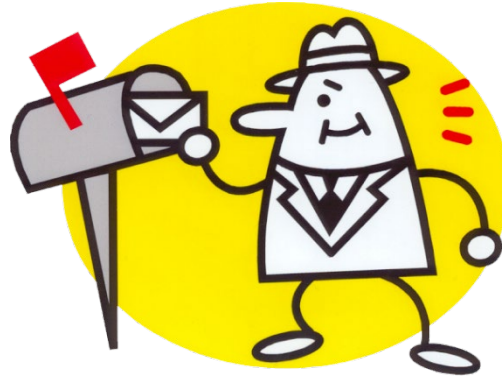


LEGAL MAILBAG – DECEMBER 5, 2024



By Julia V. Wilde, Partner, Shipman & Goodwin LLP - GUEST COLUMNIST

The "Legal Mailbag Question of the Week" is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors. Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

I have worked in districts that follow the policy that IEP progress reports are mailed home directly to families, as they are treated as the confidential file of the student to whom they belong. I have recently taken on a new position in a wonderful school system. This district has what seems to be the best of the best and outshines in so many areas - curriculum, coaching for staff, professional development, opportunities for students to grow beyond the classroom, however their practices with student information seems to breach confidentiality on many levels.

One specific area is that IEP progress mark documents are handed to the students -(I can only speak about the middle school level) attached to their report cards for quarterly reporting, without any envelope, for students to walk out the door with. My previous practice has always been to mail these documents home separately to maintain confidentiality. My question is - if report cards should not have any designation of a disability or programming for or on them, should the school be attaching and sending home IEP progress marks? What made this bother me even more was one of my student's IEP progress marks was attached to another student's report card. An error which occurred in the main office. I can only imagine this is not the first time.

Signed,
In Confidence

Dear In Confidence:

Legal Mailbag appreciates your commitment to student privacy and must agree that your concerns about confidentiality in these circumstances are well-founded.

To start, the disclosure of personally identifiable information contained in education records without the consent of a parent, guardian or eligible student (aged 18 or older) is generally prohibited under the federal Family Educational Rights and Privacy Act (FERPA). A parent, guardian, or eligible student may, however, consent to the disclosure of such information. There are also circumstances where consent is not required for disclosure—for instance, when disclosure is made to a school official with a legitimate educational interest in the information or when a student transfers from one school district to another. Subject to certain notification requirements, districts also may publish “directory information” that would not generally be considered harmful or an invasion of privacy if disclosed, such as an athletic team roster or honor roll list.

Under FERPA, "education records" are defined as records that are directly related to a student and that are maintained by an educational agency or institution. The US Department of Education has advised that records such as grades or transcripts do indeed constitute education records. Here, the confidentiality obligations imposed by FERPA clearly apply to both the regular quarterly report cards provided for all students, and to any progress reporting provided for students pursuant to the student’s individualized education program (IEP)—or to other special education records for that matter. In fact, the federal regulations implementing the Individuals with Disabilities Education Act (IDEA) also contain a specific requirement that prior parental consent must be obtained before records containing personally identifiable information are disclosed, subject to limited exceptions, consistent with FERPA. Districts must also identify all employees who may have access to confidential information and ensure that those collecting or using it receive appropriate training. Because the progress reports you reference are education records that are directly related to a student and maintained by an educational agency, they are subject to these protections.

The IDEA requires school districts to provide periodic reports on the progress a student is making toward meeting the annual goals contained in the student’s IEP. At a minimum, progress must be reported consistent with the scheduled distribution of general education grade-level report cards. However, under Connecticut law, the student’s planning and placement team has the ability to report progress more frequently.

Legal Mailbag also wishes to clarify what information about students’ disabilities and special education services may be included on their report cards. Federal law distinguishes between report cards, which are issued to parents to indicate their child’s progress or level of achievement in their program of study, and transcripts, which are intended to inform postsecondary institutions or prospective employers of a student’s academic credentials. To that end, while transcripts may not contain information disclosing students’ disabilities, report cards generally may contain such information, as long as the report card, or supplemental

progress reporting attached to it, is written in a way that satisfies the obligation to inform parents of their child's progress.

Although neither federal nor state law describes exactly how schools should or should not handle confidential material, there is a duty to safeguard student records. Schools must take reasonable steps to control access to and prevent the unauthorized release of personally identifiable information. Legal Mailbag is also compelled to point out that good intentions or an accidental oversight will not typically excuse a violation of confidentiality requirements. In one recent case, for example, a state education department correctly concluded that a school violated FERPA and the IDEA when it inadvertently mailed a student's IEP to the parents of two of her classmates. The mistake was plainly an unfortunate clerical error, but the agency ruled that a breach of privacy had still occurred because the school had not obtained consent to share the records and the disclosure did not fall within any of the exceptions to the consent requirement.

In the scenario you have described, it appears that confidential information may have been improperly disclosed on at least one occasion (albeit inadvertently), and it is not difficult to imagine it happening again. Without even an envelope for protection, it is simply too easy to foresee the personally identifiable information being misplaced or improperly shared. And if someone other than the intended recipient sees the report card or progress report, the district may find itself facing an investigation or legal complaint.

Legal Mailbag agrees with you that a reasonable way to prevent such unauthorized disclosures is to verify the contents of any documents being sent home and then mail them in a sealed envelope. As a reminder, although districts are not required to do so, if a parent or guardian consents, such records can be provided electronically through email or a secure parent portal, which may provide an even greater level of protection. If a parent or guardian lacks access to technology, State Department of Education guidance indicates that educational records should be mailed home or provided to a parent or guardian in-person. Although stapler snafus and other mix-ups may still occur, taking such precautions make it far less likely that a confidential record will fall victim to wandering eyes, sticky hands, or the disarray of a typical middle school backpack. Indeed, Legal Mailbag would suggest adopting such best practices not only for these progress reports, but for report cards and any other communications containing confidential information as well.