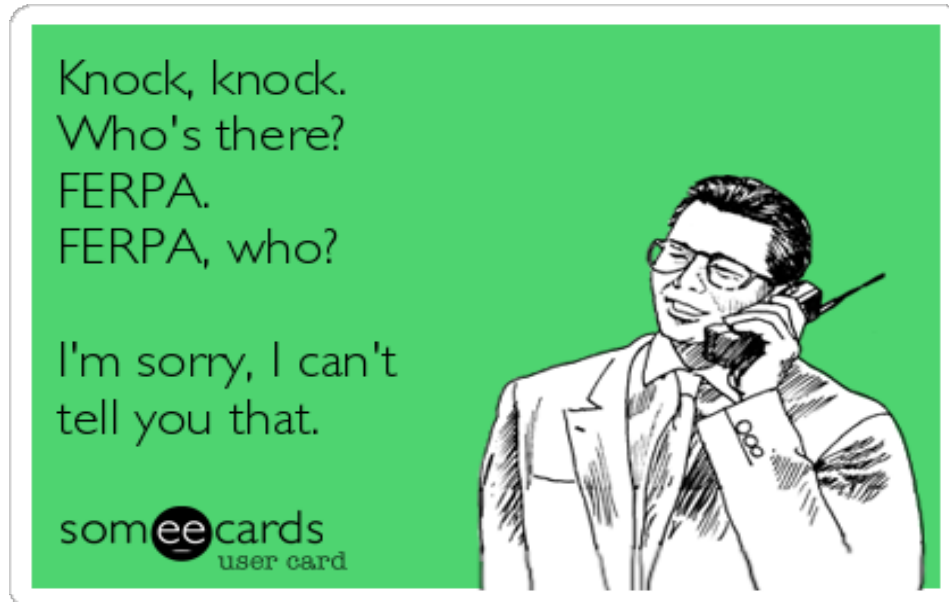




Advanced FERPA: Emails and Academic Records



Are digital communications (such as email and texts) student records?

The short answer is that in most jurisdictions, courts have not answered this question.

FERPA did not contemplate that education records could be maintained in numerous places. At the time the law was passed, education records were typically kept in one place within a single continuous record.

There is no question that emails have become a staple in college communication between faculty, faculty and students, and faculty and administration. Since FERPA was passed in the pre-digital age, the law required schools provide students with access to their own “education records” and that the school safeguard education records from unauthorized disclosure. The law provides that if a document was related to a student, and kept by the school, it was an “education record.”

This definition of an “education record” has changed considerably in the digital age. In considering whether a document or communication is considered part of a student’s education record is the definition of what “maintaining” means.

This *Melissa Talks* explores whether emails concerning students are “education records” under FERPA, and will cover a few principles that all college employees should keep in mind.

What is an education record?

FERPA defines “education records” as “those records, files, documents, and other materials which:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20U.S.C. § 1232g(a)(4)(A).¹

So, are emails considered “maintained” as part of a student’s academic record?

There is no federal appellate precedent on the issue, and state courts and federal district courts have split on the answer to this question.

What has the Supreme Court said about the meaning of “maintained” for purposes of FERPA?

The Supreme Court has only spoken once on the meaning of “maintained” and the case related to peer grading practices, specifically whether having students grade each other’s assignments and then announce the grades in front of the class so that the teacher could record them violated FERPA.²

The Supreme Court held that the school did not “maintain” the records because Congress meant for FERPA to reach records that are “kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled.”³ The Court believed the statute implied that education records are maintained by a single custodian, such as a registrar. To a large extent, this is not the case anymore. Education records are spread out between different offices across the campus.

What do lower courts say?

A majority of courts have found that a school does not “maintain” student emails. The most cited case on this issue involved an alleged violation of the Individuals with Disabilities Education Act (IDEA) because it purging electronically stored emails relating to the complaining student.⁴ The complainant argued that since every email was kept on central servers, they were maintained by the institution and should have, therefore, been kept as part of the student’s educational record.

The court did not agree. It reasoned that like the students’ grades in *Owasso*, emails “have a fleeting nature” and observing that “[a]n email may be sent, received, read, and deleted within moments.”⁵ The court believed requiring all emails to be maintained would ignore the clear purpose of FERPA, which did not contemplate records being kept in various places.

Later cases would draw the same decision—that emails are “fleeting” and not permanent (so, not maintained).

What about when emails are intentionally added to a student’s record?

¹ Education records do not include, for instance, “records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof,” or “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purposes of law enforcement.” §1232g(a)(4)(B)(i)-(iv).

² *Owasso Independent School District No. I-011 v. Falvo*, 534 U.S. 426 (2002)

³ *Id.* at 433

⁴ *S.A. ex rel. L.A. v. Tulare Cnty. Office of Educ.*, No. CV-F-08-1215, 2009 WL 3126322, at *1 (E.D. Cal. Sept. 24, 2009).

⁵ *Id.* at *7

The purpose of FERPA is to get access to a student's educational record, not simply every document tangentially associated with the student. In that regard, courts may adopt the position that a record is "maintained" only when an employee or agent of the institution makes a conscious decision to "maintain" the record for the institution's own purpose; for example, if an administrator forwards a student email to a student conduct officer for an investigation or maintains the digital correspondence specifically for a school file

One example of this is the Ohio Supreme Court's decision in the wake of the football scandal at the Ohio State University. In March of 2011, Ohio State football coach, Jim Tressel, admitted he received emails showing a number of Ohio State players had violated NCAA rules by exchanging memorabilia for free tattoos. ESPN asked Ohio State to disclose those emails, and others between the NCAA and Ohio State athletic department about the violations. Ohio State refused, arguing the emails were "education records."⁶ The Ohio Supreme Court sided with the college, because Ohio State's athletics department "retain[ed] copies of all e-mails and attachments sent to or by any person in the department" and that "the emails cannot be deleted."⁷ Thus, unlike the "transient" records in *Owasso*, the athletics department emails were "maintained" for FERPA purposes.

As courts become more technologically literate, attorneys for schools, students, and other parties should expect the debate about FERPA's application to digital communications to become more nuanced and sophisticated.

So, how does this notion of emails NOT enjoying FERPA protection fit with the idea of public records requests?

In a high profile example, local newspapers sought documents from the community college where Jared Loughner (Rep. Gabby Giffords' shooter) attended. Pima Community College argued the records were FERPA protected as they were maintained as part of his educational record. The court held that the college could not withhold emails among college staff about Loughner citing FERPA.⁸ The court held the emails were not 'maintained' by an educational institution under FERPA unless the institution had control over the access and retention of the record.⁹ The fact that individual users can delete the emails in their inboxes, notwithstanding that an email "happen[s] to remain on the server by no action of the educational institution," means that emails are not "maintained." In the court's view, the fact that the college had to conduct a "system wide database search for a word or name indicates these documents were not saved in a central location on a permanent database. Therefore, FERPA did not prevent disclosure of the documents.

What are some best practices out there?

1. School employees and agents should avoid the use of school email to communicate about students to the greatest extent possible. [*Note: The Department of Education has made clear that email is not secure enough to use for sending certain types of student information, such as grades, to students.*]
2. School employees and agents should not to use their personal phones, email accounts, Twitter, and other social media accounts and other personal technology to communicate with other staff, students, parents or teachers about students.

⁶ *State ex rel. ESPN, Inc., 132 Ohio St.3d 212 (2012).*

⁷ *Id.* at 219

⁸ *Phoenix Newspapers, Inc. v. Pima Community Coll.*, No. C20111954 (Ariz. Super. Ct. May 17, 2011).

⁹ Slip op. 3

3. If a student makes a blanket request to inspect digital communications as part of a request to review their academic record, the student should be asked to narrow the scope of the request as much as possible, before it responds.
4. When in doubt, consult the Office of the General Counsel.

For additional information on this subject please feel free to email Melissa Flores or Annette Linders.



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