

State Bar Section Report School Law



Newsletter Coeditors

Dorcas Green
Jon McCormick

Editorial Review Board

Carolyn Hanahan
Christopher Gilbert
Robert J. Young

Jay Brim
S. Anthony Safi
Michael Shirk

Spring 2003

Vol. 5, No. 4

Dear School Law Section Members:

The Section's annual summer retreat and continuing education seminar is set for Friday, July 18, and Saturday, July 19, in Galveston, Texas, at the San Luis Resort. The planning committee co-chairs, Kevin Lungwitz and Lynn Rossi Scott, have lined up an excellent group of speakers and topics. Scheduled topics include a legislative update, employee contacts, immigration and employment, legal rights of gay students and employees, retaliation cases in the Fifth Circuit, family law issues on campus, and one hour of ethics.

For those of you who have never attended the retreat, it is a great opportunity for CLE in a relaxed setting, and families are welcome. The seminar is held only in the morning, with the afternoon left open for golf, swimming, tennis, and other leisure activities. The Section's golf tournament will be held on Friday afternoon at the Galveston Island Municipal Course. A casual, buffet-style dinner will be held on Friday night at Landry's Seafood Restaurant. You should receive the brochure and registration form any day now in the mail.

Finally, I would like to thank Dorcas Green and Jon McCormick for yet another outstanding issue of the newsletter. If you would like to write an article for a future issue, please contact Dorcas or Jon.

Lisa A. Brown
Chair
School Law Section
Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 221-1256
lbrown@bracepatt.com

SCHOOL LAW SECTION 2002-2003 OFFICERS AND COUNCIL MEMBERS

OFFICERS

Lisa A. Brown, Chair
Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 221-1256
lbrown@bracepatt.com

Lonnie Hollingsworth, Vice Chair
Texas Classroom Teachers Assn
P. O. Box 1489
Austin, Texas 78767
(800) 252-9648
lonnie@tcta.org

Lynn Rossi Scott, Chair Elect
Bracewell & Patterson, L.L.P.
Lincoln Plaza, Suite 4000
500 N. Akard Street
Dallas, Texas 75201-3387
(214) 758-1091
lscott@bracepatt.com

Wayne Haglund, Treasurer/Secretary
Law Office of Wayne Haglund
P. O. Box 713
Lufkin, Texas 75902-0713
(936) 639-0007
whaglund@haglundlaw.com

Denise Hays, Immediate Past Chair
Walsh, Anderson, Brown, Schulze
& Aldridge P.C.
P. O. Box 2156
Austin, Texas 78768-2156
(512) 454-6864
dhays@wabsa.com

COUNCIL MEMBERS

Sandra Carpenter Houston
1203 W. Pioneer Pkwy
Arlington, Texas 76103
(817) 459-7398
scarp1@aisd.net

Dohn Larson
Texas Classroom Teachers Assn
P. O. Box 1489
Austin, Texas 78767
(512) 477-9415
dlarson@tcta.org

Kevin Lungwitz
Texas State Teachers Association
316 West 12th Street
Austin, Texas 78701
(512) 476-5355 ext 1145
kevin1@tsta.org

Miles Bradshaw
3830 Richmond Avenue
Houston, Texas 77027-5802
(713) 892-6307
bradsha@houstonisd.org

Eric Nichols
Henslee, Fowler & Hepworth
3200 SW Freeway
Houston, Texas 77027
(713) 552-1653
nichols@school-law.org

Shellie Hoffman Crow
Walsh, Anderson, Brown, Schulze &
Aldridge P.C.
P. O. Box 2156
Austin, Texas 78768-2156
(512) 454-6864
scrow@wabsa.com

Greg Ellis
Texas Assn of School Boards
P. O. Box 2947
Austin, Texas 78768-2947
(512) 467-0222
greg.ellis@tasb.org

Blake Hansen
McMahon, Tidwell
P. O. Box 311
Odessa, Texas 79760
(915) 367-7271
bhansen@mcmahonfirm.com

Calendar of Events

July 18-19, 2003

School Law Retreat - Galveston

PRIMER ON FINANCING OPTIONS FOR SCHOOL DISTRICTS IN TEXAS

Nancy Hagquist

Winstead Sechrest & Minick P.C.

Texas school districts have a variety of options for the financing of new facilities, facility renovations, equipment, furnishings, vehicles, and other items. In general, the most cost-effective option for any particular district for any particular proposed financing will depend on the district's financial condition at the time, whether the district is willing to request voter approval for a financing option, and what type of facility/project the district wants to finance. To provide a quick reference for beginning that analysis, the following is a brief summary of the options currently available to Texas school districts under state law. *This is a summary only and bond counsel should be advised of the particular facts of any given proposed financing to determine whether any particular option is applicable to a proposed financing.*

Financing of School Buses with Time Warrants – Section 34.005, Texas Education Code

A district may issue interest-bearing time warrants to finance the purchase of a school motor vehicle (including a bus, bus body, or bus chassis), if the district is financially unable to immediately pay for such purchase. The warrants must mature in serial installments no later than the fifth anniversary of the date of issue, and may not be sold at a discount. The warrants are payable from any available funds of the district and are entitled to first and prior payment out of those funds.

Financing of School Buses with Contracts – Section 34.009, Texas Education Code

A district may enter into a contract for the use, acquisition, or lease with option to purchase of a school bus if such contract is determined to be economically advantageous to the district. Such a contract must mature no less than two years or no more than ten years from its date of issuance. The contract may be but is not required to be subject to appropriation. Any such contract of \$100,000 or more may be submitted to the Texas Attorney General's Office for approval.

Energy or Water Conservation Improvements for Existing Facilities - Section 44.901, Texas Education Code

A school district may enter into a contract for energy or water conservation measures to reduce energy or water consumption or operating costs of existing school facilities. Such a contract may be for the installation or implementation of insulation of buildings and systems; storm windows, doors, caulking, and weatherstripping; automatic energy control systems; heating, ventilating, or air conditioning system modifications or replacements; lighting fixtures with improved energy efficiency; electrical system improvements; water-conserving fixtures, appliances, and equipment; water-conserving landscape irrigation equipment; landscaping measures that decrease water demand; energy recovery systems; rain-water harvesting and distribution equipment; equipment for recycling or reuse of water; metering equipment; or other energy or water conservation-related improvements or equip-

ment. These improvements may be financed: (1) under a lease purchase contract with a term not greater than 15 years from final installation; (2) with the proceeds of bonds; or (3) under a contract with the provider of the energy or water conservation measures that has a term not greater than 15 years from the final date of installation.

Contracts with providers must include a guarantee by the provider of energy and/or water savings to the district. If the term of the contract is more than one year, the district's contractual obligations under the contract in any one year during the term of the contract may not exceed the total cost savings divided by the number of years in the contract term.

General Obligation Tax Bonds - Subchapter A, Chapter 45, Texas Education Code

A school district may issue bonds payable from ad valorem tax revenues for the construction, acquisition, and equipment of school buildings; the acquisition or refinancing of property financed under a contract entered into pursuant to Subchapter A, Chapter 271, Texas Local Government Code; the purchase of sites for school buildings; and the purchase of new school buses. The bonds may be sold at a private or public sale and may not mature more than 40 years from the date of issuance. A district must be able to demonstrate, before issuing tax bonds, that the district has a projected ability to pay the principal of and interest on the proposed tax bonds and all previously issued tax bonds (other than tax bonds authorized to be issued at an election held on or before April 1, 1991 and issued before September 1, 1992) from a tax at a rate not to exceed \$0.50 per \$100 of valuation. Voters in the district must approve the issuance of tax bonds and the levy of the tax pledged to the repayment of the bonds.

Payment of principal and interest due on tax bonds issued may be guaranteed by the Permanent School Fund pursuant to the provisions of Subchapter C of Chapter 45 of the Texas Education Code, if a district's application for the guarantee is approved by the Commissioner of Education. If so guaranteed, and a district defaults on the payment of principal or interest due on the tax bonds, the Permanent School Fund will make the payments due.

A portion of a district's debt service due on its tax bonds may be paid by the State of Texas if the district applies for and is awarded Existing Debt Allotment or Instructional Facility Allotment funds pursuant to Chapter 46, Texas Education Code.

If approved by the voters, independent school districts which have at least 2,000 students in average daily attendance or a combined aggregate principal amount of at least \$50 million of outstanding bonds and voted but unissued bonds may, in connection with the issuance of tax bonds, exercise the powers of an "issuer" pursuant to Chapter 1371, Texas Government Code (i.e., may enter into "credit agreements"—letters of credit, swaps, etc.). There is a limit on the aggregate

principal amount of tax bonds which a district may issue which are related to a credit agreement. (But see Chapter 1371, Texas Government Code, which provides that a district with an average daily attendance of 50,000 or more is an “issuer” and therefore may enter into credit agreements in relation to the issuance of tax bonds.)

A district may also issue refunding bonds payable from an ad valorem tax levied by the district to refinance tax bonds issued previously by the district if the refunding bonds mature no later than 20 years from the date of issuance and if the refunding provides a savings in debt service costs to the district.

Revenue Bonds for Recreational Facilities - Subchapter B, Chapter 45, Texas Education Code

A district may issue revenue bonds to finance the acquisition, construction, improvement, equipment, operation, and maintenance of a gym, stadium, or other recreational facilities for the district, located in or outside of the district. The bonds must be payable from revenues from rental, rates, and charges from the recreational facilities and may be secured by mortgages on the real property on which the facilities are located. Bond proceeds may also be used for capitalized interest, operation and maintenance expenses of the facilities, and for reserve funds. A district may also issue refunding bonds to refinance any revenue bonds issued pursuant to this subchapter.

Revenue Bonds for School Buildings - Subchapter D, Chapter 45, Texas Education Code

An independent school district which obtains approval of its voters to sell surplus real property may issue revenue bonds payable from the proceeds of the sale of the property. The bonds must be issued to construct or equip school buildings located in the district or for the acquisition of sites for school buildings. Bond proceeds may also be used for capitalized interest and reserve funds. The final maturity on the bonds must occur no later than 90 days after the final payment is due to the district from the buyer of the surplus property, and the final payment due from the buyer must occur no later than ten years after the date of execution of the contract of sale for the property.

Voter approval is not required if the proceeds of the sale of the property or of the bonds will be used for constructing or equipping a facility that must be built pursuant to an order or judgment entered by a United States district judge in any action in which the district is a party.

Time Warrants - Section 45.103, Texas Education Code

A district which is in need of funds for the following purposes may issue interest-bearing time warrants (which may be in the form of a promissory note or other evidence of debt) for the following purposes:

- o To construct, repair, or renovate school buildings;
- o To purchase school buildings and school equipment;
- o To equip school properties with heating, water, sanitation, lunchroom, or electric facilities; or
- o To hire a person to compile taxation data.

The warrants may mature no later than five years from the date of issuance and are payable from any available funds of the district. The warrants may not be issued at a discount. A district may not issue warrants in excess of five percent of the assessed valuation of the district in the year in which the warrants are issued, and payments due on the warrants in any given year may not exceed the anticipated surplus income (excluding taxes collected for payments due on tax bonds) of the district for the year in which the warrants are issued, based on the district’s budget for that year. While time warrants are outstanding, a district must deposit delinquent taxes collected (except for those taxes levied to support tax bonds) into a fund to be used to pay off the time warrants. A district may not have more than \$500,000 in warrants outstanding at any one time.

Delinquent Tax Notes/Loans - Section 45.104, Texas Education Code

A district may enter into a loan payable from delinquent maintenance tax revenues for the purpose of financing maintenance expenditures of the district. The loan may be evidenced with negotiable notes which must not mature more than 20 years from their date of issuance.

Short-Term Loans for Salaries – Section 45.105, Texas Education Code

A district may enter into short-term loans payable from state and county available funds and/or local district funds for the purpose of paying teachers’ and superintendents’ salaries before the school funds for the current year become available. Any such loan must be paid from revenues received in the year in which the loan is incurred.

Maintenance Tax Notes - Section 45.108, Texas Education Code

Independent or consolidated school districts may issue maintenance tax notes for the purpose of any lawful expenditure of the district other than the payment of debt service on tax bonds or new construction or acquisition of school buildings. The notes issued may not exceed 75% of the district’s previous year’s income and may not mature more than 20 years from the date of issuance. Notes may be issued only after the district adopts a budget for the current school year, and are payable from any available funds of the district, including maintenance tax revenues.

Contracts for Athletic Facilities - Section 45.109, Texas Education Code

An independent school district may enter into a contract with any corporation, city, or institution of higher education located wholly or partially within district boundaries for the use of a stadium or other athletic facilities for any purpose related to sports activities and other physical education programs for the students of the district. The contract term may not exceed 75 years. Payments due from the district under the contract may be paid from any available funds of the district and if voters approve, the district may pledge maintenance tax revenues to payments due under the contract.

Certificates of Indebtedness - Section 45.111, Texas Education Code

A district located in a county with a population of 200,000 or more may issue interest-bearing certificates of indebtedness to finance the construction or equipment of school buildings in the district, or for the refinancing of certificates previously issued. The certificates must be payable from maintenance tax revenues. A district may not have more than \$250,000 in aggregate principal amount of certificates outstanding at any one time. There are additional limits on the amount which any particular district may issue depending on the total assessed valuation of the district. Certificates may mature no later than 25 years from their date of issuance and may not bear interest at a rate in excess of seven percent. The certificates may not be sold at a discount.

Athletic Stadium Authorities - Subchapter F, Chapter 45, Texas Education Code

Two independent school districts may create an athletic stadium authority which may construct, enlarge, furnish, and equip one or more stadia; purchase existing stadia and furnishings, and equipment for its stadia; and operate and maintain stadia. An authority may issue revenue bonds for any of these purposes which are to be payable from the stadia revenues. The bonds may also be secured by a mortgage on the stadia, but may not mature more than 40 years after the date of their issuance. A district may enter into a contract with the authority very much like contracts a district may enter into pursuant to Section 45.109, Texas Education Code.

Higher Education Facility Corporation Obligations - Chapter 53, Texas Education Code

A city may create a nonprofit higher education facilities corporation to issue obligations to finance and/or refinance educational facilities or housing facilities for open-enrollment charter schools holding charters granted pursuant to Chapter 12 of the Texas Education Code. Educational facilities include classroom buildings, laboratories, science buildings, faculty or administrative office buildings, or other facilities used exclusively for the conduct of the educational and administrative functions. Housing facilities includes a single- or multi-family residence used exclusively for housing and boarding students, faculty, or staff members. A higher education facilities corporation may acquire educational or housing facilities by purchase, lease, or construction; may acquire land for these purposes; may furnish and equip educational and housing facilities; and may provide for the operation and maintenance of the facilities. The facilities need not be located within the city limits of the city which creates the corporation.

The higher education facilities corporation may issue revenue bonds which must be payable from revenues to be derived from the operation of the facilities or any other revenues pledged for that purpose. The bonds may also be secured by a mortgage on the facilities.

Public Property Finance Contractual Obligations - Subchapter A, Chapter 271, Texas Local Government Code

A school district may enter into a contract or issue obligations to finance the acquisition of personal property. The con-

tract or obligation may be for a term not to exceed 25 years. The contract or obligation may be payable from a pledge of any available revenues of the district. "Personal property" includes appliances, equipment, facilities, and furnishings, or an interest in personal property; or material and labor incident to the installation of the real property; the term does not include real property.

Lease Revenue Bonds - Section 271.004, Texas Local Government Code and Chapter 303, Texas Local Government Code

A district may create a public facility corporation pursuant to Chapter 303, Texas Local Government Code, and pursuant to Section 271.004, Texas Local Government Code, may enter into a lease with the corporation, with a term not to exceed 25 years, pursuant to which the district leases real property improvements and equipment from the corporation. The lease or contract must be subject to appropriation. Before entering into the lease, the district must publish notice of its intent to enter into the lease and if a petition meeting the requirements of this subchapter is not received by the district within 60 days after publication of the notice, the district may enter into the lease with the corporation without holding a referendum on the question of whether the lease should be approved.

The corporation may issue revenue bonds to finance the acquisition and construction of real property and improvements to real property for the school district. The bonds must be payable from the lease payments to be made by the district to the corporation. The revenue bonds may also be secured by a mortgage on the real property being leased by the corporation to the district.

A portion of a district's lease payments due under a lease (which are used to pay off the corporation's revenue bonds) may be paid by the State of Texas if the district applies for and is awarded Instructional Facility Allotment funds pursuant to Chapter 46, Texas Education Code.

Tax Anticipation Notes - Chapter 1431, Texas Government Code

An independent school district which has an average daily attendance of at least 190,000 (as determined under Section 42.005 of the Texas Education Code) may issue tax anticipation notes to:

(1) pay a contractual obligation incurred or to be incurred for professional services (including those offered by a tax appraisal engineer, engineer, architect, attorney, mapmaker, auditor, financial advisor, or fiscal agent);

(2) pay operating or current expenses;

(3) fund the district's cumulative cash flow deficit (the amount by which the sum of the district's anticipated expenditures and cash reserve reasonably required to pay unanticipated expenses exceeds the amount of the district's cash, marketable securities, and money on-hand (excluding certain funds)); or

(4) pay a contractual obligation incurred or to be incurred for the purchase of materials, supplies, equipment, and machinery for the district's authorized needs and purposes.

Final maturity of notes issued are limited to 15 years, seven years, or one year, depending on the purpose for which the notes are issued. Notes issued to finance operating or current expenses may not exceed 75% of the income of the district for the fiscal year preceding the year in which the notes are issued. The notes may be secured by tax or other revenues or the proceeds of bonds to be issued by the district; they may not be secured by a combination of tax and other revenues. To be secured by bond proceeds, the voters must have approved the issuance of anticipation notes when they approved the issuance of bonds by the district.

Bonds for Local Government Sports Centers – Chapter 1432, Texas Government Code

A district which has all or most of its territory located in a county with a population of more than 1.3 million may construct, acquire, lease, improve, enlarge, and operate one or more facilities used for sporting events or activities, including auxiliary facilities such as parking areas or restaurants, and may issue revenue bonds to finance such facilities. Revenue bonds issued under this Chapter may be payable from all or part of the revenue of the facilities, a mortgage on the facilities or personal property relating thereto, or funds received from any other source except tax revenues.

Federal Income Tax Treatment of School District Obligations

Tax Exemption of Interest Paid on District Obligations Other Than Qualified Zone Academy Bonds: - Sections 103 and 141-150 of the Internal Revenue Code of 1986

In general, interest on an obligation issued or entered into by a school district to finance capital expenditures to serve the district's public purposes will be tax-exempt to the holder of the obligation if the structure of the financing and the district comply with certain federal income tax laws and regulations. This tax-exemption of the interest results in lower borrowing costs to the district.

But having state law authority to issue or enter into an obligation does not mean that the interest on the obligation will qualify for tax-exempt treatment under federal income tax law, so a district should check with bond counsel for that analysis. Areas of particular concern include the financing of operating costs or the financing of a facility all or a portion of which a district intends to lease to another party.

Qualified Zone Academy Bonds - Section 1397E of the Internal Revenue Code of 1986

The Qualified Zone Academy Bond ("QZAB") Program is a federal tax credit program that was created in 1997 by Congress to assist school districts with the financing of facilities, equipment, and other items designed to improve the curriculum and, therefore, the ability of their students to enter the workforce upon graduation from high school. The QZAB Program was modeled after a public-private partnership created between IBM and certain schools in New York City under which IBM contributed computers and its employees tutored students in computer skills.

In Texas, QZABs may be issued by a district to finance renovations, maintenance, and equipment to be used in a district's

academy, at little or no interest cost. The holders of the QZABs receive a tax credit instead of interest or receive the tax credit together with a small amount of interest. The tax credit and any interest received by a holder are taxable to the holder.

In Texas, QZABs may be issued as tax bonds, maintenance tax notes, or public property finance obligations.

Requirements:

Before contemplating the issuance of QZABs in any given calendar year, a district must apply to the Texas Education Agency ("TEA") for an allocation of the State of Texas QZAB allotment for that year. A district must demonstrate to the TEA that it has received written commitments from private entities for contributions to the district's academy (as defined below) in an amount required by federal law, and that the district is either (1) located in an empowerment zone or enterprise community or (2) at least 35% of the students in the academy are eligible for the free or reduced-cost school lunch program. If a district meets TEA requirements and funds remain to be allocated, TEA will award an allocation to the district. The TEA award of allocation, however, does not mean that the district has met all the federal law requirements of the QZAB Program.

In order for an obligation to be issued as a QZAB, it must be:

- (1) used for renovations and/or equipment to be used by a "qualified zone academy" (except for 5% of the proceeds which may be used for costs of issuance or other non-qualified purposes);
- (2) issued by a state or local government (which includes a district) within which the academy is located;
- (3) designated as a QZAB by the district;
- (4) an obligation for which the district has certified compliance with the private business contribution requirement:
 - (a) private entities have committed in writing to make "qualified contributions" with a present value of at least ten percent of the proceeds of the obligations to be issued;
 - (b) where "qualified contributions" are equipment, technical assistance in developing curriculum or training teachers, services of employees as volunteer mentors, educational opportunities outside the academy, or any other property or service specified by the eligible local education agency as possible contributions, all for use in or with the academy;
- (5) an obligation for which the district has certified that it has written approval of the "eligible local education agency" (the Board of Trustees); and
- (6) an obligation the final maturity of which does not exceed the maximum term permitted for that particular obligation, as set by the U.S. Treasury.

Because an obligation will not be a QZAB unless a qualified zone academy has been created, a district must have or create an academy. A qualified zone academy or "academy" is:

(1) any public school (or academic program within a public school, or all schools within a district) which is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level;

(2) a school or program designed in cooperation with business to enhance the academic curriculum, increase graduation and employment rates, and better prepare students for the rigors of college and the increasingly complex workforce;

(3) a school or program in which the students will be subject to the same academic standards and assessments as other students educated by the eligible local education agency;

(4) a school or program, the comprehensive education plan of which, is approved by the eligible local education agency; and

(5) a school located in an empowerment zone or enterprise community or for which there is a reasonable expectation that at least 35% of the students attending the school or the program will be eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

If the district should fail to meet these requirements, the obligations issued by the district may lose their status as

QZABs retroactively to the date of issuance. The loss of QZAB status would mean that the holders of the obligations would no longer be able to claim the tax credit associated with the obligations, and may in fact be required to pay interest and penalty to the Internal Revenue Service due to the loss of the tax credit they claimed prior to the date on which the district was notified that the loss of QZAB status occurred.

These issues and others which may arise during the financing can be addressed by bond counsel on behalf of a school district interested in issuing QZABs. As part of the planning process, bond counsel with experience in issuing QZABs should be consulted by a school district before the QZAB financing is structured, before an academy is created or designated, if possible, and before private contributions are solicited and pledges are received.

Summary

State law provides school districts with a variety of financing options, some of which may or may not be appropriate for your district, and some of which may not result in tax-exempt financing for your district. Start the process of determining what might work for your district by scanning the summaries in this primer of financing options, but follow up with your district's financial advisor and bond counsel to be sure your preferred method of financing fits your district's circumstances.

STRAIGHT FROM THE TOP

Answers to FERPA Questions
as presented by LeRoy S. Rooker, Director
Family Compliance Office
U.S. Department of Education

Compiled by Karen Randolph, Texas Association of School Boards and
Dorcas A. Green, Walsh Anderson Brown Schulze & Aldridge, P.C.

On July 16, 2002 Mr. LeRoy Rooker, Director of Family Office of the U.S. Department of Education, gave a presentation to interested school district personnel and attorneys providing guidance on the Family Education Rights to Privacy Act. Excerpts from his presentation were chosen to help the practitioner deal with FERPA questions.

Impact of Falvo Decision

Q. In light of the Falvo¹ decision allowing students to grade papers in class, will the Family Compliance Office (FCO) revise the regulations defining education records?

A. *The FCO is planning on issuing new regulations, however, the Supreme Court in Falvo confirmed FCO's position that for a record to qualify as an "education record," it must be maintained by the school district.*

Comments on definition of "Educational Records"

Q. Where does the FCO stand on teacher grade books?

A. *Despite the Supreme Court's discussion in Falvo, the FCO considers grade books to be education records.*

Q. Are there any records that don't fall under the category of "educational records"?

A. *"Sole Possession" records of the maker are not educational records. For example, if records are kept as "memory jogger" type of records such as personal notes kept by a teacher/counselor as a reminder to themselves for dealing with a particular student.*

Q. Are documents created in the course of a student investigation "educational records"?

A. *Section 99.8 provides that a school may designate a school official (e.g. principal) to serve as the law enforcement unit for the school. This official may investigate incidents related to law enforcement and create and maintain records for a law enforcement purpose. This designation must be done officially, the records must be maintained in a separate location from education records, and the school district must have specified that it has taken this action in the annual FERPA notice of rights to parents. [The distinction offered by Mr. Rooker was that the records are not created or maintained as educational records but as law enforcement records.]*

1 *Owasso Indep. Sch. Dist. v. Falvo*, 122 S. Ct. 934 (2002)

Comments on Definition of “Parent”

*Custodial step parents will be treated as parents with rights outlined in FERPA but not the same for non-custodial step parents unless consent is obtained from a parent.

*Involved parents who are away for long periods of time (*i.e.*, long-haul truck drivers) need to leave written documentation for the school noting who is authorized to have parental access rights while absent.

*Mr. Rooker counseled to “document, document, document” if the school district is unsure of the adult’s authority to have access to student records. In today’s world, students often live with other family members or other families without legal custody even being changed. Be able to show that reasonable inquiry is made before allowing access to student records by someone other than the authorized parent.

*Any parent regardless of custody status or level of involvement with the student still retains access to records absent a court order specifically revoking or limiting those educational rights.

Comments on the School District’s Annual Notification

*Remember, the annual notification to parents must be “reasonably likely to inform”.

*The method or form is not dictated by statute or regulation. It is not required that the parent must sign for notice of FERPA rights. Notice as part of the student handbook/materials is acceptable. Many school district across the nation use the local newspaper to provide this annual notification. School districts may consider using their web site as a means of providing the annual notification.

Comments on “Personally Identifiable Information”

*Use caution in identifying students as passing the TAAS. While it can possibly be categorized as an “honor or an award” and included within the category of directory information that is releasable. The FCO will be reviewing this issue but if the designation of the honor of passing in effect identifies students who have not passed, there could be a violation of FERPA.

*Unless a confidentiality agreement is reached with an outside institution as provided in the statute, a district cannot share personally identifiable information with institutions who are awarding grants of money to schools.

Comments on Directory Information

*It is permissible for a school district to declare that email addresses are private. A state cannot require disclosure of information that is protected by FERPA.

*Schools can require parents to consent to “all or nothing” release. Parents can be prohibited from picking and choosing what piece of directory information they want released and what piece they do not want released. The administrative burden on a school district could be substantial if this was allowed.

*Schools can pick and choose from the list of what items FERPA identifies as directory information so long as state law does not require disclosure of all FERPA designated directory information.

*Race, gender, national origin, disability, etc. cannot be divulged as directory information.

*School districts can designate class rosters or student class schedules as directory information so long as these items were included in the annual notice of parents and the parents are given the opportunity to opt out.

Comments on definition of “Record”

*Emails are records.

*Records can include documentation that exists only in the hard drive of a computer and the school district may have to spend time and resources to retrieve data if requested. Mr. Rooker acknowledges that public information laws may allow the district to charge for certain records and labor it requires to provide the records.

*Mr. Rooker recommends that school district adopt and/or update their retention policies to decrease the burden on districts.

Comments on FERPA Concerns in Disciplinary Hearings

Q. What should a school do with a parent complaining about disciplinary action taken against their child and they insist on this discussion to occur in open session?

A. *The District can explain that even though the parent can discuss their student in open session that the school district cannot without express consent from the parent. The school district cannot infer that the parent has consented to a discussion about their child.*

*Remember that Section 99.12 provides that a school cannot give information to a parent about disciplinary action regarding a child other than his/her own except to note that “appropriate action has been taken” unless the parent of the child receiving disciplinary action consents to the disclosure.

Q. Has the Office of Civil Rights (OCR) and FPCO issued any guidelines on interaction between Title IX and FERPA?

A. *There have been joint meetings between OCR and the FPCO to discuss the interplay between Title IX and FERPA. Title IX does not require specific notification of specific disciplinary action to the complainant. However, concern still remains about Title IX requirements to conduct an investigation when school officials are prohibited from discussing particular student information that would be required for a proper investigation. Mr. Rooker notes that if Title IX requires the release of private student information then Title IX would trump FERPA.*

Comments on Parent Complaints

*Parent complaints which are maintained by the District are educational records and are protected by FERPA.

- Q. Would a teacher who is the subject of a parent complaint have the right to see that complaint if they were facing disciplinary proceedings as a result of that complaint?
- A. *This could be very fact specific and would need to be decided on a case by case basis. Due process rights could be involved if the disciplinary action would affect a teacher's compensation.*
- Q. If a teacher is disciplined as a result of a parent complaint and the teacher's conduct is required to be reported to the State Board for Educator's Certification, can the school release the parent/student complaint without permission?
- A. *No. Usually the school district should be able to get the complainant's written permission. Suggest using consent forms as part of the investigation to let the parents know the information may be needed to send to SBEC. Another option for a school district who has designated a law enforcement unit officer to investigate and make a record. The record would not be an educational record but would be a law enforcement record that could be released without consent.*

Comments on Hall Monitoring or Bus Videos

*Remember videos are generally considered an educational record and the school district cannot release to the parents the video tape that would reveal the identity of other students.

*Can a school district have the designated law enforcement unit maintain these videos and not have the videos maintained as an educational record. Remember that if the law enforcement unit turns over a copy of the video to administer discipline to the student, then that copy becomes an educational record.

*Names of students on a bus when there is a wreck or the bus roster may not be released absent a subpoena. It is generally permissible to classify bus rosters as directory information except for those bus routes that would tend to identify a student as a special education student.

Comments on Records for Safety Reasons

- Q. Is there a way under the current law for schools to share education records with law enforcement for non-emergency safety concerns?
- A. *No. Congress would need to amend FERPA and the Bush administration supports such an amendment.*
- Q. What would constitute an emergency justifying release of FERPA protected information?
- A. *As an example, the parents of a child who is the subject of a death threat letter by another student should be told of the threat. Timing is a factor because it probably is not the same emergency if the threatening child is in*

custody and it is three weeks later. The District should document their analysis of why an emergency exists.

Comments on Parents' Access to Counselor Records

* Parents have rights of access to all counseling records of their children under FERPA despite any counselor duty of confidentiality, absent the sole possession exception.

Comments on Maintenance of Records

- Q. What education records does FERPA require schools to maintain?
- A. *FERPA does not require maintenance of any specific education record unless someone with access rights requests a record that is currently maintained. The school district cannot destroy a record after it has been requested.*

*Keep all requests related to special education student records.

- Q. How long do FERPA rights exist for education records of a student?
- A. *If the student dies and the rights were with the student at the time of death, the rights expire. If the student dies and the rights were with the parents at the time of death, then the rights continue until the parents' death.*

Comments on Subpoenas for Education Records

- Q. What if the school district gets a subpoena for education records?
- A. *Contact your attorney to ensure that the subpoena is lawfully issued. Contact the parents of the child involved and give the parent/student sufficient time to get the subpoena quashed. No set time for what is "reasonable" is in the law but use good judgment. If the subpoena states that the parents are not to be notified, then comply with the subpoena without notice to the parents.*

Comments on FERPA Enforcement

* FCPO investigates complaints made within 180 days from the date the complainant knew of or should have known of the alleged violation.

*FCPO generally investigates to determine if "sufficient evidence" exists to conclude that a violation has occurred. If "sufficient evidence" exists, then FCPO works with the school district to bring about voluntary compliance, i.e. changing policies. Courts have upheld other means of seeking compliance such as injunctions. There is no private cause of action under FERPA, but state law privacy actions still exist.

Conclusion

Mr. Rooker emphasized that the recent *Falvo* decision only illustrates that FERPA, although on the books for a long time, is still very relevant to the privacy issues of students and how school districts must continue to strive and stay in compliance with the law. Mr. Rooker encourages school district officials and attorneys to contact the FPCO for guidance.

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