# "I WANT ALL THE EMAILS."

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"I want copies of all emails about my kid." Email just became the bane of your being. Likely your records policy and guidelines could be improved to expressly exclude emails; the law nonetheless gives you a strong foundation to say "no" to the demand for emails.

"Educational records" are (a) items containing "information directly related to a student" and (b) "maintained" by an educational entity. 20 U.S.C. §1232g(a)(4). See *Owasso Indep. Sch. Dist. v. Falvo,* 534 U.S. 426 (2002) (holding educational records are records deliberately maintained by a school in a centralized location). Emails are not educational records under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA), or the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §§ 1401-1482, unless the school district's policy happens to include emails.

FERPA provides two basic rights: a privacy right in the sense of preventing release of educational records except in certain circumstances, and a right to "inspect and review" educational records. Similarly the IDEA provides a right to examine those educational records.[1] See 20 U.S.C. § 1415(b)(1) (granting right to examine records); 34 C.F.R. § 300.613 (implementing IDEA-based access right). Both rights, privacy and access, are tied to the definition of "educational records," so while the inquiry begins there, the question of what are "educational records" cannot be fully exempted from practical considerations involved in the right to "inspect and review," especially in the digital age.

The issue whether records are "maintained" by an educational entity is often the matter in dispute. ("Information directly related to a student" is usually not much in dispute as the FERPA regulations define "personally identifying information" (PII) and, in effect, almost fully equate PII with "information directly related to a student." 34 C.F.R. Part 99, subpart D.) Precedent is clear that a school must deliberately, not incidentally, "maintain" a record for the item to be an "educational record."

"Maintained" was the cornerstone issue throughout the *Owasso* litigation, from the district court deciding that peer-grades were not maintained, to the Fifth Circuit Court of Appeals reversing[2], and ending with the Supreme Court unanimously rejecting[3] the Fifth Circuit's reasoning. "The word 'maintain,'" as viewed by the court, "suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, . . . ." *Owasso Indep. Sch. Dist.,* 534 U.S. at 433. The court went on, writing "[i]t is fanciful to say [the teacher] maintain[s] the papers in the same ways the registrar maintains a student's folder in a permanent file." *Owasso Indep. Sch. Dist.,* 534 U.S. at 434.

Applying *Owasso*, the court writing in S.A. *ex rel. L.A. v. Tulare County Office of Education,* Civ. A. 08-1215, 2009 WL 3126322, *5, 53 IDELR 143 (E.D. Cal. Sept. 24, 2009), ruled directly on the issue:

> The plain language of the statute and regulation that define "education records" is consistent with California DOE's interpretation that only those emails that both are maintained by the educational institution and personally identify Student are educational records. The statute, 20 U.S.C. § 1232g(a)(4)(A), and the regulation, 34 C.F.R. § 99.3, include the conjunction "and" between the two requirements.

1. I am focusing on the right to inspect and review. I trust that whether an item, such as an email, is or is not an education record, the school would not release such information without justification.
2. See, e.g., *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1215 (10th Cir. 2000) ("To constitute an 'education record,' however, these grades must also be 'maintained . . . by a person acting for [an educational] agency or institution.").
3. Justice Scalia "concur[ed] only in the judgment of the Court," believing it unnecessary to address the "central repository" raised by the Court. *Owasso Indep. Sch. Dist.*, 534 U.S. at 437.

> As conjunctive phrases, the statute and regulation require an email to satisfy both prongs to be an education record. Thus, an email is an education record only if it both contains information related to the student and is maintained by the educational agency. Conversely, an email that is not maintained by the educational agency is not an education record.

The *Tulare* decision noted that "[e]mails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion—that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained 'in the same way the registrar maintains a student's folder in a permanent file'—is 'fanciful.' Id. at *5. See also *Weston ex rel. C.S. v. Kansas City, Mo., Sch. Dist.,* Civ. A. 07-0229, 2011 WL 5513207 (W.D. Mo. Nov. 10, 2011).[4]

Keep in mind that the parental right relative to educational records, under both FERPA and the IDEA, is to "inspect and review." The right originates in Nixonian-era legislation from 1974 long before e-data was even imagined. FERPA requires a school to "establish appropriate procedures for granting a request by parents for access to the education records. . . ." 20 U.S.C. § 1232g(a)(1)(A). The IDEA similarly requires schools to "establish and maintain procedures," 20 U.S.C. § 1415(a), including a procedure allowing parents to "examine all records relating to such child. . . ." 20 U.S.C. § 1415(b)(1). See also 34 C.F.R. § 613(a) ("inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part.") (Emphasis added.) The IDEA regulations expressly incorporate the FERPA regulatory definition of "education records," 34 C.F.R. § 300.611(b), thereby also incorporating the same "maintained" concept. "[U]nder this part" further limits the scope of possible records to IDEA related documents.

It surely is "fanciful" indeed to think parents have the right to access public school information systems in order to "inspect and review" email. How does one "inspect and review" email and e-data that is not deliberately maintained, i.e., organized? (One wonders how parents could exercise the right to amend such non-maintained digital data, too.) The law does not provide or even contemplate a parental right to inspect and review such things as servers, hard drives, back-up files, even individual smart phones, or require a school district to corral vast e-data (both in scope of possible sources and depth in levels of meta data from each source) because parents might want to examine and review (or amend) an item. In its Owasso decision, the court cautioned that:

> The Court of Appeals' logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision.

*Owasso Indep. Sch. Dist.,* 534 U.S. at 432. The caution is prudent: a sea-change to Spending Clause legislation, such as finding the mass of e-data lingering in a public school's technology infrastructure is "maintained" and its consequential burden on schools caused by expansive access rights, is to be left to Congress. Unless "maintained," such as with a "permanent secure database," emails are not educational records.

Epilogue. Emails will not go away. Whether or not educational records, emails and e-data are discoverable in a court proceeding. Knowing early-on what is to be found in those emails remains an element of prudential lawyer and client counseling.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

4. "There has been a running debate on the supplying of 'education records.' The School District is correct that the United States Supreme Court has suggested a very narrow reading of the term, limiting it to permanent records deposited with a single central custodian. *Owasso Ind. School Dist. v. Falvo,* 534 U.S. 426, 435-36 [] (2002). See also *Bd. Ed. Toledo City School Dist. v. Horen,* 2010 WL 3522373 (N.D. Ohio Sept.8, 2010); *S.A. v. Tulare County Office of Ed.,* 2009 WL 3126322 ( E.D. Cal. Sept. 24, 2009)." The court noted that the school district nonetheless produced "a great deal of material that was not strictly necessary, under federal law," which was "commendable," and the fact that "[s]ome record-keeping, in a general sense, may have been considerably less than