

How Should Arkansas Schools Handle Parent Demands for Emails About Students? Navigating FERPA & FOIA.



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Arkansas schools often face parent requests to see all the school's documents and emails about their child. Schools may wonder whether a parent has a right to such sweeping information.

Federal law gives parents^[1] the right to access their child's education records under the Family Educational Rights and Privacy Act ("FERPA"). FERPA applies to all schools who receive federal funding, including public and private schools. Independent schools who do not accept federal funding generally are not subject to FERPA. In addition, the Arkansas Department of Education's Regulations similarly give parents rights to access certain education records. The Arkansas Freedom of Information Act ("FOIA") also obligates public schools to produce certain types of public records upon request. Taking these laws into consideration, are parents entitled to all emails discussing their child?

What is in the Education Record Under FERPA? Whether emails are part of the education record is a murky subject. FERPA's definition of "education records" is broad. A student's education record is defined as records "that contain information directly related to a student and are maintained by an educational agency" or a party acting on its behalf.^[2] When it comes to emails, schools must ask, first, does this email "directly relate" to the student, and, second, is the email "maintained" by the school?

FERPA only requires schools to produce education records that are "directly related" to the student in question. Schools can use common sense to determine whether an email relates to the student, or if a student is simply mentioned in the email, copied on the email, or involved in the email in a non-direct way. Emails that contain personally identifying information about the student likely qualify. However, emails about faculty, staff, a school program, or another student likely do not "directly relate" to the one specific student in question.

FERPA also only requires schools to produce education records that are "maintained" by the school. Although the term "maintain" is undefined, the U.S. Supreme Court opined in 2002 that FERPA implies that education records are "institutional records kept by a single central custodian, such as a registrar."^[3] Although this case did not deal with emails, it implies that centrality of the records is key to determining whether they are to be included as part of the "education record." Although Arkansas courts have not considered whether emails are part of a student's education record, out-of-state court opinions provide useful guidance. As an initial matter, emails that are printed or saved electronically in a central file with the student's other records are almost certainly subject to disclosure to parents. For other emails, the law is unclear. Several courts have held that school districts are not required to provide emails to parents under FERPA when emails are not kept in a central location or are available only via a keyword search.^[4] However, in other situations courts have found that emails are "education records" where certain

departments had email retention policies and emails could not be deleted.^[5] Ultimately, whether emails related to a student are part of the “education record” under FERPA may depend on the school’s email maintenance practices and procedures.

Arkansas FOIA. Arkansas’s FOIA^[6] statute is one of the broadest in the country, giving the public access to anything defined as a “public record,” with some exceptions. For public schools, even if emails are not “education records” subject to disclosure under FERPA, that is not the end of the story. A parent may try to use FOIA to obtain records concerning their child. Importantly, education records as defined under FERPA are specifically exempt from FOIA.^[7] However, as discussed above, emails about a student may or may not be part of the education record. Whether emails are subject to production under FOIA depends on whether the email qualifies as a “public record.” Arkansas FOIA defines a public record as a “record of the performance or lack of performance of official functions” by a public official.^[8] The mere fact that an email is created and stored on a computer operated by a public official does not make it a public record; it depends on the content of the email.^[9] Practically speaking, most emails related to a student likely do not reflect the performance of official functions. However, in some cases, schools should consider whether the emails requested reflect official business of the school, such as student government meetings, meetings with the school board or superintendent, or emails that reflect other official functions. In these cases, even though the emails may not be part of the “education record” under FERPA, they may be subject to release under FOIA.

Practical Issues for Schools. A school receiving a FERPA and/or FOIA request from a parent seeking all emails concerning their child should take caution. Emails referring to students can be voluminous, as parents and teachers often communicate electronically about various issues. A school faced with such a request may have hundreds or thousands of emails that result from a keyword search of the student’s name. In theory, each email would need to be reviewed and redacted where necessary to preserve the privacy of other students. Given the budgetary and staffing constraints on most schools, such a review would be unduly burdensome. In order to be deemed an “education record,” most courts considering this issue appear to require that a school deliberately preserve emails in a central location with the intent of maintaining them for an extended period of time. Schools would be wise to review their record maintenance policies to determine, practically, where emails are maintained and if any automatic deletion policies exist. Schools may consider printing important emails about a student and maintaining them in a central location with other student records. Such a practice may serve to protect a school from having to review, redact, and produce numerous emails. For private schools, the inquiry ends with FERPA. Public schools, however, should consider whether emails concerning a student withheld under FERPA may be considered a public record under FOIA.

Takeaways

- **FERPA Compliance.** Emails placed in a student’s physical files are likely covered by FERPA and must therefore be provided to parents upon receipt of a proper request. Emails *not* placed in a student’s physical file may or may not be “education records” subject to disclosure subject to a lawful request. Schools should review their records retention policies to determine how and where emails are maintained.
- **FOIA Compliance.** Emails that are “education records” under FERPA are exempt under FOIA. However, emails skirting FERPA may nonetheless be covered by FOIA and subject to disclosure to a parent upon receipt of a proper request if the emails relate to performance of official school business.
- **Training.** This is an area of the law where an ounce of prevention is worth a pound of cure. Schools should ensure that the required employees are aware of their obligations under FERPA, FOIA, and other records laws and regulations.

- **Ask for help.** When a request for records is received, seek the advice of an experienced education lawyer. Thoughtfully navigating a difficult request upfront can often prevent later litigation and complications.

[1] When a student turns 18 years-old or attends a postsecondary institution, they become an “eligible student,” and all rights under FERPA transfer from the parent to the student. 20 U.S.C. § 1232g(d).

[2] 20 U.S.C. § 1232g(a)(4)(A).

[3] *Owassa Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 435 (2002).

[4] *See, e.g., S.A. ex rel. L.A. v. Tulare Cty. Office of Educ.*, 2009 WL 3126322 (E.D. Cal. Sept. 24, 2009) (rejecting an argument that emails identifying a student and located in “individual inboxes or the retrievable electronic database” are “maintained” in a central location and cautioning against imposing “a weighty administrative burden on every teacher.”); *see also Burnett v. San Mateo Foster City Sch. Dist.*, 739 Fed. Appx. 870, (9th Cir. June 26, 2018) (holding that a school district did not violate FERPA by producing email maintained only in the student’s printed physical file); *Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, No. C20111954 (Ariz. Super. Ct. May 7, 2011) (noting that “documents scattered throughout a database, only located via a key-word search, are not ‘maintained’ under FERPA.”); *E.D. v. Colonial Sch. Dist.*, C.A. No. 09-4837, 2017 WL 1207919, at *10 (E.D. Pa. Mar. 31, 2017) (holding that “[u]nless [the school district] kept copies of emails related to [the student] as part of its record filing system with the intention of maintaining them,” not “every email which mentions [the student] is a bona fide education record.”).

[5] *See, e.g., President & Trs. of Bates Coll. v. Congregation Beth Abraham*, No. CV-01-21, 2001 WL 1671588, at *4 (Me. Super. Ct. Feb. 13, 2001) (concluding that emails sent to a professor were “education records”); *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012) (holding that emails are education records “maintained” by the school because the university athletic department “retains copies of all emails and attachments sent to or by any person in the department [and] the emails cannot be deleted.”)

[6] Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 et seq.

[7] There are over 40 specific FOIA exemptions, one of which is an exemption for public records that meet the definition of “education records” under FERPA. Ark. Code Ann. § 25-19-105(b)(2).

[8] Ark. Code Ann. § 25-19-103(7)(A).

[9] *See Pulaski Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 716 (2007).