



SHIPMAN & GOODWIN LLPSM
COUNSELORS AT LAW

In conjunction with the

Connecticut Association of Schools

A Conference for School Office Personnel

Thomas B. Mooney
Gwen J. Zittoun

April 29, 2016

AGENDA:

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|--------------------------|--|
| 9:15 a.m. to 10:00 a.m. | Legislative Update (Gwen and Tom) |
| 10:00 a.m. to 10:30 a.m. | Confidentiality and Issues Relating to Transgender Students (Gwen) |
| 10:30 a.m. to 10:45 a.m. | Break |
| 10:45 a.m. to 11:15 a.m. | Board Operation and FOIA/Record Retention Review (Tom) |
| 11:15 a.m. to 11:40 a.m. | Questions and Answers (Gwen and Tom) |

I. Legislative Update

- A. Physical restraint and seclusion of students, Public Act 15-141.
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00141-R00SB-00927-PA.PDF>
- B. Mandatory reporting to DCF of suspected abuse/neglect, Public Act 15-205.
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00205-R00HB-06186-PA.PDF>
- C. Immunizations and screenings, Public Acts 15-174 and 15-242.
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00174-R00HB-06949-PA.PDF>
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00242-R00HB-06987-PA.PDF>
- D. Discipline of preschool through second grade students, Public Act 15-96.
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00096-R00SB-01053-PA.PDF>
- E. Special education updates
 - 1. Paraprofessionals at PPT meetings, 2015 Special Session, Special Act 15-5 (Section 277).
<https://www.cga.ct.gov/2015/act/pa/pdf/2015PA-00005-R00SB-01502SS1-PA.pdf>
 - 2. Transition Bill of Rights, Public Act 15-209 and 2015 Special Session, Special Act 15-5 (Section 266).
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00209-R00HB-06737-PA.PDF>
<https://www.cga.ct.gov/2015/act/pa/pdf/2015PA-00005-R00SB-01502SS1-PA.pdf>
- F. Chronic Absenteeism, Public Act 15-225.
<ftp://ftp.cga.ct.gov/2015/act/PA/pdf/2015PA-00225-R00SB-01058-PA.PDF>

II. Confidentiality

- A. Confidentiality: Family Education Rights and Privacy Act (FERPA)
 - 1. FERPA requires both access AND confidentiality
 - a. The district must maintain the confidentiality of personally identifiable information, unless the parent or eligible student provides written consent for release of the information or an exception applies.
 - b. Personally identifiable information includes the student's name and other identifying information, as well as information that may lead a person to identify a student.

“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.”

The district is also prohibited from releasing any information in conjunction with a “targeted request.”

“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.”

- c. There are many exceptions to the requirement for parental/eligible student consent.

2. Important Exceptions

- a. NOTE: As a threshold matter, to be an “education record” under FERPA, subject to certain exceptions (*e.g.*, records relating solely to the student in his/her capacity as an employee), the record must “contain information directly related to a student,” and must be “maintained by an educational agency or institution or by a person action for such agency or institution.” 20 U.S.C. Section 1232g(a)(4)(B). Thus, a surveillance tape is not an “education record” as to bystander students.
- b. Disclosure is to a school official who has a **legitimate educational interest** in the information:
 - i. Fulfill his or her professional responsibilities.
 - ii. Most often applied to teachers and other school employees working directly with the student.
 - iii. It may also apply to agents of the school who are considered “school officials.”
- c. Health and safety emergency:
 - i. In the aftermath of the Virginia Tech shootings, the regulations were changed to allow schools to consider the “totality of the circumstances” pertaining to a threat to the health or safety of the student or other individuals.

- ii. If there is an “articulable and significant threat” to the health and safety of the student or other individuals, the school may disclose the information to “appropriate parties,” including parents and emergency personnel.
 - iii. Must document the articulable and significant threat.
 - d. Other relevant exceptions:
 - i. Student moves to another school district or public charter school, records may be sent to the receiving district; or even after a student has enrolled in a new institution so long as the disclosure is “for purposes related to the student’s enrollment or transfer.”
 - ii. Court order or subpoena
 - iii. Directory information
- 3. Sending records to out-of-district placements
 - No consent required if the PPT seeks enrollment in the out-of-district placement.
- 4. Records of students committed to DCF
 - No consent required to release records to DCF for students in custody of DCF
 - Superintendents are required to provide a description of education status and academic progress to DCF, a foster parent and the student’s attorney for every student in their district committed to the custody of DCF.
 - Should be substantially similar to the description provided to the parent or legal guardian of a child or youth who is not committed and should include: Current levels of educational performance, including absenteeism and grade level performance, test results, report cards individual success plans and discipline reports.

III. Confidentiality and Other Legal Issues Involving Transgender Students

- A. Laws protecting against discrimination. *E.g.*, Conn. Gen. Stat. Section 10-15c.
- B. Recent guidance:
 - Connecticut Coalition for Safe Schools
([http://www.ct.gov/chro/lib/chro/Guidelines for Schools on Gender Identity and Expression final 4-24-12.pdf](http://www.ct.gov/chro/lib/chro/Guidelines%20for%20Schools%20on%20Gender%20Identity%20and%20Expression%20final%204-24-12.pdf))
 - U.S. Department of Education, Office of Civil Rights: *Township High School District 211* (Ill.) (OCR Case No. 05-14-1055) (Nov. 2, 2015)
(<http://adc.d211.org/wp-content/uploads/2015/12/D211-OCR-Agreement.pdf>).
 - *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. Apr. 19, 2016)
(<http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf>)
- C. Case-by-case discussions and determinations
 - 1. Restrooms
 - 2. Locker Rooms
 - 3. Name/Pronoun
- D. Change of records
 - * Court order?

IV. Board Operation

- A. Authority of Board members
- B. Agenda
- C. Board policy and regulation
- D. Minutes

Access

COMPARE: privilege for executive session with privilege for documents

V. FOIA Review

Processing FOIA Requests

Public Records:

- A. Except as otherwise provided by any federal or state law, *the public is entitled to access to all records relating to the conduct of the public's business maintained or kept on file by any public agency.* Conn. Gen. Stat. § 1-210(a).
- B. A public record or file is defined as any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether such data or information be handwritten, typed, tape-recorded, printed, photostatted, photographed or recorded by any other method. Conn. Gen. Stat. §1-200(5).
- C. Examples of records exempt from disclosure under FOIA:
 - 1. preliminary drafts or notes, provided that the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;
 - 2. test questions, scoring keys and other data used to administer a licensing examination, examination for employment or academic examinations;
 - 3. names and addresses of students enrolled in any public school or college without the consent of each student;
 - 4. educational records exempt from disclosure under the Family Educational Rights and Privacy Act.
- D. Mechanics of disclosure:
 - 1. A request must be made to the public agency official who has custody or control of the public record. Public agencies may require that a request for copies of public records be in writing, but they may not insist on a written request to inspect public records. Conn. Gen. Stat. Section 1-210(a), Conn. Gen. Stat. Section 1-212(a). Moreover, the Freedom of Information Commission has ruled that a valid FOIA request need not mention the FOIA.
 - 2. Disclosure must be made "promptly," during regular business hours, which will vary with the particular facts and circumstances.

3. Public officials must respond within four business days or the requesting party may consider that the request has been denied. NOTE: you may respond that you are working on the request if a prompt response will take more than four days. You may also ask (but not insist) that the requesting party narrow his/her request.
4. The agency may charge a fee not to exceed fifty cents per page.
5. The FOIA now has a special provision concerning hand-held scanners. People may make copies using a scanner for a fee of \$20.00 per day.

QUERY: Is an iPhone a hand-held scanner? “As used in this section, “hand-held scanner” means a battery operated electronic scanning device the use of which (1) leaves no mark or impression on the public record, and (2) does not unreasonably interfere with the operation of the public agency.” Conn. Gen. Stat. Section 1-212(g).

6. The FOIA does not require that public agencies do research or create records.
7. Special rules regarding requests for electronic records are set forth in Conn. Gen. Stat. Sections 1-211, 1.212:
 - Public agencies must provide records in the medium requested.
 - The public agency may charge the actual cost to the agency of providing the record, including the hourly salary costs of personnel for the labor involved as well as the cost of the medium on which the records are provided.

E. Disclosure of personnel files under the FOIA:

1. Threshold question -- what and where is the “personnel file”?
2. Most such information is subject to disclosure under the FOIA.
3. Conn. Gen. Statute 10-151c provides that teacher performance and evaluations are exempt from FOIA (but not disciplinary records, letters of complaint etc.). NOTE: In *Spatola v. New Milford Board of Education*, Docket # FIC-2015-543 (Proposed decision dated April 4, 2016), the Hearing Officer has ruled that aggregate teacher data is not exempt from disclosure.

4. The FOIA contains an express exemption from public disclosure for “personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy” Also, *be careful* about *social security numbers*.
5. Disclosure of records concerning a public employee constitutes an invasion of privacy only if the information sought does not pertain to a matter of public concern and disclosure of the information would be highly offensive to a reasonable person.

Note: Only the employee whose records are being sought, and not the public agency holding the records, has standing to assert the personal privacy exemption under § 1-210(b)(2).

If a public agency receives a request for personnel, medical or similar files *and* the agency reasonably believes disclosure would constitute an invasion of privacy.

The agency must immediately notify in writing:

- i. each employee concerned, unless notice in writing is impractical due to the large number of employees involved; and
- ii. the collective bargaining representative, if any.

F. Record Retention Requirements

1. Retention requirements are under the jurisdiction of the Public Records Administrator, who promulgates the Record Retention Schedule for Municipalities, found at <http://ctstatelibrary.org/publicrecords/general-schedules-municipal/>
2. General administration records - Schedule M1
<http://ctstatelibrary.org/wp-content/uploads/2015/05/M1.pdf>
3. Personnel records - Schedule M2
<http://ctstatelibrary.org/wp-content/uploads/2015/05/M2.pdf>
4. Education records - Schedule M8
<http://ctstatelibrary.org/wp-content/uploads/2015/05/M8.pdf>

Examples:

- Routine correspondence 2 years
 - Email: either transitory (no retention required), less than permanent (same as analogous hard copy) or permanent, depending on the nature of the record.
 - Permission slips for participation in athletic activities 3 years
 - Application for employment, hired duration plus 30 yrs
 - Leave requests, supervisor's copy 1 year
 - Retirement forms duration plus 30 yrs
 - Employee training records 6 years
 - Attendance and transcript information in the student cumulative file 50 years after the student leaves
 - Special education records, generally 6 years after student has left the district
 - Teacher grade book current plus 1 year
5. Prior to destruction, district must obtain written permission of the Public Records Administrator.

VI. Questions and Answers

A CONFERENCE FOR SCHOOL OFFICE PERSONNEL

**Connecticut Association of Schools
Shipman & Goodwin LLP**

April 29, 2016

Please forward me by e-mail the reference materials on the issues of Board operation and minutes, student attendance, liability, administration of medication, custody, subpoenas, and copyright law from Mooney, A Practical Guide to Connecticut School Law (8th Ed. 2014).

NAME: _____

SCHOOL
DISTRICT _____

E-MAIL
ADDRESS _____

Please either fill out this sheet or make a request by e-mail to lbadolato@goodwin.com. Thank you.