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### Confidentiality of Educational Records and Child Protective Proceedings

Frank E. Vandervort

*University of Michigan Law School, vort@umich.edu*

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## CONFIDENTIALITY

### Confidentiality of Educational Records and Child Protection Proceedings

By Frank E. Vandervort

The Federal Family Education Rights and Privacy Act (FERPA), which provides funding for state educational programming, requires that student records be disclosed to a nonparent only with the written consent of the child's parent, unless the disclosure falls within one of the several exceptions detailed in the statute.<sup>1</sup> 20 USC 1232(b). One of the exemptions provided for in the federal law permits a school to disclose information to "state or local officials or authorities to whom [that] information is allowed to be reported or disclosed pursuant to state statute," if that official certifies in writing "that the information will not be disclosed to any other party except as provided under state law without the prior written consent of the parent of the student." *Id.* If these basic requirements are met, the question of whether children's protective services (CPS) workers, foster care workers and lawyers-guardian ad litem may access a child's educational records is a question largely left to state law.

#### Can an educational professional report suspected child maltreatment to CPS?

As the federal law makes clear, state educational institutions and authorities must generally protect as confidential information gleaned by educational professionals about a child unless a state law specifically provides for the disclosure of that information. Under Michigan's Child Protection Law (CPL), educational professionals are mandated reporters of suspected child maltreatment. MCL 722.623(1)(a). The CPL also contains a broadly written exception to those confidentiality rules, and provides that:

Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect...if that member of the clergy receives information concerning suspected child abuse or neglect while acting in any other capacity listed in MCL 722.623.

The Michigan Supreme Court has interpreted this provision of the law broadly to give courts handling child protective proceedings the maximum access to confidential information. "[T]he purpose of a child protective proceeding," a majority of the court wrote, "is to protect the welfare of the child. It is in the best interest of all parties for the fact finder to be in possession of all relevant information regarding the welfare of the child." *In re Brock*, 442 Mich 101, 119 (1993).

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<sup>1</sup> It is worth noting that the Individuals with Disabilities Education Act (IDEA) contains a confidentiality provision which refers back to FERPA. 20 USC 1417(c). Similarly, Michigan's Freedom of Information Act specifically exempts a student's educational records from its disclosure provisions, and permits disclosure only as permitted by FERPA. MCL 15.243(2).

### **Can CPS gain access to school records beyond the report of suspected abuse or neglect?**

At times, CPS must investigate a case of suspected child maltreatment that would require it to have access to a child's educational records. The CPL specifically directs that school personnel cooperate with CPS during an investigation as provided in MCL 722.628(8). Because these specific statutory provisions require that school authorities report suspected child maltreatment and then cooperate with CPS' investigation of that report, school records should be readily available to CPS workers.

### **Can CPS share educational information with others involved in the case?**

Under the federal FERPA statute, educational institutions that receive federal funding may share a child's educational records with state and local authorities if that state agency or official certifies that those records will not be redisclosed to another party, except as provided for in state law or with parental consent. Under Michigan law, when CPS obtains educational records regarding a child, it may be required to share those records with other professionals as provided for in the CPL.

Michigan law generally makes confidential any information gleaned by CPS in the course of an investigation. MCL 722.627(2). The CPL, however, provides that CPS records are to be made available to certain other individuals or agencies. For instance, a child's lawyer-guardian ad litem has access to CPS' records regarding the case. MCL 722.627(2)(j). Additionally, the court may order that any information in CPS' possession be made available to the court. MCL 722.627(2)(g).

### **Is information in a student's educational record protected by privilege?**

Testimonial privilege, which generally prevents one from testifying regarding the privileged information in his or her possession in court without the permission of the person who is the subject of the information, can be thought of as a special form of confidentiality applicable only in the courtroom. A Michigan statute grants a student a privilege with regard to her or his educational records. MCL 600.2165. That statute states:

No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.

As was noted earlier in this section, however, the CPL eliminates most testimonial privileges, including those relating to a student's educational records. MCL 722.631.

In Michigan, child protective proceedings are generally open to the public, which means that the contents of a student's educational records may be testified to or discussed in a public forum. MCR 3.925(A).

### **Confidentiality of School Records for Children Receiving Foster Care Services**

Children receiving foster care services in Michigan are placed with the Department of Human Services under a court order. The children are either temporary or permanent court wards. They can be residing with their own parents or guardian, relatives, foster parents, or in residential facilities. Who may consent to the release of information from educational records at public or private schools in Michigan is dependent on the legal status and age of the child. (See chart below.)

FERPA protects each student's educational record with confidentiality rules and procedures; it gives the student's parent or guardian the right to access their child's or ward's educational record in its entirety until the student reaches eighteen years of age, a court terminates the parent's or guardian's rights, or the student enters a postsecondary educational institution before his or her 18th birthday. **Once the student attains age 18 years or enrolls in a postsecondary school, only he or she may access his or her educational records or consent to release of information from those records.**

FERPA also provides that the parent or eligible student must give written permission for the educational program to release information to a third party. Schools may disclose the records, without consent, to comply with a court order or lawfully issued subpoena in cases of health or safety emergencies, or to state and local authorities within a juvenile justice system as provided in specific state law.

The Michigan Department of Human Services Foster Care Manual policy CFF 722-4 authorizes DHS or its contract agencies to release information to service providers, including school personnel, when necessary to provide services for the child.

**Consents Required for Release of Information from Educational Records of Children in Foster Care**

<b>Legal Status</b>	<b>Who Signs the Consents</b>
Temporary court ward	Parent <b>or</b>  Court with jurisdiction over child, if the parent cannot be located or refuses to consent, <b>or</b>  Youth, at 18 years of age
Permanent court ward – non-Michigan Children’s Institute (MCI) ward	Court with jurisdiction over child or whomever it designates by court order, <b>or</b>  Youth, at 18 years of age
Permanent state ward – MCI ward	Superintendent of Michigan Children’s Institute or designee (usually the DHS caseworker or other local DHS official), <b>or</b>  Youth, at 18 years of age