

The
University of the
Education  State of New York
Department

-----X
In the Matter of a Privacy Complaint
Filed Against

Investigation and Determination by New
York State Education Department
Chief Privacy Officer

Success Academy Rockaway Park Middle School
-----X

On October 11, 2023, a complaint was filed with the New York State Education Department’s (“NYSED”) Privacy Office. The complainant, whose child attends Success Academy’s Rockaway Park Middle School (the “School”), asserts that the School improperly disclosed the student’s Personally Identifiable Information (“PII”) when it posted student grade point averages (“GPA”) in a manner visible to everyone entering the student’s classroom. Complainant further alleges that the school routinely engages in this practice. Complainant alleges that such displays violate the Family Educational Rights Privacy Act (“FERPA”) and Education Law § 2-d.

In response to the complaint, I requested that the School investigate and summarize its findings. The School’s response was received on November 10, 2023.

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 laws² and regulations 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, NYSED adopted a Bill of Rights for Data Privacy and Security that authorizes NYSED’s Chief Privacy Officer 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

¹ 20 USC § 1232g; 34 CFR Pt. 99

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

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.”

School’s Response

The School does not dispute the parent’s allegations raised in the complaint, nor does it contest that a student’s GPA is PII derived from an education record. However, the School asserts that it obtains the “express parent/guardian consent for the display of scholar works, including academic performance.” The School contends that it provides a means for consent (identified as their “Display of Scholar Work” form)³ (“the form”) for a parent(s) or guardian(s) to sign authorizing the School to share students’ GPAs. In its response to the complaint, the School asserts that it expects to amend this form “to make it even more clear what scholar works will be displayed.” Additionally, the School states that it will amend its policy for clarity to ensure parents know what PII will be shared publicly.

In its response to the complaint, the School provided my office with a copy of its “Display of Scholar Work” form, its annual “FERPA Notice and Directory Policy,” and a description of its annual employee training for data privacy.

Analysis

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. In this matter, the School is a charter school that comes under the jurisdiction of FERPA and Education Law § 2-d. And complainant is the parent of a student who attends the School. Consequently, my office has the authority to investigate this complaint.

The PII at issue here are students’ GPAs, which complainant asserts was posted for public viewing. Because there is no dispute that a student’s GPA is PII, I must review the circumstances regarding the sharing of this information to the student’s class and the school community.

Pursuant to FERPA, an educational agency may disclose certain PII deemed “directory information.” This phrase is defined in FERPA’s implementing regulations as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.⁴ FERPA also requires that schools using directory information:

- give the parents and students adequate notice of the types of information it has designated as directory information;
- provide the parent (or eligible student) with the opportunity to opt-out of the disclosure of such information; and

³ The School identifies its students as “scholars.”

⁴ Directory information could include information such as the student's name; address; telephone number; e-mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees; honors and awards received; and the most recent educational agency or institution attended (34 CFR § 99.3).

- provide a period of time, within which a parent (or eligible student) may notify the school in writing that he or she does not want any or all of those types of information designated as directory information.⁵

In *Letter to Veit*,⁶ the U.S. Department of Education’s (“USDOE”) Student Privacy Policy Office (“SPPO”) determined that, “under the directory information exception,” a school could disclose the names of a subset of students who are the top 10% or similar ranking, if their “parent(s) (or if they are eligible students) have not opted out of directory information.”⁷ SPPO further determined that this information could be considered an “honor or an award” so long as students’ specific GPAs are not disclosed.⁸ This addresses the widely used practice of honors lists or honor rolls. In guidance posted online, SPPO has affirmed its position that “FERPA does not generally permit a school to disclose a student’s GPA without the parent’s or eligible student’s consent.”⁹

Determination

Here, the School complied with its obligation to provide information to the parents and students regarding what PII it deems to be “directory information” within its Annual FERPA Notice and Directory Information Policy. Although the School contends that its Directory Information Policy permits the public display of individual students’ GPAs, it only permits the public display of “[h]onor roll or other recognition lists” and/or “[d]egrees, honors, and award received.” Student GPAs are not reasonably encompassed within this language.

Even assuming that they were, however, the School would be prohibited from exempting GPAs under the USDOE’s opinion in *Letter to Veit*. As such, I find that the School’s current practice of disclosing and sharing student GPAs violates FERPA and constitutes an unauthorized release or disclosure under State regulations (8 NYCRR 121.1 [t]).

If the School seeks to continue its practice of publicly sharing all students GPAs, it must first obtain the written consent¹⁰ of a parent or eligible student that expressly permits this practice. FERPA requires that a consent to disclose education records must:

- be signed and dated,
- specify the records that are to be disclosed,
- state the purpose of the disclosure, and
- identify to whom the disclosure may be made.¹¹

⁵ 34 CFR § 99.37(a).

⁶ Student Privacy Policy Office, 121 LRP 32093 (6/22/21).

⁷ While permitted, SPPO further noted that “[i]f a parent or eligible student has opted out of the directory information, a school would need to get consent before disclosing the honor.”

⁸ *Id.*

⁹ Disclosure of student's grade point average without consent (ed.gov)

¹⁰ “[O]ral consent for disclosure of information from education records would not meet FERPA’s consent requirements.” SPPO’s Privacy Technical Assistance Center (<https://studentprivacy.ed.gov/faq/what-must-consent-disclose-education-records-contain>).

¹¹ 34 CFR §99.30.

As a remedy, I hereby direct the School to provide an update to the Privacy Office at privacy@nysed.gov, by February 23, 2024 as to how it has changed its policies and practices in accordance with this decision and the requirements of FERPA, as interpreted by USDOE. I remind the School that Education Law § 2-d and 8 NYCRR 121.4 (b) require all educational agencies to take necessary precautions to protect their students' PII.

A handwritten signature in black ink, appearing to read "Louise DeCandia". The signature is fluid and cursive, with a large initial "L" and "D".

Louise DeCandia, Esq.
Chief Privacy Officer
New York State Education Department
89 Washington Avenue
Albany, NY 12234