

The
University of the
Education  State of New York
Department

In the Matter of
A Privacy Complaint
Filed Against

Review and Determination by
New York State Education Dept.
Chief Privacy Officer

Elmira City School District

On June 14, 2023, a complaint was filed with the New York State Education Department's ("NYSED's") Chief Privacy Officer by a parent ("Complainant") whose child ("student") attends the Elmira City School District ("District"). Complainant states that the District provided the student and parent's phone number to both the administrators, and parents of students participating in the District's My Brother's Keeper ("MBK") program, without consent. Complainant further states that the student neither knew of, nor participated in the program. Complainant also alleges that subsequent to notifying the District about the release of her phone number, the District retaliated by denying Complainant access to the parent portal. Complainant alleges that these acts violate the Family Educational Rights Privacy Act ("FERPA") and Education Law § 2-d.

In response to the complaint, I requested that the District investigate and provide a written response, including a summary of its investigation and addressing specific questions and issues. The District submitted its response on July 14 and 17, 2023. After reviewing the District's responses, I requested a copy of the District's 2022-2023 Annual FERPA Notification and Directory Information policy for the same year. On August 3, 2023, the District provided its Parents Bill of Rights ("PBOR") required by Education Law § 2-d; its policy number 5676 on Privacy and Security for Student Data and Teacher and Principal Data and a Notification of Rights Under FERPA that does not contain any information about the District's Directory Information policy. Notwithstanding, my office was able to obtain the District's Directory Information policy from its website.

Applicable Law

FERPA¹ protects the privacy of student educational records and places restrictions on the release of students' Personally Identifiable Information ("PII"). Also, New York has adopted additional privacy laws and regulations. Education Law § 2-d² protects PII from unauthorized disclosure and provides parents with rights regarding their child's PII, especially as it pertains to third party contractors.

In accordance with the requirements of Education Law § 2-d NYSED has adopted a § 2-d Bill of Rights for Data Privacy and Security that authorizes NYSED's Chief Privacy Officer to address parent complaints about possible breaches and unauthorized disclosure of PII. Section 121.1(a) of the Regulations of the Commissioner of Education defines a breach as the "unauthorized acquisition, access, use, or disclosure of student data and/or teacher or principal data by or to a person not authorized to acquire, access, use, or receive the student data and/or teacher or principal data." Section 121.1(t) of the Commissioner's Regulations defines an unauthorized disclosure or release as "any disclosure or release not permitted by federal or State statute or regulation, any lawful contract or written agreement, or [a disclosure] that does not respond to a lawful order of a court or tribunal or other lawful order."

District Response

The District admits that it shared address and cell phone information with the MBK program coordinator (the "coordinator") and that a group text was created using cell phone information inviting families to join the MBK mentoring program at an informational dinner. The District asserts that Complainant's information was included because Complainant sought support for the student the previous year. Upon learning that the Complainant wished to be removed from the list and that the student would not participate in the program, the Assistant Principal emailed District staff and the student was removed from the distribution list.

The District further states that it has trained all of its employees and the coordinator on student privacy and that it does "not feel [it] had breached any privacy laws or had acted arbitrarily in sharing the information. The information was shared with a district program coordinator, not an outside organization, as described."

Finally, the District denies that it limited Complainant's access to the parent portal.

¹ 20 U.S.C. 1232g; 34 C.F.R. Part 99

² N.Y. EDUC. LAW § 2-d

Analysis

Section 121.4 of the Regulations of the Commissioner of Education and NYSED's § 2-d Bill of Rights for Data Privacy and Security, allow parents, eligible students, teachers, principals, or other staff of an educational agency to file complaints about possible breaches and unauthorized releases of personally identifiable information ("PII"). Complainant is the parent of a Student who attends a District school and NYSED's privacy office may therefore address the complaint. The District did not dispute Complainant's standing to bring this complaint.

Allegation One: Unauthorized disclosure of student and family phone number.

Section 121.1(t) of the Commissioner's Regulations defines an unauthorized disclosure or release as "any disclosure or release not permitted by federal or State statute or regulation, any lawful contract or written agreement, or [a disclosure] that does not respond to a lawful order of a court or tribunal or other lawful order." The same section defines protected student data as "personally identifiable information from the student records of an educational agency." As applied to students, Education Law § 2-d(1)(d) and section 121.1(m) of the Commissioner's Regulations provide that PII has the same meaning as in FERPA's regulations. The information at issue here is the Student and Complainant's phone number. FERPA's definition of PII is not all inclusive and includes, as applicable to this discussion, "[t]he name of the student's parent or other family members; [and the] address of the student or student's family." [34 C.F.R. § 99.3 Personally Identifiable Information (b) and (c)]. Although phone numbers are not specifically included in this definition, it would be difficult to find that a family's phone number is not PII.

Accordingly, as phone numbers can be considered PII, I must review the circumstances regarding the sharing of this information. The PII was shared with the coordinator, administrators, and other parents. Additionally, the District states that the student's participation in the program was shared with all staff.

FERPA authorizes the sharing of educational records with school officials who have a legitimate educational interest in the information [34 CFR § 99.31 (a)(ii)]. The District states that although the coordinator is not an employee, he is a school official with a legitimate educational interest in the information, because he is implementing the MBK program. The District's Notification of Rights Under FERPA does define school official and states that it may be a contractor or consultant who, while not an employee, is performing an institutional service or function for which the school would otherwise use its own employees. Moreover, the District states that Complainant displayed an interest in such program in the previous school year. In light of these circumstances, I find that the District was justified in sharing this information with the coordinator.

The PII was also shared with other parents of students participating in the MBK program through a group text created by the District. The District states that it has found transmitting information via email to be an “ineffective” method to communicate with groups of students. The District further states that the phone numbers were not connected with an identifiable name. Notably, the District’s Student Directory Information Policy (#7242) last revised October 17, 2012, states that “telephone listing” is directory and that the District will release such information. FERPA authorizes the release of directory information when an education agency provides notice to parents of:

- The types of PII that it designates “directory”;
- The parents right to refuse (opt-out) to have the educational agency designate some or all of that information directory as it pertains to their child; and,
- The period of time when a parent must notify the educational agency that they choose to opt-out of having their child’s information be deemed directory.

Here, the District complied with the first requirement, by providing information as to what PII is considered “directory” in its Student Directory Information Policy. However, neither that policy nor their Notification of Rights Under FERPA for Schools addresses the rights of parents to opt-out. I note that upon notice from the Complainant that the student would not participate in the program, the District did remove the parent’s information from the group text. Despite the fact that the District was responsive to the Complainant’s request, I find that, because there is no opt-out information available to parents, the District’s directory information is not in compliance with FERPA.

Finally, it is unclear why the list of students participating in the MBK program was shared with “all staff” and whether there is a legitimate educational interest to share such information with *all* of the District’s staff. At first glance it appears to be excessive but without additional information, I am unable to make a determination as to whether or not the sharing of this information is necessary and appropriate.

Allegation two: Retaliation against Complainant

Complainant alleges that the District restricted Complainant’s access to a parent portal as retaliation for her complaint. The District disputes this allegation by stating that access has not been restricted and that Complainant did not bring this concern to the District. During a subsequent phone call with Complainant, my office was told that access to the parent portal was no longer an issue. I therefore decline to address this allegation.

Determination

Based upon the District's responses; its lack of opt-out information for parents who do not want to share directory information; its FERPA notification that does not deviate from the federal model to address the District's individual needs and circumstances, and the date of its student directory information policy (more than ten years old), it appears that the District could use a primer on FERPA requirements. I urge the District to subscribe to the U.S.D.O.E.'s [Student Privacy Policy Office \(SPPO\) monthly newsletter](#) which will provide information on upcoming FERPA trainings. Additionally, my office is working to have SPPO deliver a training to New York educational agencies in early October which the District should attend. Also, I remind the District that, beginning this fall my office will be monitoring educational agency compliance with FERPA and Education Law § 2-d³. The District is strongly encouraged to review and update its annual FERPA notification and directory information policy in preparation for this monitoring and the 2023-2024 school year. Finally, the District should ensure that, in accordance with FERPA and Education Law § 2-d, it is only sharing PII with school officials who have a legitimate educational interest in such information [34 CFR § 99.31 (a)(ii)].

August 24, 2023



Louise DeCandia
Chief Privacy Officer
New York State Education Department

³ See <https://www.nysed.gov/sites/default/files/programs/data-privacy-security/nysed-privacy-office-website-monitoring-memo-7.19.23.pdf>