

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

July 2, 2015

Opinion No. 15-55

Availability of Student Directory Information

Question 1

If a local education agency or school district receives a request from a charter school within its district for the names and addresses of students within the school district, who are not currently students at the charter school, may the school district provide the requested information to the charter school?

Opinion 1

Yes, provided that the local education agency or school district has determined that the charter school has a legitimate educational interest in the disclosure of this information.

Question 2

Is disclosure of the student directory information referenced in Tenn. Code Ann. § 10-7-504(a)(4)(A) permissive or mandatory?

Opinion 2

The provision in Tenn. Code Ann. § 10-7-504(a)(4)(A) authorizing the disclosure of student directory information is permissive.

Question 3

If a local school district receives a public records request from a Tennessee citizen for a student's telephone number, may the school district release that information?

Opinion 3

No. Tennessee Code Annotated § 10-7-504(a)(4)(A) does not authorize the release of a student's telephone number without prior consent.

ANALYSIS

There are two statutes, one state and one federal, that govern access to student educational records and information in the hands of educational institutions: the Tennessee Public Records Act (“TRPA”) and the Family Educational Rights and Privacy Act of 1974 (“FERPA”).

FERPA protects student educational records and personally identifiable information of students from improper disclosure by conditioning the receipt of federal funds by “any public or private educational agency or institution” on adherence to certain requirements related to access to and disclosure of student educational records. *See* 20 U.S.C. § 1232(g)(b); *Gonzaga University v. Doe*, 536 U.S. 273, 276 (2002); *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926 (6th Cir. 2000). FERPA’s basic rule is that before an educational institution may disclose personally identifiable information from a student’s educational record, the institution must obtain written consent from the parent or eligible (over 18) student. Thus, FERPA does not, *per se*, make student records confidential nor does it prohibit disclosure of records; but if an educational institution does not comply with the access and disclosure requirements of FERPA, it jeopardizes its federal funding. *See* 20 U.S.C. § 1232(f). However, without jeopardizing its federal funding, an educational institution may disclose personally identifiable information from an educational record of a student without the required consent if the disclosure is “to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required.” 20 U.S.C. § 1232g(b)(1)(A).

TRPA provides that “[a]ll state, county and municipal records shall, at all times during business hours, . . . be open for personal inspection by any citizen of this state . . . unless otherwise provided by state law.” Tenn. Code Ann. § 10-7-503(a)(2)(A). A “public record” is defined as any record, “regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” Tenn. Code Ann. § 10-7-503(a)(1)(A).

A state law that provides otherwise with respect to student educational records is Tenn. Code Ann. § 10-7-504(a)(4)(A), which specifies that “[t]he records of students in public educational institutions shall be treated as confidential.” However, this statute further provides that “information relating only to an individual student’s name, age, address, dates of attendance, grade levels completed, class placement and academic degree awarded may likewise be disclosed.”

1. You have asked whether a local education agency (“LEA”) or school district may provide to a charter school in the district the names and addresses of students within the school district who are not currently enrolled as students at the charter school. Under TRPA, public charter schools are part of the state program of public education and the LEA is the chartering authority of a charter school in its district. *See* Tenn. Code Ann. § 49-13-104(2) and 105(a). Thus, officials of a public charter school chartered by an LEA constitute “other school officials . . . within the agency or institution,” and, under FERPA, the LEA would be permitted to provide the names and addresses of students within the school district to the officials of such charter school, if the LEA has determined that such officials have a “legitimate educational interest.” The LEA would also be permitted to provide this information to the officials of the charter school under TRPA,

because disclosure of this information is specifically authorized in Tenn. Code Ann. § 10-7-504(a)(4)(A).

2. Your next question is whether the provision in Tenn. Code Ann. § 10-7-504(a)(4)(A) authorizing the disclosure of certain student information is mandatory or permissive. In determining whether a statutory provision is to be construed as permissive or mandatory, Tennessee courts have stated, generally, that:

“The intention of the legislature as to the mandatory or discretionary nature of a particular statutory provision is determined primarily from the language thereof. Words or phrases which are generally regarded as making a provision mandatory include ‘shall,’ and ‘must.’ On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word ‘may,’ or ‘authorizes,’ or ‘power,’ or the phrase ‘it is lawful,’ especially where the act to be done does not affect third persons and is not clearly beneficial to them, or to the public generally.”

Baker v. Seal, 694 S.W.2d 948, 951 (Tenn. Ct. App. 1984) (quoting 73 Am.Jur.2d *Statutes* § 22 (1974); see also *JJ & TK Corp. v. Bd. of Commis.*, 149 S.W.3d 628, 631 (Tenn. Ct. App. 2004) (use of the word “shall” in a statute is generally construed as being mandatory rather than discretionary) and *Steppach v. Thomas*, 346 S.W.3d 488, 505 (Tenn. Ct. App. 2011) (use of the word “may” in a statutory ordinarily connotes discretion or permission). At times, though, Tennessee courts have concluded that words of a permissive nature, such as “may,” are to be given a mandatory significance. *Fiske v. Grider*, 171 Tenn. 565, 106 S.W.2d 553, (1937); *Burns v. Duncan*, 23 Tenn. App. 374, 133 S.W.2d 1000 (1940). Thus, in determining whether a provision is permissive or mandatory, “the prime object is to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other” *Stiner v. Powells Hardware Co.*, 168 Tenn. 99, 75 S.W.2d 406, 407 (1934).

In this instance, the applicable statute uses both “shall” and “may”:

The records of students in public educational institutions *shall* be treated as confidential. . . . Statistical information not identified with a particular student *may* be released to any person, agency or the public; and information relating only to an individual student’s name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded *may* likewise be disclosed.

Tenn. Code Ann. § 10-7-504(a)(4)(A) (emphasis added).

In looking at the statute as a whole, the clear legislative intent is to maintain the confidentiality of records of students in public educational institutions. Accordingly, the use of the word “may” in authorizing the disclosure of certain student information is intended to be

permissive, *i.e.*, to give a public educational institution discretionary authority to release the information in question as may be consistent with the statutory purpose of maintaining confidentiality.

3. Your last question is whether a school district or LEA may disclose the telephone number of a student.

FERPA provides that an educational agency or institution may disclose “directory information” without the required consent if it has given public notice to parents and eligible students of (i) the types of personally identifiable information it has designated as “directory information”; (ii) their right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and (iii) the time within which a parent or eligible student must notify the agency or institution in writing that he/she does not want any or all of those types of information designated as directory information. 20 U.S.C. §§ 1232g(a)(5)(B), (b)(1).

“Directory information” is defined as information

relating to a student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). The U.S. Department of Education has further interpreted directory information to mean “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed,” and it has construed this statutory list of directory information to be non-exhaustive. *See* 34 C.F.R. § 99.3 (2013); *Electronic Privacy Information Center v. U.S. Department of Education*, 48 F.Supp.3d 1, 6, (D.D.C. 2014). In essence, FERPA exempts “directory information” found in education records from the statutory disclosure restrictions, but leaves each educational agency or institution free to determine for itself what categories of directory information it will release and for what purposes.

Since telephone numbers are specifically identified as “directory information,” a school district or LEA would be permitted under FERPA to release a student’s telephone number without prior consent, provided that it has given the required “public notice” and opportunity to parents or eligible students to “inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.” 20 U.S.C. § 132g(a)(5)(B).

On the other hand, TRPA would prohibit a school district or LEA from disclosing a student's telephone number without prior consent. Tennessee Code Annotated § 10-7-504(a)(4)(A) lists the categories of "directory information" may be released from a student's educational records; telephone numbers are not included in that listing. Accordingly, appropriate consent would be required before a student's telephone number could be disclosed.

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