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In the Matter of a Privacy Complaint Filed Against	Review and Determination of the Chief Privacy Officer
Malone Central School District	
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On March 3, 2025, the New York State Education Department's ("NYSED") Privacy Office received several complaints by a parent ("complainant") whose children (the "students") attend Malone Central School District ("district"). First, complainant states that the district "lost" one student's Personally Identifiable Information ("PII") and Personal Health Information ("PHI") that she had delivered to the Committee on Special Education ("CSE") Office at Franklin Academy. Additionally, complainant explains that although, in the beginning of the school year, she opted out of having the students' photographs taken and shared by the district, both students were photographed by a third-party photographer and later the district published other pictures of the students in a newsletter it shared via a parent communication app.

In response to the complaint, I requested that the district investigate the allegations, provide a written response summarizing its investigation, and address specific questions and issues. The district submitted its response on April 8, 2025.

Applicable Law

FERPA¹ is a federal law that protects the privacy of student educational records, and places restrictions upon educational agencies regarding the release of student PII. New York has adopted additional privacy laws and regulations² that further protect a student's PII from unauthorized disclosure, especially as it pertains to third-party contractors.

In accordance with the requirements of Education Law § 2-d, and NYSED's adopted Bill of Rights for Data Privacy and Security, the Chief Privacy Officer is

¹ 20 USC § 1232g; 34 CFR Pt. 99

² Education Law § 2-d & 8 NYCRR Pt.121

authorized to address parent complaints about possible breaches of PII, and/or unauthorized disclosures or release. Protected student data is defined in the Commissioner's Regulations as "personally identifiable information from the student records of an educational agency." Section 121.1(a) of the Commissioner's Regulations 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) 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."

<u>District Response</u>

The district denies complainant's first allegation that the district lost the student's paperwork containing PII and PHI. However, the district admits that its pupil personnel services office did not have an opportunity to review the student's paperwork for some time after it was received, which may have appeared to complainant as though the paperwork was lost.

Regarding the additional allegations, the district admits that, due to staff confusion, the students' photographs were taken on picture day by a contracted photography company. The district states that "going forward building administration will clarify the scope of the media authorization form, so staff members are made to understand that no photos or videos may be taken, whether by internal staff or by third party contractors, of students whose parents have opted out of the taking of photos or videos."

Also, the district admits that it took additional photographs of the students, associated with the school's positivity project and shared those photographs in a school newsletter, in violation of the parent's opt-out on the district's media authorization form. According to the district, this was "an isolated incident that occurred as a result of a mistake made by a single employee."

Analysis

Both FERPA and Education Law §2-d prohibit the unauthorized disclosure of student PII from students' education records. Regarding the first allegation, complainant has not sufficiently shown that any breach occurred. After its investigation, the district determined that the PII and PHI was never misplaced. Without documentation evidencing that the files were lost, I am unable to determine

that a violation of FERPA or Education Law §2-d and its implementing regulations occurred.

With respect to the additional allegations, the district admits that the students' pictures were taken and shared contrary to complaint's opt-out on the media authorization form. However, to determine whether a violation of FERPA and or Education Law Section 2-d occurred, we must first determine whether the photographs constituted education records under FERPA. In order to be an education record, a photograph must directly relate to a student and be maintained by the educational agency (district) or a party acting for the agency or institution.³

In this case, the district asserts that it does not maintain a copy of the pictures taken on picture day. However, without documentation that the picture day photographer, who was a third party contractor of the district, is no longer maintaining any digital images of the photographs taken, I cannot find that the picture day photographs are not education records. Additionally, it is unclear whether the photographs taken of the students that were used as part of the newsletter are maintained by the district. Thus, I have insufficient information to determine whether these photographs were education records of the students.

Whether or not violations are found of FERPA and/or Education Law § 2-d, it is settled that the complainant's opt-out of the district's media authorization form was not followed. While the district outlined its procedures to ensure that parents who have opted their children out of being photographed is abided, I am hard pressed to determine that these procedures are working well when one family had two children photographed on two occasions and their pictures shared on one occasion. In this technologically savvy era where pictures can be easily manipulated or used to determine an individual's identity with other accessible on-line data, parents' wishes to not have their children partake in photo and video recordings at school simply must be adhered to.

I urge the district to better train staff and administrators on the district's policies regarding the taking of photos and videos of students. This training should specifically address implementation of the district's media authorization form and what the responsibility of staff is when a parent has opted-out.

Date: May 1, 2025

³ 34 C.F.R § 99.3; FAQs on Photos and Videos under FERPA, Student Privacy Policy Office, U.S.D.O.E.

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