

# SCHOOL AND COLLEGE LEGAL SERVICES of California

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## LEGAL UPDATE

November 16, 2009

**To:** Superintendents, Member School Districts (K-12)

**From:** Marko H. Fong, Assistant General Counsel *MH*

**Subject:** When Emails Become Student Records Under FERPA  
Memo No. 30-2009

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In the matter of *SA, a minor v. Tulare County Office of Education and California Department of Education*,<sup>1</sup> a Federal District Court recently clarified that emails about a student do not automatically become educational records under the Family Educational Right to Privacy Act<sup>2</sup> (FERPA) simply because they have been kept on a server.

FERPA defines the term educational record as:

- 1) Contains information directly related to a student; and
- 2) Are maintained by an educational agency or institutions or by a person acting for such agency or institution.<sup>3</sup>

The attorney for the student in the Tulare case had requested “any and all electronic mail sent or received by the Department concerning or personally identifying student” essentially arguing that the emails presence on an electronic server for any length of time meant that they had been “maintained” under FERPA. The Tulare County Office of Education responded by sending hard copies of emails that had been printed and placed in the student’s permanent file. The County Office also noted that some emails involving the student had been purged from its server.

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<sup>1</sup> 2009 WL 3126322 (E.D. Cal.)

<sup>2</sup> 20 U.S.C. Section 1232g

<sup>3</sup> 20 U.S.C. Section 1232g (a)(4)(A)

After the California Department of Education sided with the County Office on this issue, the District Court granted the County Office's motion for summary judgment. The court pointed out that the US Supreme Court had previously noted that "*Maintained* suggests FERPA records be kept in a filing cabinet, a records room at the school, or on a permanent secure database."<sup>4</sup> Computer servers arbitrarily preserve all data that passes through the server during any given period. The Tulare Court pointed out that extending the definition of "maintained" to servers would impose a "weighty administrative burden."

The student also demanded that records be turned over in their "original electronic form." The Court declined to rule on this matter.

Districts should be aware of the following:

- 1) Emails can be educational records if they should be maintained permanently as required by law or district policy.<sup>5</sup> Such emails should be printed out and placed in the student's permanent file.
- 2) Individual districts should review their classification system for all types of records and adopt an email disposal policy that would allow for periodic purging of e-mails that name individual students that are not educational records consistent with both FERPA and the California Public Records Act.<sup>6</sup>

We caution that this is a case of first impression at the Federal District Court level. It remains subject to possible challenge or being narrowed or overruled by a higher court. Email remains a "recorded" form of communication which is copied automatically and leaves the control of the sender once sent. All staff should continue to be discreet in all work-related email.

Please contact our offices should you have questions about this case or about improving practices around preservation and disposal of emails and other electronic records.

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<sup>4</sup> Oswasso Indep. Sch. Dist. 534 US 426 (2002)

<sup>5</sup> 5 CCR 432

<sup>6</sup> Govt. Code sections 6250-6276.48