appropriate standards to protect legitimate copyright concerns, while affording the important disclosure protections for parents of special education students the legislature intended. This should not be a difficult task." (However, to date there have been no legislative revisions to this section of the Education Code.)

III. **Rights of Parents to Access Their Child's Education Records**. Under both FERPA and the IDEA, parents have the right to inspect and review education records relating to their children that are collected, maintained, or used by the district. (34 C.F.R. § 99.3; 34 C.F.R. § 99.10(a); 34 C.F.R. § 300.613(a).) (The IDEA provision covers record access in the context of records that affect the identification, evaluation, educational placement and provision of FAPE to the student.) Similarly, under California Education Code section 49069.7, parents of current or former students have an absolute right of access to any and all pupil records related to their children that are maintained by school districts or private schools.

The parental right to access and inspect their child's records has only one limitation set forth by FERPA and the IDEA: if their child's education records contain information on more than one student, the parent may inspect and review only the specific information about their child. (34 C.F.R. § 99.12(a); 34 C.F.R. § 300.615). In many cases, this will mean that the district will be required to redact information about the other student or students to comply with this directive.

FPCO has issued specific guidance with respect to videos. (Frequently Asked Questions on Photos and Videos Under FERPA (FPCO 2018) 118 LRP 16524.) When a video is an education record of multiple students, in general, FERPA requires the district to allow, upon request, an individual

parent of a student to whom the video directly relates to inspect and review the video. If the district can reasonably redact or segregate out the portions of the video directly related to other students, without destroying the meaning of the record, then it would be required to do so prior to providing the parent with access. On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates would have a right under FERPA to access the entire record even though it also directly relates to other students.

A. **Time and Place for Inspection of Records.** Neither FERPA nor the IDEA directly addresses whether a district may place restrictions on when and where parents may exercise their right to inspect their child's records, except to direct that schools may not adopt any policy that "effectively prevents" parental review. (20 U.S.C. 1232g(a)(1).) Additionally, OSEP has stated that there is "no federal law or regulation requiring that a student's education records be maintained at the same location at which the student is educated." (Letter to Woodson (OSEP 1989) 213 IDELR 224.) However, parents are entitled to receive, upon request, a list of the types and locations of their child's education records collected, maintained, or used by the agency. (34 C.F.R. § 300.616.)

California law requires that a copy of each IEP must be maintained at each school site where the student is enrolled. (Ed. Code, § 56347.) Therefore, although the student's special education file might be maintained at the district's special education office, a copy of the student's current IEP must also be maintained at the school site for parental inspection upon request.

Under California law, districts must adopt procedures to notify parents of the location of all records concerning their child, if those records are not centrally located, as well as procedures for making qualified certificated personnel available to interpret records, if requested. (Ed. Code, § 49069.7.) That section of the Education Code also allows districts to limit inspection and review times to "during regular school hours."

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B. **Timeframe for Responding to Inspection Requests.** FERPA mandates that a district must "comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request." (34 C.F.R. § 99.10(b).) However, the timeline for compliance is significantly shorter in California. Under Education Code sections 49069.7 and 56504, parents have the right and opportunity to examine all records of their child (and to receive copies of those records) within five business days after making a request, either orally or in writing. With respect to parents of students with disabilities, districts must respond to a request for records "without unnecessary delay"—and in no case more than five business days after the request is made orally or in writing—before any IEP meeting or any due process hearing. (Ed. Code, § 56504.)

C. **Right to Copies.** Under FERPA, parents are only entitled to receive copies of their child's requested records "if circumstances effectively limit [them] from exercising the right to inspect and review." (34 C.F.R. § 99.10(d).) And even in those situations, districts have the option—in lieu of providing copies—to make other arrangements for inspection and review. FERPA regulations do not indicate what types of circumstances would "effectively limit" parents from making an in-person inspection. OSEP has stated, however, that "a parent shall receive copies of the records when he or she lives too far from the school district to see the records in person." (Letter to Longest (OSEP 1988) 213 IDELR 173.)

However, pursuant to California law, the term "access" is significantly broader and includes the requirement to provide copies. "Access" is defined as "personal inspection and review of a record or an accurate copy of a record, or receipt of an accurate copy of a record, an oral description or communication of a record or an accurate copy of a record, and a request to release a copy of any record." (Ed Code, § 49061, subd. (e).) Additionally, Education Code sections 49069.7 and 56504 require districts to adopt procedures for providing copies of requested pupil records to parents within the five-day timeframe described above.

Note: One decision has held that California law does not impose an obligation on districts to mail the records to the parent. Moreover, the ALJ found that the district's requirement that the person receiving the records show identification and demonstrate he or she has the legal right to receive those records was consistent with the protections imposed by FERPA. (Student v. Oakland Unified School Dist. (OAH 2014) Case Nos. 2013100534 and 2013110827, 114 LRP 34251.)

D. Fees for Copies. Under FERPA, districts may charge a fee for providing parents with copies of education records, but the fees must be waived if they would "effectively prevent the parent from exercising the right to review and inspect the records." (34 C.F.R. § 99.11(a).) The IDEA contains similar language. (34 C.F.R. § 300.617(a).) California Education Code section 49065 states that "any school district may make a reasonable charge in any amount not to exceed the actual cost of furnishing copies of any pupil record." Education Code section 56504 states that a "public agency may charge no more than the actual cost of reproducing the records, but if this cost effectively prevents the parent from exercising the right to receive the copy or copies, the copy or copies shall be reproduced at no cost." Notwithstanding the above, districts must provide the parent with a copy of the student's IEP at no cost. (34 C.F.R. § 300.322(f).) Additionally, under Education Code section 49065, districts cannot charge for providing up to two transcripts of former students' records or up to two verifications of various records of former students.

FERPA, the IDEA and California law do not permit districts to charge parents a fee to search for or to retrieve a student's education records. (34 C.F.R. § 99.11(b); 34 C.F.R. § 300.617; Ed. Code, § 49065.)

IV. Rights of Parents to Prohibit Nonconsensual Disclosure of Education Records to Third Parties. FERPA contains a general prohibition preventing districts from disclosing information from a student's education records without prior consent from parents. (34 C.F.R. § 99.30.) However,

as discussed in section C., below, FERPA and state law provide for numerous exceptions to this rule.

Note: The IDEA contains a similar restriction, again referencing FERPA: "Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies . . . , unless the information is contained in education records and the disclosure is authorized without parental consent under [FERPA]." (34 C.F.R. § 300.622(a); see also, Ed. Code, § 56515, subd. (c).) A disclosure to a participating agency (another agency that collects, maintains, or uses personally identifiable information, or from which information is obtained, under the IDEA, i.e., a County Office of Education) may be made without parental consent, except that prior consent is required before a disclosure may be made: (1) to an agency providing transition services; or (2) between officials in the LEA where a private school is located and officials in the LEA of the parent's residence, if the student is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence. (34 C.F.R. § 300.622(b).)

California law also references FERPA, stating that "a school district shall not permit access to pupil records to a person without written parental consent or under judicial order except as set forth in this section and as permitted by [FERPA]." (Ed. Code, § 49076, subd. (a).)

A. **Disclosure.** The term "disclosure" is defined by FERPA to mean "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party . . . that provided or created the record." (34 C.F.R. § 99.3.) Disclosures do not have to be intentional or made directly to an identifiable third party in order to violate FERPA. For example, FPCO has found FERPA violations occurred when a discussion was held about a student's IEP during an open school board meeting attended by reporters (Greater Hoyt School Bd. (FPCO 1993) 20 IDELR 105) and by a district's practice of sending postcards to parents advising them that their child was not successfully completing a course and would be placed on probation from participating in extracurricular activities (Letter to Bell (FPCO 2004)

105 LRP 649). In the latter instance, the violation occurred because FPCO stated that "anyone who reads the card would know that the student is not successfully completing her classes." It ordered the district to "discontinue mailing the postcards, and send any records protected by FERPA to parents in sealed envelopes."

On the other hand, disclosures of personally identifiable information about a student derived from sources other than the student's education records do not violate FERPA. FPCO has stated on numerous occasions that "FERPA does not protect the confidentiality of information in general. Thus, FERPA does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge, personal observation, or hearsay, and not specifically obtained from an education record, is not protected from disclosure under FERPA." (See, e.g., Letter re: Jackson Pub. School Dist. (FPCO 2007) 108 LRP 20761.)

1. **Case Example.** In Letter to Anonymous (SPPO 2023) 124 LRP 4247, according to Parent, Student's teacher violated FERPA by improperly displaying her child's grades and her school identification number in the classroom without Parent's consent, causing the student embarrassment. Concluding that District did not require Parent's consent to disclose Student's personally identifiable information under the circumstances, SPPO closed the parent's complaint. SPPO acknowledged that FERPA grants parents the right to have some control over the disclosure of their children's education records without their consent. But it pointed out that FERPA is not intended to interfere with a classroom teacher's ability to carry out normal and legitimate educational activities and functions. "We have not issued formal guidance on the applicability of FERPA to teachers posting student work in classrooms." SPPO stated that it (and its predecessor, FPCO) historically has advised districts not to post grades or graded work in school hallways or other public areas without parental consent unless the information qualifies as directory information. However,

because the teacher in this case displayed Student's grades and ID number in the classroom and not a public area, SPPO concluded that the disclosure did not violate FERPA. Nonetheless, SPPO emphasized that "parents and school officials [should] work together to resolve these types of concerns where possible."

B. **Consent.** Absent the applicability of one or more of the exceptions provided in FERPA or California law, a disclosure of personally identifiable information about a student that is contained in the student's records violates the law unless the district has received a "signed and dated written consent" (which can include an authenticated signature in electronic form) from the student's parent or parents. (34 C.F.R. § 99.30(a), (d).) To be valid, the written consent must: (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. (34 C.F.R. § 99.30(b).) If the parent requests, the district must provide a copy of the record or records that were disclosed. (34 C.F.R. § 99.30(c).)

C. **Exceptions to Prohibition on Nonconsensual Disclosure.** The FERPA statute and its regulations contain 17 specific exceptions under which a district may disclose personally identifiable information from a student's education records to third parties without prior parental consent (and there are additional exceptions provided in California's Education Code). (20 U.S.C. § 1232g; 34 C.F.R. § 99.31(a); Ed. Code, § 49076.) Several of these FERPA and California exceptions pertain exclusively to disclosures by postsecondary institutions and several others are used infrequently. The discussion below is confined to those exceptions to the prohibition on nonconsensual disclosure that most frequently impact K-12 students.

1. **School Officials with Legitimate Educational Interest.** Under FERPA, an educational agency or institution may disclose personally identifiable information from an education record of a student without prior parental consent if the disclosure is made to "other school officials, including

teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." (34 C.F.R. § 99.31(a)(1)(A).)

Disclosure to contractors, consultants or other party to whom the district has outsourced institutional services or functions may be considered a "school official" provided that the outside party: (1) performs an institutional service or function for which the district would otherwise use employees; (2) is under the direct control of the district with respect to the use and maintenance of education records; and (3) is subject to specific restrictions contained in FERPA governing the redisclosure of personally identifiable information from education records. (34 C.F.R. § 99.31(a)(1)(B)(1).) In its comments to the 2008 FERPA regulations, the U.S. Department of Education declined to provide a list of all outside parties who can qualify as "school officials," stating that: "We think it would be impossible to provide a comprehensive listing and believe that agencies and institutions are in the best position to make these determinations. At the discretion of a school, school officials may include school transportation officials (including bus drivers), school nurses . . . and other outside parties providing institutional services and performing institutional functions, provided that each of the requirements in § 99.31(a)(1)(i)(B) has been met." (73 Fed. Reg. 74815 (Dec. 9, 2008).)

California law permits nonconsensual disclosures of personally identifiable information to be made to "a contractor or consultant with a legitimate educational interest who has a formal written agreement or contract with the school district regarding the provision of outsourced institutional services or functions by the contractor or consultant." (Ed. Code, § 49076, subd. (a)(2).)

FERPA provides that districts "must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational

interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement." (34 C.F.R. § 99.31(a)(1)(B)(2).)

FERPA does not contain a definition of what constitutes a "legitimate educational interest," instead leaving the matter up to the policies established by the local educational agency or institution. (34 C.F.R. § 99.31(a)(1)(A).) However, the regulations provide that if a district has a policy of disclosing education records to school officials with a legitimate educational interest in those records, the district's annual FERPA notice, required to be provided to parents under 34 C.F.R. § 99.7 and discussed in detail below, must contain "a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest." (34 C.F.R. § 99.7(a)(3)(iii).)

School officials responsible for implementing a student's IEP are considered to have a legitimate educational interest in receiving that document. In fact, California law requires districts to ensure that "the regular teacher or teachers, the special education teacher or teachers, and other persons who provide special education, related services, or both to the individual with exceptional needs have access to the [IEP]." (Ed. Code, § 56347.) Additionally, districts are required to provide copies of the IEP to "service providers from other agencies who provide instruction or a related service to the student off the school site." (Ed. Code, § 56347.)

2. **Health or Safety Emergency.** FERPA permits districts to disclose personally identifiable information from an education record "to appropriate parties . . . in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." (34 C.F.R. § 99.36(a).) California law contains similar

language, permitting disclosures to "appropriate persons in connection with an emergency if the knowledge of the information is necessary to protect the health or safety of a pupil or other persons." (Ed. Code, § 49076, subd. (a)(2).)

In making a determination of whether a disclosure of information is necessary to protect the health or safety of the student or others, FERPA allows districts to "take into account the totality of the circumstances pertaining to a threat." If the district determines that there is an "articulable and significant threat to the health or safety of a student or other individuals," it may "disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." (34 C.F.R. § 99.36(a).) The word "protect," as used in the regulation, means "to keep from harm, attack, or injury." (73 Fed. Reg. 74838 (Dec. 9, 2008).) If the district is subsequently challenged as to whether its disclosure was appropriate, FPCO has indicated that it will not substitute its judgment for that of the district in evaluating the circumstances and making its determination, provided that, based on the information available at the time of the disclosure, there is a rational basis for the decision to disclose. (73 Fed. Reg. 74838 (Dec. 9, 2008).)

3. **Directory Information.** Provided certain conditions are met, a district may disclose, without prior parental consent, personally identifiable information about a student that it has designated as "directory information." (34 C.F.R. § 99.36(a).) FERPA defines "directory information" as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information can include, but is not limited to, the student's: name; address; telephone listing; email address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports;

weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended. (34 C.F.R. § 99.3.) It does not include the student's social security number. A student ID number or other similar identifier can be part of directory information only if it cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number, password or other factor known or possessed only by the authorized user. (34 C.F.R. § 99.3.)

A district may only disclose directory information if it has given public notice to parents of students in attendance (and eligible students in attendance) at the agency or institution of: (1) the types of personally identifiable information that it has designated as directory information; (2) the parent's right to refuse to let the district designate any or all of those types of information about the child; and (3) the period of time within which a parent has to notify the district in writing that he or she does not want any or all of those types of information about the student designated as directory information. (34 C.F.R. § 99.37(a).) In its public notice, the district may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. (34 C.F.R. § 99.37(d).)

California law treats directory information somewhat differently than does FERPA, as directory information is explicitly excluded from the definition of a "pupil record" under Education Code section 49061 (rather than being listed as one of the exceptions under which a district may disclose personally identifiable information from a student's records). The Education Code defines "directory information" similar to that provided by FERPA, except that its list does not include the student's photograph, place of birth, grade level or enrollment status. (Ed. Code, § 49061, subd. (c).)

The Education Code requires districts to adopt a policy identifying those categories of directory information that may be released and allows them to determine which individuals, officials, or organizations may receive directory information. However, Education Code section 49073 states that "no information may be released to a private profitmaking entity other than employers, prospective employers, and representatives of the news media, including, but not limited to, newspapers, magazines, and radio and television stations." Additionally, districts may limit or deny the release of specific categories of directory information to any public or private nonprofit organization "based upon a determination of the best interests of pupils." Directory information cannot be released regarding a student identified as a homeless child or youth, unless a parent or another individual with parental rights, has provided prior consent. (Ed. Code, § 49073, subd. (c).)

California law contains two additional directives regarding the release of directory information. Education Code section 49073.5 states that "it is the intent of the Legislature that a school district, in adopting a policy pursuant to Section 49073 governing the release of pupil directory information, not purposefully exclude any military services representative from access to that information." That section also provides that "it is further the intent of the Legislature, in the interest of pupil confidentiality, that school districts minimize the release of pupil telephone numbers in the absence of express parental consent. The Legislature finds and declares that the nondisclosure of pupil telephone numbers will reduce the possibility of harassment of pupils and their families by organizations that receive pupil directory information."

4. **Officials from Other Schools.** FERPA permits a district to nonconsensually disclose information from a student's education records to another school where the student seeks or intends to enroll (or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer). (34 C.F.R. § 99.31(a)(2); Ed.

Code, § 49076, subd.(a).) The "sending" school may make the disclosure if it includes a statement in its annual notification of rights that it discloses education records for this purpose, or if it makes a reasonable attempt to notify the parent in advance of the disclosure. The parent is entitled, upon request, to a copy of the record that was disclosed. (34 C.F.R. § 99.34(a).) Additionally, federal law (Every Student Succeeds Act ("ESSA") at 20 U.S.C. § 7917) requires each state to have a procedure in place to facilitate the transfer of disciplinary records with respect to a student's suspension or expulsion "to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll." Further, the FERPA regulation allowing disclosures for health or safety emergencies, discussed above, allows districts to disclose "appropriate information" to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student. (34 C.F.R. § 99.36(b).)

FPCO has stated that FERPA permits nonconsensual disclosure of information from education records in connection with placements of students with disabilities. "That is, an educational agency or institution that is subject to FERPA may disclose personally identifiable information from a student's education records to a third party (such as another school) in order to make an educational placement under the IDEA." (Letter to Anonymous (FPCO 2013) 113 LRP 35724.)

Additionally, under the IDEA, for students with disabilities who transfer to either a new district in the same state or to a district in another state, the new district in which the student enrolls must take reasonable steps to promptly obtain the student's records—including the IEP, supporting documents and any other records relating to the provision of special education or related services—from the previous district in which the student was enrolled. The previous district is also obligated to take reasonable steps to promptly respond to the request from

the new district. (34 C.F.R. § 300.323(g).) (See also Ed. Code, § 56325, subd. (b).)

5. **Judicial Orders or Subpoenas.** FERPA permits districts to make nonconsensual disclosures of personally identifiable information about a student in order to comply with a judicial order or lawfully issued subpoena. However, the disclosure may be made only if the district makes a reasonable effort to notify the parent in advance of compliance, so that the parent has an opportunity to seek protective action. (Certain exceptions to the notification requirement apply, including if the court has ordered that the contents of a subpoena issued for law enforcement purposes not be disclosed.) (34 C.F.R. § 99.31(a)(9).) (See also Ed. Code, §§ 49077, 49078.)

   Additionally, if a district initiates legal action against a parent or student, it may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the district to proceed with the case as plaintiff. Similarly, if the parent initiates legal action against the district, the district may disclose to the court, without a court order or subpoena, any of the student's education records that are relevant for it to defend itself. (34 C.F.R. § 99.31(a)(9).)

V. Rights of Parents to Amend Their Child's Education Records. FERPA grants parents the right to request the district to amend a student's education records (or request a hearing to correct or amend those records) if they believe that the records contain information that is "inaccurate, misleading, or in violation of the privacy rights of the student" (34 C.F.R. §§ 99.20-99.22.) The right to request amendment does not apply to files and documents that fall outside the definition of "education records" under FERPA. (Letter to Anonymous (SPPO 2021) 122 LRP 14792.) The IDEA also affords parents the right to amend education records, paralleling the amendment rules and requirements under FERPA. (34 C.F.R. §§ 300.618-300.621.)

California law (Ed. Code, § 49070) contains slightly different requirements, allowing parents to file a written request with the superintendent to correct or remove information in the student's records that they allege to be:

- Inaccurate;
- An unsubstantiated personal conclusion or inference;
- A conclusion or inference outside of the observer's area of competence;
- Not based on the personal observation of a named person with the time and place of the observation noted;
- Misleading; or
- In violation of the student's privacy or other rights.

A. Challenges Generally Not Subject to Amendment Procedures.

1. Challenges to Grades. If parents request that the district change their child's grades under FERPA's amendment procedures, they can succeed only if they can show that the grade was supposed to be something other than what was shown on the student's education record (i.e., that it was inaccurately recorded, that a mathematical error was made in its computation, or that there was a scoring error on a test that affected the grade, or for any of the reasons detailed above under Education Code section 49070). Further, under California law, the superintendent cannot order a student's grade to be changed unless the teacher who determined the grade is, to the extent practicable, given an opportunity to state orally, in writing, or both, the reasons for which the grade was given and is, to the extent practicable, included in all discussions relating to the changing of the grade. (Ed. Code, § 49070.) Absent such showing, FERPA does not provide an avenue to dispute the validity of report cards, tests, or other grades. (Letter to Anonymous (FPCO 2007) 107 LRP 52770; Letter to Anonymous (FPCO 2015) 115 LRP 17292.)

2. Challenges to Substantive Decisions. Generally, FERPA's and California's amendment procedures cannot be used to

challenge substantive decisions made by a district (e.g., teacher's substantiated non-misleading comments and opinions in a progress report, or an accurately recorded substantive disciplinary decision). (Letter to Anonymous (FPCO 2016) 116 LRP 48415; Letter to Anonymous (FPCO 2016) 116 LRP 39321.)

B. **Decision to Amend and Right to Hearing.** If the parents request the district to amend an education record, the district must decide whether to amend the record "within a reasonable period of time." (34 C.F.R. § 99.20.) In California, the time limit on the decision is within 30 days after the receipt of the request. (Ed. Code, § 49070.) If the district decides not to amend the record, it must inform the parents of the denial and, upon request, provide them an opportunity for a hearing to challenge information in a student's records. (34 C.F.R. § 99.21; Ed. Code, § 49070.) California law provides that the parents have 30 days to appeal the district's (superintendent's) decision to the district's governing board. (Ed. Code, § 49070.) Following the conclusion of the appeal, if the governing board sustains any or all of the allegations, it must order the superintendent to immediately correct or remove and destroy the information from the written records of the student, and inform the parent in writing. If the final decision of the governing board is unfavorable to the parents, or if the parents accept an unfavorable decision by the superintendent of the school district, the parents shall be informed and have the right to submit a written statement of their objections to the decision. This statement then becomes a part of the student's school record until the information objected to is corrected or removed. (Ed. Code, § 49070.)

Note: If the superintendent or governing board sustains the parents' request to change the name, gender, or both, of a student or former student, the district must add a new document to the student's or former student's record that includes a list of information detailed in Education Code section 49070.

VI. **Parents' Right to Receive Annual Notice.** On an annual basis, districts must provide parents of currently enrolled students with notice of their

rights under FEPRA. Notice must be provided by any means that would be reasonably likely to inform them of their rights. (34 C.F.R. § 99.7.)

A. **Contents of Notice Under FERPA.** Under 34 C.F.R. § 99.7, the notice must inform parents or eligible students that they have the right to—

1. Inspect and review the student's education records.

2. Seek amendment of the student's education records that the parents believe to be inaccurate, misleading, or otherwise in violation of the student's privacy rights.

3. Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

4. File a complaint with the U.S. Department of Education concerning alleged failures by the district.

5. The notice must include the procedure for exercising the right to inspect and review education records and the procedure for requesting an amendment to records.

B. **Other Notification Requirements.**

1. If the district has a policy of disclosing education records to school officials with legitimate educational interest, the notice must include a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

2. If the district has a policy of disclosing "directory information", it must provide notice to parents and eligible students of that policy. Specifically, the notice must include: the types of personally identifiable information that the district has designated as directory information; parents' right to refuse to let the district designate any or all of those types of information

about the student as directory information; and the period of time within which parents have to notify the district in writing that they do not want any or all of those types of information about the student designated as directory information.

C. **Specific California Requirements**. California law contains more specific, and broader, notification requirements than does FERPA. Under Education Code section 49063, districts must notify parents in writing of their rights upon the date of the student's initial enrollment, and annually thereafter. The notice shall be, insofar as is practicable, in the home language of the student. The notice must take a form that reasonably notifies parents of the availability of the following specific information:

1. The types of student records and information contained therein that are directly related to students and maintained by the institution.

2. The position of the official responsible for the maintenance of each type of record.

3. The location of the log or record required to be maintained pursuant to Section 49064 (requiring listing of all persons, agencies, or organizations requesting or receiving information from the education record and the legitimate interests therefor).

4. The criteria to be used by the district in defining "school officials and employees" and in determining "legitimate educational interest."

5. The policies of the institution for reviewing and expunging those records.

6. The right of the parent to access pupil records.

7. The procedures for challenging the content of pupil records.

8. The cost, if any, that will be charged to the parent for reproducing copies of records.

9. The categories of information that the district has designated as directory information.

10. Other legal rights and requirements, including the right of the parent to file a complaint with the U.S. Department of Education concerning an alleged failure by the school district to comply with the provisions of FERPA.

11. The availability of the prospectus prepared pursuant to Section 49091.14 (listing of curriculum and courses).

D. **Additional Recommendations.** The U.S. Department of Education has released guidance that urged districts to be more transparent with parents regarding their data privacy, confidentiality and security practices. It advised districts that, in addition to the information they must disclose to parents pursuant to FERPA's annual notice requirements, it would be a best practice to inform parents concerning: what data they are collecting about students; why they are collecting that information; how that information is protected; whether they share any personal information with third parties and, if so, with whom and for what purpose; and who parents should contact with questions about data practices. (Transparency Best Practices for Schools and Districts (USDOE 2014).)

VII. Other Laws Protecting Student Privacy.

A. **Health Insurance Portability and Accountability Act.** The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is a comprehensive federal law that addresses a number of health care-related topics in various sections of the United States Code. HIPAA applies to health information created or maintained by "health care providers" who engage in certain electronic transactions, as well as applying to health plans and health care clearinghouses. HIPAA covers protected health information ("PHI"), which is individually

identifiable health information transmitted or maintained in any form. PHI becomes subject to HIPAA protections against disclosures to third parties when it is created or received by a health care provider, employer, health plan, health care clearinghouse, school or university. A district may subject itself to HIPAA if it employs a health care provider who engages in a HIPAA-protected electronic transaction. However, importantly, records protected under FERPA are not subject to HIPAA restrictions and requirements. (Joint Guidance on the Application of FERPA and HIPAA To Student Health Records (USDOE/HHS 2019) and Family Educational Rights And Privacy Act: Guidance for School Officials on Student Health Records (SPPO 2023) 123 LRP 13132.) The scope of the HIPAA privacy rules was limited in this way to avoid unnecessary duplications.

Examples of school-related records subject to HIPAA's confidentiality protections would include:

- A school-based health clinic operated by an outside entity, which handles billing and maintenance of records; and
- Electronic filing of Medicaid claims. (In California, Medicaid is known as Medi-Cal.)

Examples of school-related records not subject to HIPAA's confidentiality protections would include:

- Student health records, such as vaccination history, that are maintained by the district, since such records are protected by FERPA; and
- Health-related records for students with disabilities connected to an IEP or assessments, which are also protected by FERPA.

B. **Protection of Pupil Rights Amendment.** The Protection of Pupil Rights Amendment ("PPRA") (20 U.S.C. § 1232h) governs participation by students in surveys that concern one or more of the following eight protected areas: (1) political affiliations or beliefs of the student or the student's parent; (2) mental or psychological

problems of the student or the student's family; (3) sex behavior or attitudes; (4) illegal, anti-social, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom respondents have close family relationships; (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; (7) religious practices, affiliations, or beliefs of the student or student's parent; or (8) income (other than that required by law to determine eligibility for participation in a federally funded program or for receiving financial assistance under such program). PPRA requires that districts furnish parents with advance notice of their rights, which include providing consent before a student participates in a survey involving one or more of the eight protected areas if the survey is funded, in whole or in part, by U.S. Department of Education funds and the right to opt-out of their child's participation in any such survey that is not federally funded.

C. Data Privacy Laws.

1. Children's Online Privacy Protection Act. The Children's Online Privacy Protection Act ("COPPA") is a federal law governed by the Federal Trade Commission ("FTC") that controls what information may be collected from children under the age of 13 by companies operating websites and mobile applications. (15 U.S.C. § 6501, et seq.) COPPA requires companies to post a clear privacy policy on their website or mobile application, provide notice to parents, and obtain parental consent before collecting personal information from children under the age of 13.

2. Student Online Personal Information Protection Act. California Business and Professions Code section 22584, also known as the Student Online Personal Information Protection Act ("SOPIPA"), which became effective on January 1, 2016, sets forth privacy rules for operators of websites, online services, and applications that are marketed and used for K-12 school purposes, even if those operators do not contract with educational agencies.

3. **<u>Collection of Student Information from Social Media</u>.** California Education Code section 49073.6 requires that districts considering "a program to gather or maintain in its records any pupil information obtained from social media" first notify students and their parents or guardians about the proposed program, and provide an opportunity for public comment at a regularly scheduled public meeting before adopting the program.

4. **<u>Data Privacy Requirements for Contracts with Technology Providers</u>.** Under California Education Code section 49073.1, technology services agreements entered into, amended, or renewed by a district or after January 1, 2015, must follow specific requirements. These requirements apply to contracts for services that utilize electronic technology, including cloud-based services, for the digital storage, management and retrieval of pupil records, as well as educational software that authorizes a third-party provider to access, store and use pupil records.

F3 Law's Student Services work covers the full range of needs to ensure compliance with state and federal law. From First Amendment issues to student discipline to student records to residency issues, F3 Law is a premiere student services law firm and has assisted districts in a variety of student-related legal issues.

F3 Law Student Services Legal Symposium Leadership and
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Amanda D'Amico is an associate in the firm's San Diego office. She is a member of the Student Services and Special Education, Labor and Employment, and Litigation practice groups. Amanda has extensive experience supporting clients with all aspects of special education law and disciplinary proceedings under the IDEA and Section 504, including resolution sessions, mediation, due process hearings, and defense of school districts in Federal and state civil litigation.	
Summer D. Dalessandro is a partner in the firm's San Diego office. Highly respected education law attorney Summer advises and defends Southern California public school districts and institutions in a variety of special education and student issues. Drawing on her substantial knowledge base, Summer guides clients in procedures such as administrative hearings, mediations, and litigation, including federal court appeals, as well as in governance and leadership matters.	
Rebecca Diddams is an associate in the firm's Sacramento office. Rebecca focuses her practice on the areas of special education, student services, and charter schools, including issues pertaining to Section 504, student rights and discipline, and student policy compliance. She advocates for school districts in complaint hearings before the Office of Administrative Hearing, the Office for Civil Rights, and the California Department of Education.	

Peter Fagen is a partner in the San Diego office. Providing outstanding counsel to school districts, superintendents, and boards, Peter guides clients in district leadership and governance, labor relations, mediations, education technology, artificial intelligence, data privacy concerns and elections and voting rights issues. He also performs fact-finding inquiries in advance of strikes and advises on personnel and student problems, business matters, and redevelopment projects.	
Christopher J. Fernandes is a partner in the San Diego office. Serving school districts throughout Southern California, Chris represents clients in a variety of matters, including due process hearings stemming from special education and student discipline issues. He enjoys the intellectual stimulation of education law and relishes the opportunities to address novel issues that frequently arise.	
Damon Fournier focuses his practice on special education, general student services, charter schools, and board governance. Drawing from his experience as an educator and parent, Damon approaches client inquiries in a supportive and relatable way. He knows educating the state's students is no small task, so he collaborates with district personnel to efficiently solve and prevent issues from arising in the future.	
Howard J. Fulfrost is a partner in the Los Angeles office. With a passion for helping students and public education entities function at the highest level possible, Howard represents school districts, county offices of education and special education local plan areas in all aspects of special education law. Howard's ability to facilitate fair and effective negotiations brings administrators and families together to attain the best outcomes possible.	
Amanda S. Georgino is an associate in the firm's Los Angeles and Inland Empire offices. In her broad, multifaceted practice, Amanda represents and advises school boards and school administrators in the areas of labor and employment, governance and litigation. She handles a variety of legal issues concerning employees, students, parents, labor associations and the public—with a particular focus on employee discipline matters. Throughout her legal career, Amanda has provided counseling and addressed disputes and concerns involving legal topics such as constitutional rights, torts, the Americans with Disabilities Act/Fair Employment and Housing Act analysis and compliance, benefits and payroll and collective bargaining.	

Maria Gless serves in a senior counsel position in the firm's Inland Empire office and is a member of the Student Services and Special Education practice group. She guides clients on a variety of matters, including special education, student discipline and other student legal matters. Maria brings significant experience in education law to F3, having practiced at a California education law firm for over twenty years before she joined the firm, where she advised school districts on a myriad of student issues and special education law.	
Emily Goldberg is an associate in the firm's Los Angeles office and focuses on Special Education, working diligently for the school districts so the administrators can provide an optimal environment in which to teach their students effectively and comfortably.	
Angela Gordon is a partner in the Los Angeles office. Highly regarded for her broad and deep knowledge of special education and student matters, Angela serves school districts, county offices of education and special education local plan areas. Angela represents clients in due process hearings and mediations before the California Office of Administrative Hearings; IEP team meetings; as well as compliance complaints before the California Department of Education and the Office for Civil Rights.	
Matejka M. Handley is an associate in the firm's Sacramento office. She focuses her practice on the areas of special education, student services, and charter schools, including issues pertaining to Section 504, student rights and discipline, and student policy compliance. She advocates for school districts in complaint hearings before the Office of Administrative Hearing, the Office for Civil Rights, and the California Department of Education.	
Austin Jones is an associate, working primarily in the firm's Inland Empire office. He provides advice to school districts and other public agencies in the areas of student services, student discipline and special education. When clients encounter issues and conflicts arising under Section 504 of the Rehabilitation Act of 1973, Austin helps them craft appropriate responses and fulfill the legislation's requirement that public schools provide "free and appropriate education" to all students, regardless of ability.	

Melanie D. Larzul is a partner in the Oakland office. Skillfully guiding Northern California school districts, county offices of education, and special education local plan areas (SELPAs), she keeps clients compliant in all aspects of special education law. In addition, Melanie helps them prevent and resolve a wide array of general student matters, from student discipline challenges and Title IX sexual harassment claims to issues involving student records, enrollment, and Section 504.	
Jasey Mahon is an associate in the San Diego office. Drawing on her legal acumen and outstanding research and writing skills, Jasey handles document reviews, creates pleadings, and prepares cases for due process hearings in a range of special education matters. Her commitment to drafting documents in a way that paints a picture of the specific legal situation, and showcases a path toward a solution, keeps the child's best interests front and center.	
David R. Mishook is a partner in the firm's Oakland office. As an enthusiastic advocate for public learning, litigator he advises and defends California school districts, county offices of education and community college administrators statewide in all aspects of student services and special education cases. Appearing in state, federal and appellate courts statewide, David handles general, complex and municipal litigation involving issues of civil rights, civil harassment, employment, personal injury and criminal matters.	
Elizabeth B. "Lisa" Mori is a partner in the Oakland office. With a rich legal career spanning three decades she advises both large and small school districts on a range of employment matters, including evaluations, discipline, layoffs, status issues and leaves. As a highly experienced labor relations lawyer and chief negotiator, she advocates for clients in collective bargaining discussions. Lisa also represents public school agencies in state and federal court proceedings and before myriad administrative organizations. Currently co-chair of the firm's Charter School Practice Group, she adeptly advises school districts and county boards of education on matters such as petition review, charter renewal and revocation actions, facilities issues and oversight.	
Lucy Nadzharyan is an associate in the firm's Los Angeles office. She focuses her practice on special education matters, due process hearings, and employee investigations. Known for her attention to detail and holistic approach to addressing issues, clients rely on Lucy to navigate them through the complexities of due process hearings.	

Marie Naguib is an associate in the firm's Inland Empire office. Marie provides guidance and practical solutions to a wide range of legal challenges. She assists clients dealing with issues related to employee evaluations and disciplinary actions, student conduct, cases of sexual harassment, free speech concerns, and finds acceptable outcomes to problems.	
Taylor Needham is an associate in the firm's Inland Empire office. She practices primarily in the student services and special education arenas. She represents school districts in a range of matters, including in issues arising from Individual Education Plans (IEPs), special education placement, disciplinary action, expulsions, suspensions, manifestation determinations, parental consent, distance learning and vaccination policies.	
Jennifer Nix is a partner in the firm's Oakland office. Over the past decade, she has been a beacon for K-12 clients, representing school districts, county offices of education, and special education local plan areas (SELPAs) in all related matters, especially in the areas of the Individuals with Disabilities Education Act (IDEA), Section 504, Title IX, and student discipline. Her expertise extends to administrative proceedings before the Office of Administrative Hearings, the U.S. Department of Education's Office for Civil Rights, and the California Department of Education. Prior to her law career, she was a middle and high school level public school teacher.	
Dan Ojeda is a partner in the firm's Los Angeles office. In a legal career spanning more than 30 years, he has held positions of increasing scope and responsibility in university, in-house corporate and law firm environments, with particular expertise in higher education law. He generates creative solutions to challenging legal issues such as free speech, Title IX and investigations, crisis management, contracts, collective bargaining, labor and employment, governance and board issues, privacy and record retention, public security and policing, discrimination, sexual harassment, DEI initiatives, athletics, and faculty and student affairs.	
Jennifer Oliva is an associate in the firm's Inland Empire office bringing extensive trial and litigation experience to her practice. She works in the areas of special education, litigation, and student services. She diligently applies her outstanding research, writing and people skills to a variety of matters, including due process complaints, hearing and trial preparation, discovery motions, and witness interviews.	
Shawn Olson Brown is a partner in the Oakland office and serves as the co-coordinator of the esteemed professional development series, F3's Special Education Symposium. She guides public agencies in special education, charter school and student matters. In addition to conducting discrimination investigations, she represents clients in Individualized Educational Plan (IEP) meetings, and litigation and due process hearings before various governmental organizations. Focusing her practice on large, urban Bay Area school districts, Shawn considers herself an enthusiastic advocate for the best possible administration of public education.	

Wesley B. Parsons is a partner in the Los Angeles office. Highly respected for his special education law acumen, Wesley B. “Wes” Parsons represents school districts, county offices of education and special education local plan areas throughout California as a strong advocate, advisor and trainer. He handles general student matters, including those that involve discipline, bullying, harassment and discrimination. Additionally, Wes navigates disputes between students’ families and school districts regarding the educational options being offered to children. His clients rely upon his sage counsel and services both at the school site and administrative levels.	
Jonathan P. Read is a partner in the San Diego office. His practice primarily focuses on special education law, representing school districts and other educational agencies in all facets of due process and disciplinary proceedings. He has developed a specific emphasis on representing school districts at highly contentious IEP team meetings and in cases involving private school reimbursement. He also specializes in issues related to juvenile courts, foster care, and interagency responsibility for IDEA compliance. Jonathan is a popular speaker at school districts as well as state and national conferences.	
Laurie E. Reynolds is a partner in the Oakland office. With more than two decades of experience in education law, she advocates for school administrators, districts, boards and associations in due process hearings and mediation conferences. She skillfully counsels school organizations in student discipline, special education matters, and Section 504 accommodations.	
Lee G. Rideout is a senior counsel in the Los Angeles office. Highly regarded for her in-depth knowledge, strategic thinking and strong communication skills, Lee counsels school districts, county offices of education and special education local plan areas on navigating both their day-to-day legal issues and long-term, big-picture concerns. Lee represents clients in mediations, due process hearings, as well as discrimination and other claims. She also conducts personnel investigations, provides guidance regarding IEP team meetings, and advises on an array of compliance matters, including those that involve student discipline, appropriate delivery of services to students, employment and others.	
Lyndsy B. Rodgers is a partner in the Los Angeles office. Lyndsy practices student and special education law, including independent study and virtual learning, Section 504 and IDEA compliance, OCR and CDE complaints, creative early dispute resolution, mediation and due process, and special education appeals. Her education law practice tends to be multidisciplinary, and includes special education-related labor negotiations, independent study audit issues, and SELPA organization and administration, local plan review, and SELPA policy and contract development. She partners with her clients in their areas of need to provide staff training and create or update effective, meaningful policies and procedures to foster legal compliance and better serve students.	

David Salazar is a partner in the Los Angeles office. He handles issues in special education and student services and advocates in litigation, on appeal, and before the Office of Administrative Hearings. A dedicated advisor, David guides districts in complying with provisions of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act and other laws and regulations. He also assists them in preparing for Individual Education Plan (IEP) meetings and manifestation determinations.	
Karen E. Samman is a partner, working primarily in the firm's Oakland office. She also serves clients from the Sacramento and Fresno offices. Karen advises California school districts, county offices of education and special education local plan areas (SELPAs) in multiple areas of practice. In particular, she provides legal advice to our clients in matters related to disability laws, students, board governance and privacy issues, and issues related to use of AI in the educational setting. She has conducted many investigations over her years of practice.	
Tiffany M. Santos is a partner in our San Diego office. Drawing on her career-long focus on representing public education organizations, Tiffany advises Southern California school districts and local agencies regarding all aspects of special education, labor and employment issues, governance, litigation, charter schools and student matters such as discipline, discrimination, harassment and bullying.	
Elizabeth Schwartz is an associate in the firm's Oakland office, where she adeptly handles a range of special education and student services issues. Elizabeth always aims to find solutions to problems as quickly and painlessly as possible. If special education or expulsion due process hearings are ultimately warranted, however, clients know they can turn to Elizabeth as their go-to person to walk them smoothly through every step of the way with the least amount of exposure. With significant experience and deep, broad knowledge in conducting and advising in these proceedings, Elizabeth relishes the opportunity for judges to hear the districts' positions through her clear, persuasive advocacy.	
Ankita P. Sheth is an associate in the firm's Oakland office, where she primarily assists clients in student services and special education matters. Ankita advises school districts, county offices of education, and special education local plan areas concerning student issues across all facets of special education law, including duties under the Individuals with Disabilities Education Improvement Act, Section 504 of the Rehabilitation Act, and related California laws and regulations.	

Lenore A. Silverman is a partner in the Oakland office. She has helped clients resolve countless problems and conflicts relating to special education and student matters. As she shifts into an of counsel-status, Lenore continues to enrich the firm and its clients by drawing on her keen insight into the realities of what schools and their governing organizations experience and how to keep them legally compliant while best addressing their challenges. Special education issues tend to elicit emotional responses, and Lenore always approaches these situations with sensitivity and common sense.	
Aisha Sleiman is an associate in the firm's Sacramento office. A champion for equal access to justice, Aisha has dedicated her career to empowering underserved communities through legal advocacy. Currently, she represents school districts in the Bay Area and Sacramento on all aspects of special education law. Specifically, Aisha represents clients in IEP meetings, Section 504 meetings, litigation, and due process hearings, as well as matters before the Office of Civil Rights and the California Department of Education.	
Rachael B. Tillman is a partner in the firm's Sacramento office. Legal advisor and litigator she counsels and represents school districts on an array of issues that manifest in the student services and special education environments. With extensive trial, appellate, and administrative hearing experience, she advocates for clients in state and federal courts throughout the state. Rachael also represents clients in mediations and administrative and due process hearings and performs investigations under such legislation as Title IX. Always thoroughly prepared for any circumstance, she gets out in front of problems and positions clients as optimally as possible.	
Jan E. Tomsky is a partner in the Oakland office. Nationally recognized for her expertise in special education law, Jan draws on her seen-it-all experience, deep well of knowledge and steadfast commitment to her clients to advise them on the most difficult circumstances and achieve the best outcomes possible. Jan represents school districts in mediations, due process hearings and litigation in state and federal courts and the Ninth Circuit Court of Appeals. Bringing a rare combination of persuasion and finesse, she advocates for clients in disputes that often involve the most sensitive issues.	
Cynthia D. Vargas is a partner in the Inland Empire office. She represents and counsels school districts, county offices of education and special education local plan areas (SELPAs) throughout southern California and beyond, with a focus on the San Bernardino County and San Diego regions. A seasoned trainer, advisor, negotiator and litigator, Cyndi successfully advocates for clients in due process and Section 504 hearings, Individualized Educational Program (IEP) team meetings, mediations and informal resolutions. She also represents clients in compliance complaints with the California Department of Education, investigations with the Office for Civil Rights and a variety of other matters that public school agencies routinely address.	

Komey Vishakan is a senior counsel in the Oakland office. She guides clients on a full range of matters including board governance, investigations, Title IX compliance, litigation, student discipline, and personnel matters. As a former General Counsel of a school district, she has a keen understanding and respect for both the challenges and the limitations her clients face. She uses her unique insights and a 360-degree perspective to guide her clients powerfully through complex and high-visibility issues.	
Kaite Yoshida is an associate in the Sacramento Office. Her experience spans business, facilities, real estate and governance matters. She supports school districts across the Sacramento area with a keen eye for detail, collaborative spirit, and deep understanding of the unique needs of educational institutions.